EMPLOYMENT EQUITY LAW AND WOMEN IN THE NEW SOUTH AFRICA

BY

QAQAMBA NTSHINGWA

A Dissertation submitted in fulfillment of the requirements of the degree of Master of Laws, University of Fort Hare (Alice)

SUPERVISOR: PROF P IYA-UNIVERSITY OF FORT HARE

CO-SUPERVISOR: PROF PC OSODE-UNIVERSITY OF FORT HARE

Acknowledgements

I wish to express my gratitude to my Supervisor, Professor Phillip Iya and Co-Supervisor, Prof PC Osode for their guidance, comments, patience and constructive criticisms. However I cannot forget to express my gratitude also to the Govan Mbeki Research and Development Centre for the financial support it has given me to further my studies. Moreover I wish to thank Govan Mbeki Research and Development Centre staff for their patience and assistance with office equipment such as Computers, Photocopiers, Printers etc. It is also my pleasure to thank the East London Community for their response to my questionnaires. Finally I wish to thank my Family for their moral support and patience during the long and difficult hours spent in my quest for Masters Degree in Law.

Declaration

I, Qaqamba Ntshingwa, hereby declare that the thesis entitled 'Employment Equity Law and Women in the New South Africa' is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other University.

....

Signature Date

Summary

Equality is a fundamental right which is entrenched in the South African Constitution. However men and women must not just be equal but they must be seen to be equal in all sectors including the Labour Market. The study deals with discrimination against women in the workplace. Historically South Africa was known to be a patriarchal state because of its apartheid laws which promoted and condoned discrimination against women. Unfortunately discrimination against women had long been practiced in SA even before apartheid was introduced but Apartheid policies and laws stamped it. It is this history that caused the legacy of discrimination against women in the South African Labour Market.

In 1994 change entered into the South African door through the Interim Constitution which was later replaced by the Constitution Act 108 of 1996. Thereafter women and men became equal in the eyes of the law. The has proven the ineffectiveness of the law due to the fact that women in the South African Labour Market are still discriminated against. Arguably there has been unfortunate delay in dealing effectively with discrimination against women in the Labour Market internationally not only in South Africa. International instruments which promote equality of women and men at work are not given serious consideration. It is important to note that women deserve acceptance in the Labour Market with their biological nature. Pregnancy is not a shame, it is natural for women to get pregnant at some point and therefore should not be considered as a problem in the Labour Market. Employers must find ways of dealing with it as they do with sicknesses of men. The central issue is whether the anti-discrimination laws are protecting women at work in practice as provided in statutes. The study shows that the

anti-discrimination laws are effective enough in practice and therefore the South African legal system is faced with a number of challenges which needs to be addressed urgently. In particular it is suggested that education on gender equality must be compulsory in the curriculum of the Law Society and in the Labour Market in order to change the peoples' state of minds with regard to women.

List of Tables

Table I Women's Occupational Distribution of Employment in 1991

Table II Women Distribution of Employment by Sector in 1991

Table III Women Distribution of Employment in Specified Work Status

Table IV Response of Female Senior Officials on Gender Discrimination at work

Table IV Response of Female Senior Officials on Discrimination on the Grounds of Pregnancy at work

Table V Response of Female Senior Officials on Sexual Harassment at work

Table VI Response of Ordinary Female Employees on Gender Discrimination at work

Table VII Response of Ordinary Female Employees on Discrimination on the Grounds of Pregnancy at work

Table VIII The category of women which experiences discrimination

Table IX The motive behind the employment and promotion of women by some employers

Table X Response of Ordinary Female Employees on Sexual Harassment at work

Table XI Response of Unemployed Females on Gender Discrimination at work

Table XII Response of Unemployed Females on Discrimination on the Grounds of Pregnancy at work

Table XIII Response of Unemployed Females on Sexual Harassment at work

Table of Contents

Acknowledgement i

Declaration ii

Summary iii

List of Tables vi

Chapter 1

Introduction

1.1 Hypothesis 1

1.2 Problems for Investigation 1

1.2.1 Socio-economic Problems 1

1.2.2 Socio-political Problems 4

1.2.3 Cultural Problems 5

1.2.4 Religious Problems 6

1.2.5 Legal Issues 6

1.3 Aims and Objectives 8

1.4 Research Methodology 9

1.4.1 Process 9

1.4.2 Research Target Groups 10

1.5 Literature Review 12

1.6 Defining Important Words 21

1.7 Scope of Research 24

Chapter 2

Historical Background of Discrimination Against Women 26

2.1 Introduction 26

2.2 Contributing Factors to Inequality at Work: Historical Perspective 27

2.2.1 Pre-colonial Period 27

2.2.2 Colonisation 29

2.2.3 After 1948 29

2.2.3.1 Fighting For Equality 30

2.2.3.2 Education and Skills Training in the Past 31

2.3 Contributing Factors: Current Trends 32

2.3.1 Occupational Segregation 32

2.3.2 Different Sectors of Employment 35

2.3.3 Working Conditions 36

2.3.4 Difference in Income 38

2.3.5 Unemployment 39

2.3.6 Sexual harassment in the past 40

2.4 Conclusion 41

Chapter 3

Discrimination on the grounds of gender, pregnancy and sexual harassment 43

3.1 Introduction 43

3.2 Gender Equality 45

3.2.1 Constitutional Protection against gender discrimination 46

3.2.2 Protection under the Labour Relations and Employment Equity Acts 49

3.2.3 Promotion of Equality and Prevention of Unfair Discrimination Act 53

3.2.4 Case Law on Gender Discrimination 55

3.3 Pregnancy at Work 59

3.3.1 Law Concerning Pregnancy 59

3.3.2 Case Law on Pregnancy 60

3.4 Sexual Harassment as Form of Discrimination at Work 63

3.4.1 Forms of Sexual Harassment 63

3.4.2 Guiding Principles of Sexual Harassment 64

3.4.3 Consequenses of Sexual Harassment 66

3.4.3.1 The Victim 66

3.4.3.2 The perpetrator 67

3.4.3.3 The Organisation 68

3.4.4 Legal Implications 69

3.4.4.1 Investigation and Disciplinary Action 69

3.4.4.2 Dispute Resolution 70

3.4.4.3 Labour Court Remedies 70

(d) Criminal Charges 73

(e) Civil Charges 74

3.5 Obstacles of Equality 75

3.6 Conclusion 80

Chapter 4

4 Law Versus Practice 82

4.1 Introduction 82

4.2 Methodology 83

4.3 Data Analysis 85

4.3.1 Response of Female Senior Officials on Gender Discrimination 85

4.3.2 Response of Female Senior Officials on Pregnancy Discrimination 89

4.3.3 Responnse of Female Senior Officials on Sexual Harassment 90

4.3.4 Response of Ordinary Employees on Gender Discrimination 91

4.3.5 Response of Ordinary Employees on Discrimination on the grounds of Pregnancy 95

4.3.6 Response of Ordinary Employees on Sexual Harassment 96

4.3.7 Response of Unemployed Women on Gender Discrimination 97

4.3.8 Response of Unemployed Women on Discrimination on the Grounds of Pregnancy 100

4.3.9 Response of Unemployed Women on Sexual Harassment 101

4.4 Hypothesis Test 102

4.5 Conclusion 104

Chapter 5

The Role of the International Instruments on the Issue of Discrimination Against Women at Work 106

5.1 Introduction 106

5.2 UN approach in dealing with issues of discrimination at work 109

5.2.1 Convention on Political Rights of Women 109

5.2.2 Convention on Elimination of All Forms of Discrimination Against Women 110

5.2.2.1 General Provisions 110

5.2.2.2 Enforcement of CEDAW 115

5.2.2.3 Draft Optional Protocol to CEDAW 116

5.2.2.4 Communication Procedure 117

(e) Enquiry Procedure 117

(f) Beijing Declaration 118

5.2.3 Declaration on Elimination of Discrimination Against Women 120

5.2.4 Equal Remuneration Convention 125

5.3 African Union Approach in Dealing with Discrimination Against Women at Work 131

5.3.1 Southern African Development Community Declaration on Gender and Development 131

5.4 Comparative Study between Britain, USA, Germany, Namibia and Kenya 134

5.4.1 Introduction 134

5.4.2 Studies in Developed Countries 136

5.4.2.1 Equal Employment Opportunities in Britain 136

5.4.2.2 Sexual Harassment in Britain 139

5.4.2.3 Equal Employment Opportunities in USA 142

5.4.2.4 Sexual Harassment in USA 149

5.4.2.5 Equal Employment Opportunities in Germany 150

5.4.2.6 Sexual Harassment in Germany 153

5.4.3 Studies in Developing Countries 154

5.4.3.1Equal Employment Opportunities in Namibia 154

5.4.3.2 Sexual Harassment in Namibia 156

5.4.3.3 Equal Employment Opportunities in Kenya 157

5.4.3.4 Sexual Harassment in Kenya 160

5.4.4 Conclusion 160

Chapter 6

Conclusion and Recommendations 162

6.1 Introduction 162

6.2 Impact of SA history on the current discrimination against women 163

6.3 Courts of Law 166

6.5 Undermining the Law 171

6.6 New Legislation 172

6.7 Conclusion 174

APPENDIX I 181

BIBLIOGRAPHY 192

BOOKS 192

OTHER SOURCES 200

1. Journals, reports & other articles 200

2. List of Cases 204

3. List of statutes 208

4. List of International instruments 211

5. List of Websites 212

LIST OF ACRONYMS 215

Chapter 1

Introduction

1.1 Hypothesis

The arguments on which this research is centered, are based on the hypothesis that, currently there is an apparent lack of an adequate law to eliminate discrimination against women at work. A *prima facie* case therefore exists for an investigation to establish the nature and magnitude of problems arising from the hypothesis outlined herein, the details of which are argued in the subsequent paragraphs. Crucial to the arguments is not only the explanation of the causes of discrimination against women especially in the workplace but, more importantly, the magnitude of the emerging problems and recommendations for improvements in the law.

1.2 Problems for Investigation

1.2.1 Socio-economic Problems

Discrimination has been practiced in South Africa generally, and specifically in the labour market, for a long time. It started with the introduction of apartheid, which was a system that was in favour of white people, and therefore it was a form of affirmative action during that time to privilege white people[1]. However this research is not going to

[1] Standing G, Sender J and Weeks J: *Restructuring the labour Market: The South African Challenge* An ILO Review(1996) at 397.

focus on discrimination in general, but rather on discrimination against women, a situation which existed long before apartheid was introduced[2]. It was a tradition of paternalism which brought about this discrimination[3]. In the old days, women were known as people who belonged in the kitchen and were considered only as child-bearers. Even today they are still regarded as such[4]. Therefore, they were considered as not having the brains to play any other role in the community[5]. The period of apartheid reintroduced this custom in the labour market because it was believed that men were better than women at work[6]. During this period it even became worse because it was not only discrimination against women in general, but discrimination on the grounds of gender, race and marital status[7].

The problem with the above scenario in the context of South Africa is that the inequity that has been shown above is unconstitutional because section 9(2) of the Constitution[8] is against unfair discrimination on the grounds of sex, race, gender, marital status, pregnancy, ethnic or social origin, age, disability, belief, culture, conscience, religion, social orientation, language, and birth. However, the introduction of the new Constitution and the anti discriminatory laws[9] in the labour market have made little difference. This research attempts to find the shortcomings within the legal framework.

---

[2] Hichter H *African Women* Oxford University Press (1984) at 1.
[3] Ibid at 3.
[4] Ibid.
[5] Kentridge J "Measure for Measure: Weighing up the Costs of Feminist Standard of Equality at Work" 10 *SA Merc LJ* (1991) 85.
[6] Brazilli S *Women on the Agenda* Pandora Press (1991) at 51.
[7] Ibid at 55.
[8] Act 108 of 1996.
[9] Employment Equity Act 55 of 1998, Labour Relations Act 66 of 1995, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

There has been an increase in the number of unemployed black women, pregnant women and women in general[10]. There are employers who still hold to the old stereotypes that certain jobs are meant for men, and therefore women cannot do such jobs properly, but it is not easy for labour inspectors to find such employers. They often hide under the umbrella of affirmative action by employing and promoting more people from previously disadvantaged groups other than women as required by the Employment Equity Act[11]. However, they make sure that they employ as few women as possible in inferior positions in order to appear to be gender sensitive[12].

Before 1996, the excuse for the unemployment of women was that they lacked the skills to do certain jobs, but nowadays, even when women are more educated and have the skills they are still unemployed. There are many women from recognized and well-equipped Universities and Technikons who have not been employed for a number of years. It is now time to recognize the power of women in the workplace. It becomes more difficult for employers to employ a woman when she is pregnant because there is a fear of her being in and out of work. This is also discrimination against women because of their biological nature[13].

[10] Standing G, Sender J and Weeks J note 1above at 400.
[11] Act 55 of 1998.
[12] Standing G, Sender J and Weeks J note 1above at 397.
[13] The case of *Reed v Reed* 404 US(1971) overturned the outdated based on the breadwinner-homemaker roles of men and women.

1.2.2 Socio-political Problems

There is a limit to the number of women who reach senior positions in political organizations, resulting in fewer women in top positions in the government[14]. Some women who manage to acquire such positions are not respected by their male colleagues because men think women are not competent enough for senior posts. Women's suggestions to the organizations are not respected as they would have been if they had been men's suggestions[15]. The reason men do not respect women's suggestions is that they think women are not as intelligent as men in organisational matters. The attitude of men towards women causes women to lose their confidence and dignity[16]. Most men who are involved in political organisations or trade unions are still not converted in their minds[17]. They still do not understand why women want to be on equal footing with men, given that in their minds women do not have the ability to do much of the work done by men. These stereotypes need to be dealt with through education because their attitude is an obstacle to equality. Furthermore, organisations such as COSATU are supposed to protect women from being discriminated against[18]. The achievement of equality is impossible if there are stereotypes which promote discrimination against women within the organisation.

---

[14] Murray C *Gender and the New South African Legal Order* Juta & Co Ltd (1994) at 18.
[15] Ibid.
[16] This is a violation of section 10 in terms of the Constitution Act 108 of 1996(right to human dignity).
[17] See O' Regan C & Thompson C."Collective Bargaining and the promotion of Equality: The case of South Africa". *ILJ (*1994) 15.

1.2.3 Cultural Problems

The rigidity of certain cultures is an obstacle to equality. There are cultures where a woman is regarded as inferior to a man[19]. The culture of discriminating against women is very common in most countries of the world[20]. Fortunately, in South Africa, the Constitution prohibits this kind of culture because it is against the equality clause[20]. In spite of the Constitution, there are still problems of discrimination against women because a person does not get rid of his or her culture easily.

Many people hold on to their culture even if it is unconstitutional; they believe that moving from that culture will turn the world upside down. The patriarchal culture is entrenched in the minds of many individuals and these individuals are the workers, prosecutors, magistrates, judges and directors. Hence there is still discrimination in the workplace[21]. Women themselves contribute to discrimination because many of them still allow themselves to be discriminated against. They believe that it is a cultural imperative to discriminate against women and, therefore, that it is right. Culture is, however, flexible; it changes with time, and now is the time to respect the Constitution which states that any culture that is discriminatory in nature is invalid[22].

---

[18] Ibid.

[19] Obeng M "Culture and South African Constitution: An Overview". *Speculum Juris 16* (2002) 111.

[20] See the United States of America's Civil Rights Act of 1964 in dealing with sex discrimination. See also how United Kingdom is dealing with its sex discrimination by Sex Discrimination Act of 1975.

[21] See Mqeke RB *Customary Law and the New Millenium* Love Dale Press: Alice (2003) at 5. See also *Ryland v Edros* (1997) 2 SA 690 (C) at 708-709.

[22] Section 39(3) of the constitution Act 108 of 1996 provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law, or legislation to the extent that they are consistent with the Bill of Rights.

1.2.4 Religious Problems

Religion is another issue which promotes inequality because almost every religion discriminates against women. The Christian religion, for example, promotes inequality between men and women because every good thing in the Bible was done by a man. It was most often men who were chosen for a particular purpose that was good in the eyes of the Lord. The impression given is that only men were able to do great things during those times and women were only associated with household duties and child-bearing.

To date, most Christians believe that only men can be in leadership positions in the church; it is only recently that there has been a slight change towards accepting women as leaders. As a result, there are very few women who are Priests and Reverends today. It is going to take time for equal representation between women and men in leadership positions to take place in the church. Regrettably, the belief that a person has, in terms of his or her religion, is what he or she practises at work.

1.2.5 Legal issues :

There is insufficient attention as regards gender issues by South African Judges of existing legislation, international instruments, instruments on gender sensitivity, and the Constitution. Several laws have been introduced in South Africa to eradicate unfair discrimination in the workplace such as the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998 and the

Constitution Act 108 of 1996 (to mention few), but with little success. However other instruments that are against discrimination against women are from international organizations, such as instruments from International Labour Organisations, the United Nations and the African Union. The domination of South Africa (SA) by apartheid made it difficult for these laws to work smoothly. There was little respect for such laws amongst many employers, and the situation continues because these are laws they never wanted. Such people often use the shortcomings of the law to justify their deeds.

The absence of close scrutiny of legal instruments, existing legislation, instruments on gender equality, case law, codes of conduct and the Constitution is another cause of discrimination against women. If close scrutiny of legal instruments is not undertaken frequently there will never be a better future for the South African labour market. It should be borne in mind that so long as there is no change for the better, there will never be excellent productivity. The lack of close scrutiny of anti-discriminatory laws to the end of their implementation is another cause of continuous discrimination against women. What is wrong with the anti-discriminatory laws needs to be pinpointed in order to initiate change towards equality in the workplace.

In summary, there is no analysis of the implication of specific legal problems to the issue of gender equality. The impact of the above-mentioned problems on the South African labour market is a weakening of the economy because many women are talented in the fields they have chosen but they are not employed because they are women. Some women are doing the best in their fields of work, but they do

not get promoted, and this is discouraging. Some talented women quit their jobs because they experience sexual harassment from the supervisors. However, gender equality which is promoted by the South African (SA)Constitution should prevail over discriminatory social practices, customs, religion and culture. Most people seem not to realise that discrimination against women can weaken the economy and so are not receptive to change. Even the international instruments that promote gender equality are given little consideration in the South African labour market because much as they are incorporated in South African laws, they are not given much consideration in practice.

1.3 Aims and Objectives of the present study

In view of the problems set out in the preceeding paragraphs, this study aims at:

- Contributing generally to the jurisprudence on the issue of gender equality.
- Determining how South Africa compares with international norms, mechanisms, practices, and laws in this regard.
- Investigating the extent to which provision is made under the existing international, constitutional and other legal instruments to eliminate discrimination against women.
- Investigating the extent of the reality and effectiveness of the current policies and laws in their strategic implementation.
- Determining whether there is a need for policy and legislative intervention to address the problems established through the research.

- Bringing out alternative suggestions for the consideration and implementation of the law.

1.4 Research Methodology

1.4.1 Process

This research was conducted using various methods including library research methodology dependent on legal materials, government materials, human resource materials, papers from Non-Governmental Organisations (NGO's), information from modern technological machines such as the internet. Interviewing methods by way of questionnaires were also used to test the reality and the practicality of the research. Interviews were conducted in the Eastern Cape province because this is the place where women seem to be more disadvantaged in the workplace than in any other province. Secondly, the Eastern Cape province is to some extent representative of South Africa and therefore, to minimize costs, the researcher selected it for empirical research. The interviews are aimed at establishing:

- Which gender they think is mostly unemployed in South Africa.
- Which gender they think is largely represented in senior posts of South African labour market, and which gender is largely represented in most lower posts.
- The extent to which women are represented in judicial offices.

- What they think could be the impact of women labour court judges in eliminating gender discrimination.
- The perception of women about the effectiveness of the law in eliminating gender discrimination in the labour market.
- Who is to blame for the ineffectiveness of the law?
- What are the possible recommendations?

1.4.2 Target Groups

The rationale behind identifying target groups was to ensure that they assist in reaching the specific objective of research. Target groups were mainly chosen from the Eastern Cape province, focusing on persons from different levels of employment. Each target group consisted of four respondents because in this study there was no need to interview every person when few people could be used to represent a specified group. Furthermore, it would be time-consuming to interview every person in the labour market. The interviews were conducted in the East London area, because it is one of the biggest industrial towns in the Eastern Cape and it was also closer to the researcher, making it convenient to clarify questions which were not clear to the respondents. Only women were used as respondents because the study focused on the experiences of women in the workplace. The first target group was made up of women who were senior officials. This group represents those persons who are in senior and authoritative positions at work. The second target group consisted of four ordinary female employees, that is, employed women who were not in management positions at work. The third target group consisted

of four female unemployed persons. Unemployed females were either not employed or dismissed from their jobs because of their female character (e.g. pregnancy and physical nature).

The specific division of the first target group was as follows:

- Managers (4)
- Directors (4)
- School principals (4)

This group was chosen for this research because it represents senior officials or workers in senior positions in the labour market. The study seeks to establish whether women are equally represented as men in these positions. The representation of women in senior positions in the South African Labour Market can only be proved by the responses of women who are in senior and authoritative positions. The second target group was made up of (4) ordinary employees, as stated above. It was chosen by the researcher because there was a need to know what would be the responses of ordinary employees as compared to responses of senior officials and the unemployed females. The third target group was made up of (4) unemployed women. The researcher chose the unemployed women to ascertain their views on employment equity law, in order to prove what was stated in the hypothesis. Men were not interviewed in this study, because the study seeks simply to ascertain the perception of women about gender equality at work.

1.5 Literature Review

Du Toit and Others in *Labour Relations Law* have pinpointed what they found to be the shortomings of the anti-discriminatory laws of the country[23]. The above authors submitted that section 9(2) of the Constitution intends to protect the people who are presently disadvantaged rather than those who have been disadvantaged in the past. However, this is the first weakness of the authors of this book because the preamble to the Constitution has stated at the outset that it is introduced to redress the imbalances of the past. It is probable that the legislature saw no reason to state this fact in every part of the Constitution. The preamble discloses the rationale behind the development of the South African Constitution.

The second weakness of Du Toit and his co-authors lies in the submission that the Employment Equity Act seems to place more emphasis on the protection of blacks, women and the disabled persons as compared with other categories of people. The same authors argue that there is no need for the Act to have affirmative action that protects all the categories mentioned in the Constitution. It could as well as protect only the three categories it emphasised. Du Toit's book has however, helped the researcher in making a critical analysis of the law. Its strength lies in giving the researcher food for thought and a platform for argument in a critical analysis. For example, this text made it easier for the researcher to discuss issues of gender discrimination when dealing with critical analysis of the law.

---

[23] du Toit D, Wooolfrey D, Murphy J, Godfrey S, Bosch D, and Christie S. *Labour Relations Law. A Comprehensive Guide.* Butterworths (2000) at 351.

Another writer, Tamara Cohen argues that the anti-discriminatory laws are not clear on what is fair and unfair discrimination[24]. Cohen continues to argue that the laws leave the responsibility to the judiciary to decide the issue, and that this causes uncertainty. The strength of her book, nevertheless, lies in her arguments which are realistic if one looks at them carefully. For instance, it is not clear what circumstances make it is fair to discriminate against a pregnant woman. However, she does not give a clear direction to be followed to achieve better results. For example, she just submitted that it is better to speak of justified discrimination. All the same, the book has helped in a critical analysis of the law, especially in pregnancy discrimination.

Another source, *Report of the Presidential Commission*, submits that the main factor that causes unemployment in South Africa is the lack of education, and that is why there are more employed men than women[25]. It also submits that discrimination in the workplace is influenced by extra-market discrimination. However, the argument that unemployment of women is caused by lack of education is no longer true, because women are no longer as uneducated as they were in the past. I disagree with this view because women are no longer as uneducated as they were in the past. Many of them have the required skills and education but are still unemployed. This text makes a valuable argument that discrimination in the workplace is influenced by extra-market discrimination, which means discrimination outside the labour market.

---

[24] Cohen T "Justifiable Discrimination-Time to set the Parameters" (2000) 12 (2) *SA Merc LJ.*
[25] Standing G, Sender J and Weeks J note 1 above.

The same Report also submits that non-discriminatory hiring and promotion policies in South Africa are insufficient for equality, but the report was written before the enactment and the implementation of the Employment Equity Act, which now makes provision for equality to be implemented. The report has helped the researcher in dealing with the historical background of discrimination.

The writers of a book with a title: *Working Women* discuss how women suffer at work[26]. Many women in this book tell their stories of bad experiences at work by virtue of being female. It is a text in which women themselves share their experiences unlike other sources which rely only on assumptions.

Domestic Workers in Poverty is about women who are regarded as persons who are only able to work at home and have no opportunity to be independent[27]. The authors of this book argue that black women were only accepted in the labour market to work as domestics because they earn as little money as possible there and can only depend on their husbands for a living. They continue that even now organisations that are developed to find jobs for people will find jobs for white but not black women. That results in black women resorting to domestic work even if they have spent twelve years in school. The strength of the book lies in its identifying black women as the most numerous victims of discrimination at work.

---

[26] People's College Book *Working Women* Juta & Co Ltd (1990) at 115.
[27] Berhardien G, Lehulere K, and Shaw A *Domestic Workers in Poverty* Pluto Press (1997) at 17.

Federal law of employment discrimination is about the way the United States of America deals with discrimination, and provides a basis for comparative study. Its strength lies in the fact that it provides alternative views on gender discrimination using the USA as an example. However some of the solutions suggested may not be workable for South Africa because it is a developing country, and the USA is a developed country.

Susan Brazilli submitted that when the new Constitution became entrenched the judiciary will need to be the representation of all the categories of people in South Africa[28]. This means that women, disabled persons and blacks should be equally represented in the judiciary in the New South Africa. This view supports one of the findings of this study namely that the Constitution is being undermined and that women are still under-represented in all sectors of the workplace. (This book was written before the new Constitution was introduced, very little change has occurred since then.)

In Reversing Discrimination the authors argue that there are stereotypes that say, "I don't want your brains I want your hands". This is often what is said by the employer when the employee tells him what he does not like at work[29]. This is one strength of Ian Fuhr's book because by their actions, stereotyped employers challenge the anti-discrimination laws. His book which was written before the new Constitution, was intended to contribute to changes in the labour market. As there are still stereotypes like these even

[28] Brazilli S *Putting Women on the Agenda* Oxford University Press (1991) at 400.

[29] Innes D, Entridge M, and Perold H *Reversing Discrimination: Affirmative Action in the workplace* Crossing Press (1993) at 613.

when the Constitution has tried to address such problems, more research needs to be done to discover where the problem lies. Ian Fuhr's book has been of great assistance in arguing that it is the stereotypes which do not change and therefore lead to discrimination at work.

Facts about Germany illustrates the way Germany is today, the law, the Constitution and the labour market, and it gives information that is useful for a comparison between the situation in Germany and that in South Africa in dealing with issues of discrimination against women at work[30].

ILO country review: Restructuring the Labour Market, submits that measures to remedy inequality cannot address all issues at once or devote equal priority to all causes of inequality[30]. Therefore, it would be better to start with the strong abuses of the labour market. Since the main thrust of this study is strong abuses in the labour market, prioritizing abuse against women in the South African labour market is supported by the text. The review discusses the restructuring of the South African labour market from the period of apartheid to the liberation period. It suggests the approach of devoting priority to strong abuses of the labour market but accepts that it does not work effectively in SA labour market, which means that something else needs to be done in order to achieve equality.

[30] Societats – Verlag (1996) 71.

Beyond Apartheid is a book about the situation at work long before apartheid was introduced, the situation during the apartheid years, and the situation at the end of apartheid[31]. The book helped in tracing the history of gender and race discrimination. It gives the historical background of discrimination against women at work but makes no reference to the present situation.

In *Apartheid and Labour*[32], the writer deals with the conditions at work during the period of apartheid. It contributes information on the history of international organizations. However, it only deals with discrimination during the apartheid era and does not provide information on the present period. It illustrates all the abuses of the apartheid regime which were in conflict with the rules of ILO.

J Kentridge argues that discrimination which is justified by economic efficiency against a pregnant woman is sex discrimination and unfair because it shows that men want women to be in the world of men and vice versa[33]. It is the strength of Kentridge's book that it is a challenge to anti-discrimination laws. It will be of great help in chapter eight in the critical analysis of case law because it is one of the books that have done a good critical analysis of the law.

---

[31] Fine R and Davis D *Beyond Apartheid* Juta & Co Ltd (1990) at 63.
[32] International Labour Office in Geneva. *Apartheid and Labour* (1991).
[33] Kentridge J "Measure for Measure: Weighing up the costs of feminist standard of equality at work". (1999) 10 (1) *SA Merc LJ* 312.

Dealing with Employment Discrimination is a book in which the author argues that it is not wise for the people who know the law to ignore it, because the matter does not affect them in person, as that makes the law ineffective[34]. He also argues that some employers ignore the law because they do not feel the pain that is felt by the employees. However, that is a challenge on its own. The book gives a good critical analysis of the law, and is useful in comparative study because it is about employment discrimination in America.

The 9 to 5 Guide to Combating Sexual Harassment is based on the argument that many women did not know that sexual harassment at work is illegal. Even now that they do know, they are not getting the necessary attention from the law[35]. The latter statement is the strength of this book as it gives the idea that sexual harassment needs the type of attention which other forms of discrimination get. The book is about the elimination of sexual harassment at work. *Women in Management Worldwide* is a book in which the writer argues that there are many problems faced by women in management[36]. The strength of the book is that it gives an insight into the fact that women need to be in top management too because they perform as diligently at work as men do. The book, however, only deals with women and management and no other kind of discrimination against women at work. When women deserve to be managers, they do not get promoted because men believe that women do not have the same motivation as they do at work.

---

[34] Peres R *Dealing with Employment Discrimination* Sapes Books (1978) at 59.
[35] Bravo A and Cassedy E *The 9 to 5 Guide to Combating Sexual Harassment*.John Wiley & Sons Inc (1992) at 250.
[36] Davis S M *Women in Management World Wid.* Newyork University Press (1997) at 222.

Sometimes employers believe that women are not as good as men at management. Some employ and promote women as managers, but later frustrate those women deliberately. Davis's book helped the researcher in dealing with gender discrimination.

Women Teachers under Apartheid reveals that women teachers are mostly found in lower positions than men[37]. Some people justify this by saying that it is because women have low self-esteem and therefore do not apply for senior posts. Others say it is because they are discriminated against. The book is about discrimination against women in the apartheid era. The strength of the book is that it shows that in all fields of employment women experience discrimination.

In *Promoting Gender at Work* the writer argues that while both men and women can be subjected to sexual harassment , more women suffer from it than men[38]. Employers have the responsibility to deal with discrimination as they do with any other form of misconduct as well as to refrain from harassing employees themselves. The book is about sexual harassment of women at work, and has provided information on dealing with sexual harassment. The strength of this book is that it treats sexual harassment as a form of gender discrimination that needs to be eliminated.

Equity and Affirmative Action is a book which suggests that the current situation needs to be reversed where the talents of people such as women, the disabled and others who were

[37] Mahlase S *Women Teachers Under Apartheid* Sapes Books (1997) at 15.
[38] Date-Bah E Promoting Gender at Work Open University Press (1997) at 200.

disadvantaged in the past remain unrecognized, under-developed and often unrewarded[39]. It promotes the recognition of the talents of women, and has provided useful information on historical background of discrimination, gender discrimination, and critical analysis of the law. It is about employment discrimination from the apartheid period to date.

Barbara Bagilhole in *Women, Work and Equal Opportunity* argues that women's inequality in paid work persists in Britain because occupational segregation by sex has remained pronounced and persistent throughout the twentieth century, despite the increased feminization of the labour force[40]. This book gives information that was used in the comparative study with United Kingdom (UK) and is about equal opportunities that are supposed to be experienced by women at work. It is a book illustrating how Britain deals with discrimination against women as compared to South Africa, and that promotes the possibility of learning new ideas.

In *Gender Inequality at Work*[41] the author argues that if employers have denied women authority in order to preserve men's power and privileges, then there is less reason to be optimistic that women's growing share of managerial jobs has brought an equitable distribution of authority. This book was of great help to the researcher when doing the chapter on discrimination against women at work. The strength of this book is that it discloses the fact that there is no such thing as equal distribution of authority between men and women in South Africa. More has to be done to achieve this.

---

[39] Institute of development and labour law. University of Cape Town. *Equity and Labour* (1999) at 120.
[40] Bagilhole B *Women, Work and Equal Opprtunity* Gower Publishing Co Ltd (1994) at 65.
[41] Jacobs J A *Gender Inequality at Work* Yale University Press (1995) at 311.

1.6 Defining Important Words

Employment Equity

According to Rampele "employment equity is a broad term that is intended to convey a picture of a labour market that is both non – discriminatory and socially equitable"[42]. For the purpose of this research the term employment equity is used to mean eradication of unfair discrimination in the workplace, with the aim of creating equal worth and freedom. It should be noted that equality does not always mean equal treatment.

The above view is preferred because in the case of *President of the republic of South Africa v Hugo*[43],Goldstone J held that although equal treatment based on equal worth and equal freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. The same approach was also adopted by the Labour Court in *Leonard Dingler Employee Representative Council v Leonard Dingler (pty) Ltd*[44] *by Seady AJ.*

Affirmative Action

According to the *Comprehensive Guide for Labour Relations Law,* this is "a term that serves not as a duty but in a permissive sense as a defense to a claim of unfair discrimination allegedly suffered by person or persons on the grounds of race, gender, or

---

[42] Rampele M "Treading the Thorny Path to Equity" in W James, D Caliguire, K Cullinan (Eds) (1996) at 138.

[43] President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC). Goldstone J held that each therefore will require a careful and thorough understanding of the impact of discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.

other characteristics referred to in section 6 (1) of the EEA[45]". For the purpose of this study the term means a method designed to ensure that suitably qualified persons from disadvantaged groups have employment opportunities and are equitably represented in all occupational spheres.

Gender discrimination

In *Restructuring the Labour Market,* the term means "the disadvantages and forms of discrimination faced by women in the South African labour market"[46]. For the purpose of this research, gender discrimination is an unjustified, unreasonable, unfair differentiation or bias shown by any person against another on the grounds of sex. In the case of the labour market it is often an employer who differentiates unfairly against his or her employees on the grounds of sex.

Pregnancy

The term means a process whereby a woman bears a child inside her body for a period of nine months, and more or less in certain circumstances. "Pregnancy includes intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy[47]"

Black women

"This is a generic term which means African, Coloured, and Indian women[48]".

---

[44] *Leonard Dingler Employee Representative Council v Leonard Dingler (pty) Ltd* (1998) 19 *ILJ* 285 (LC).
[45] du Toit D, Wooolfrey D, Murphy J, Godfrey S, Bosch D, and Christie S *Labour Relations Law: A Comprehensive Guide.* Butterworths (2000) at 320.

[46] Standing G, Sender J and Weeks J note 1 above at 456.
[47] Employment Equity Act 55 of 1998.
[48] Ibid.

Employee

"The term includes an applicant for employment[49]".

For the purpose of this research, the term means any person who is working for another and who gets remunerated in return. This may include applicants for the purposes of protecting the rights of applicants.

Sexual harassment

Sexual harassment is defined and classified into two:

(i) A demand by a person in authority, such as the supervisor, for sexual favours in order to keep or obtain certain job benefits, be it a wage increase, a promotion, training opportunity, a transfer, or the job itself[50].

(ii) Unwelcome sexual advances, requests for favours or other verbal, non – verbal or physical conduct of a sexual nature which interferes with an individual's work performance or creates an intimidating, hostile, abusive, offensive or poisoned work environment.

For the purposes of this study sexual harassment happens when a person is abused physically, sexually and or emotionally anywhere by another person of opposite sex with the purpose of giving the victim what he or she desperately needs even if the victim deserves to get that thing. In the workplace, this happens for the purposes of getting

[49] Ibid.
[50] Ibid.

employed or promoted, and it happens more often to women. The perpetrator is usually a senior male official.

1.7 Scope of Research

The study is divided into chapters in order to demonstrate what the research contains, an also to make it interesting and readable. Chapter One is the introductory chapter which shows what the study is about. In that respect, it focuses on the hypothesis, problems for investigation, aims and objectives of the research, research methodology, literature review, definition of important words and the scope of the research. Chapter Two deals with the historical background of discrimination against women. Its purpose is to give an understanding of the reasoning behind the act of discrimination against women in the workplace. It would not be a good idea for any writer to get into the present situation without giving an understanding about the past. It is also impossible to recommend possible solutions to the problem without looking first at its history (i.e. the cause of the problem). This chapter focuses on the factors that made the labour market what it is today. Discrimination against women during three periods namely, the pre-colonial period, Colonialism and in the Apartheid Era are discussed in this chapter. Culture in the pre - Apartheid era played a great role in causing misery to the lives of women in the labour market. Apartheid and its laws are discussed showing the contribution of apartheid to the creation and application of laws which discriminated against women. Women and education in the past will also be discussed to show that women did not have as much access to education as men.

Chapter Three is about discrimination against women in the areas of gender, pregnancy and sexual harassment (because these are the areas in which women are affected most.) It aims at giving a clear picture of the real situation in the workplace despite the existence of the Constitution. Chapter Four discusses the difference between the law in statute books and the practice of the law. This is shown by empirical research which was done through questionnaires. Chapter Five is about the serious consideration that should be given to the provisions of the international instruments on women's rights at work. In this Chapter, the rights of women as stipulated by International Organisations such as International Labour Organisations (ILO), United Nations (UN) and African Unity (AU) are discussed. It is a chapter that also shows the state of the law concerning women at work in various countries such as United States of America, the United Kingdom, Germany, Namibia and Kenya. It is a chapter that compares the situation in these countries and South Africa.

Chapter Six is the conclusion, with findings and recommendations. It is the chapter that gives the findings from various chapters with recommendations of the respondents as well as those of the researcher

Chapter 2

Historical Background of discrimination against women

2.1 Introduction

Discrimination against women in the labour market has been practiced by employers in South Africa and in many other countries of the world from time immemorial. Discrimination against women happened because of the patriarchal nature of our societies. Men have been in control of the system, and have relegated women to reproductive purposes and also to situations of servitude in the home[1]. Many factors have contributed to the patriarchal system and they are discussed below. Discrimination has also created in women a feeling of inferiority and self-doubt.

Many women were not sent to school by their families because within their communities the belief at the time was that it was useless to educate females (especially black ones). This lack of education put them at a disadvantage, even when they realized that they could work in industries. They were only given inferior jobs with low salaries because they lacked skills[2]. The apartheid system also played a role by placing white women in better positions with better salaries than black women, but even white women had an inferior status as compared to the white males. The following paragraphs examine the critical factors which have resulted in the above discriminatory status of women.

---

[1] Bender L "A Lawyer's Primer on Feminist Theory and Tort".(1988) 30 *Journal of legal education* at 5-6.
[2] Standing G, Sender J, and Weeks J. Restructuring the Labour Market: South African Challenge. An ILO Review. (1996) at 450.

2.2 Contributing factors to inequality at work : Historical Perspective

2.2.1 The pre-colonial period

During this period there was a division of labour in the household of each family[3]. Women were expected to be in the fields during the day to plant crops, so that there would be something for the family to eat. It was the head of the family who allocated responsibilities to members of the family. The head of the family was always a man whose duty was to look after the herds of cattle[4], but even in doing this, he delegated this duty to other male dependants, and did it himself only when there were no dependants.

Women were also discriminated against during this period because they were regarded as minors by their husbands and had to obey their husbands[5]. In terms of customary law, a man is considered superior to a woman because she depends on him in every way[6]. They were not allowed to work outside the home because they had to look after children and provide sustenance. She could neither sue nor be sued (e.g. In the African society when a woman committed adultery she could not be sued; only the head of her family could be

---

[3] Hichter H *African Women* David Fulton Publishers (1984) at 1.

[4] [54] Ibid 3. See also Koyana DS Chieftainship and headmanship are not hereditary *Speculum Juris vol.16 No.1* June (2002) at 145. The fact that men were the only people who could be leaders of the society was upheld by Prof Koyana when he argued that it would be natural not only for those in power to take place of their forebears, but also for the community to prefer that the sons and grandsons of those who had proved themselves to be capable leaders in difficult times should take the lead. See also the case of *Sigcau v Sigcau* 1944 AD 67.

[5] Ibid at 1.

[6] Murray C *Gender and the New South African Legal Order* Juta & Co Ltd (1994) at 16.

sued for her conduct). A woman did not even own anything according to customary law. Her possessions belong to the head of the family[7].

Their jobs were in agriculture and in having as many children as they could to make their men happy. This was done because a man's economic status depended on the number of children that he had[8]. The more children he had, the more respected he became in the society, especially if the children were males. It was men who were in control of everything (not women). In South Africa the traditions of both Africans and whites discriminated against women and since it was the way they lived, they saw nothing wrong with those traditions. Even women themselves believed that they deserved such treatment, because they were brought up to believe that a man had to be respected by a woman because he was the head of the family. It was men who went to hunt, herd cattle and provide food for the family to eat. Women were left at home with the children. It was the way men worked before the advent of industrialism. That is why they continued to believe that a woman's place is at home even after the development of industrialism. The colonists also made sure that they did not have jobs for women in industries so that they could stay in the rural areas to plant crops for export. Men were forced to go to industries in urban areas because high taxes were introduced. The discussion above shows that it was even better during the pre-Colonial period because there was a more equitable division of responsibility than today, when women are not accepted at work and yet they have to take responsibility for their families.

---

[7] Ibid.
[8] Ibid at 2.

2.2.2 Colonialism

Women had to sell their crops at very low prices determined by the colonists and in addition pay high taxes. The tradition of women being in the kitchen and being child bearers was shown clearly in *Wookey's* case where Judge Solomon stated that centuries of practice compelled him to conclude that women could not be admitted as attorneys[9]. He went on further to hold that the Interpretation Act which stipulates that 'he' should be taken to include 'she' was not applicable in such cases.

Colonialism contributed to promoting discrimination against women at work, in that it brought Christianity to South Africa. Christianity is a religion that favours male domination. Many people in South Africa were influenced by this religion when the colonists took over this country, and in the process devalued women[10]. People were taught that in order to show respect to God one had to respect man first because he was made in the image of God Himself. It became the law to make men superior to women.

2.2.3 After 1948

1948 marked the beginning of the Apartheid Era, and a period that saw the division of the South African people. It was during this time that the laws which discriminated against women and blacks were introduced. The Apartheid political, economic and social regime was a deliberate control and manipulation of the labour market in a manner which

---

[9] *Incorporated law society v Wookey* 1912 AD 623.
[10] Fine R and Davis D *Beyond Apartheid* Juta & Co Ltd (1990) at 7.

privileged whites and men, while disadvantaging and discriminating against blacks generally, and women in particular. Apartheid government policies such as reserving certain jobs for males and enforcing gender-based wage systems were legal manifestations of Labour Market discrimination. In the Apartheid regime, discrimination against women was promoted through customs, culture and religion.

2.2.3.1 Fighting for equality

Racial discrimination during the apartheid years made women fight for equal treatment as men, but in the process they also demanded equality in terms of race[11]. The reason for women taking part in this struggle was that it was wise for them to kill two birds with one stone by fighting for gender and racial equality at the same time. They did that by using the strategy of joining other organisations that fought for racial equality such as the African National Congress (ANC), the Pan Africanist Congress (PAC) and the South African Indian Congress (SAIC).

These women ended up forming an organisation called the Federation of South African Women (FSAW) in 1954[12]. Women experienced resistance from the National Party government in their struggle for gender equality until 1990, when the ANC was unbanned. The ANC called upon women to take the lead in creating a non-sexist South

[11] Walker C *Women and Resistance in South Africa* Pluto Press (1982) at 156-164.
[12] Ibid at 281-282.

Africa under the umbrella of ANC Women's League[13] (ANCWL). In 1992, when the Constitution of the Republic was negotiated in the Conference for a Democratic South Africa (CODESA), there was only a small representation of women[14]. The small representation of women made women angry, and they demanded inclusion in the negotiations, which resulted in the formation of Gender Advisory Committee to advise on gender issues[15].

The committee had little success because even after CODESA dissolved, the Multi-Party Negotiation Process (MPNP) did not give women representatives a free voice to talk about gender issues. Problems such as the above are still experienced by women even today because the culture of discrimination against them is still in the blood of certain individuals.

2.2.3.2 Education and skills training in the past

During the apartheid era, women in South Africa entered the labour market with a severe disadvantage of having been discriminated against in schooling opportunities[16]. Furthermore, even those women who managed to receive a good education received lower wages than men for work of equal value and also got fewer benefits than men. In 1987 it was found that among 1 200 manufacturing workers there was zero rate of return

---

[13] The Statement of the National Executive Committee of the African National Congress on the E mancipation of Women at 4.

[14] There were 23 women among more than 400 delegates from political parties (National witness 7 March 1992). See Friedman S *The Long Journey: South Africa Quest for a Negotiated Settlement* (1993) at 129-38.

[15] Ibid.

[16] Standing G, Sender J and Weeks J at 118.

to school among women because they had been disadvantaged in terms adult education needs and aspirations[17]. In 1988, only 30 companies reported that they employed women apprentices in the whole country. The 1991 population census showed that only 5.1 percent of all artisans and apprentices were women. It was also discovered that in all those industries where a large number of women were employed little training was done.

In 1995, women were almost completely excluded from apprenticeship in manufacturing industries. There were no women in food-processing plants; only 2.4 percent of the total in the paper and printing sector; and only 3.5 percent in the metals and engineering sector. Other than apprenticeship, women made up only about 20 percent of all workers who received training in the firms that provided training. There were also those employers who reported that they preferred to provide training only to men.

2.3 Contributing factors: Current Trends

2.3.1 General Occupational Segregation

Women in the South African labour market were disadvantaged by the fact that they were placed in more inferior occupations than men[18]. In 1991, it was found that women comprised a very small number of high status occupational categories[19]. Women

---

[17] Ibid at 402.
[18] O'Regan C & Thompson B *The Unionisation of Women Workers in Different Sectors in south Africa* Sapes Books (1993) at 8.
[19] National Manpower Commission Annual Report (1991) at 53.

represented only 7.6 percent of managers and directors, 1.5 percent of senior engineers, 14 percent of doctors, 6.7 percent of architects, 19.4 percent of lawyers. A survey of major companies in 1990-1991 found that women were under-represented in senior positions as a result of prejudice.

Occupational segregation originating in the Apartheid era continued to be very strong in the public sector, even though there was a large number of women in that sector. There are various reports which support the fact that there are very few women in senior or even in middle management[20]. A study which was carried in 1993 showed that in three metropolitan cities, most African women who were employed, were appointed on a casual or temporary basis, white women were concentrated in administrative and clerical positions, black men were concentrated in unskilled, manual labour. White men occupied the executive positions. The greatest disadvantage faced by African women in the labour market is that of working as domestic workers because they were not covered by the Unemployment Insurance Act which provided small maternity benefits[21]. They were also not protected by the minimum wage legislation.

Domestic workers were the most vulnerable group in the labour market because they have not been covered by the minimum wage legislation and have no entitlement to the unemployment benefits, no pension or worker compensation coverage. They were also not covered by the Wage Act and the Labour Relations Act. The only promising development was the incorporation of the South African Domestic Workers Union

[20] National Manpower Commission Annual Report (1991) at 53.
[21] Ibid at 409.

(SADWU) of 1986 as a COSATU affiliate[22]. Another disadvantage faced by women was the occupational segregation discovered in the manufacturing firms where men took most managerial positions and the more skilled and supervisory jobs.

Table I Women's occupational distribution of employment in 1991[23]

Occupational Group	*Per cent of women in total*	*Per cent of African women*
Professional, technical	*2.7*	*1.6*
Executive, administrative	*0.4*	*0.1*
Clerical, sales	*5.9*	*2.1*
Transport, communication	*0.2*	*0.1*
Service occupation	*7.9*	*9.4*
Farming & related	*2.0*	*2.3*
Artisans & apprentices	*0.3*	*0.2*
Production work, Supervisors	*3.2*	*3.1*
Unspecified	*6.9*	*8.3*

SALDRU Living Standard Survey 1991

[22] Ibid.
[23] 1991 Population Census.

2.3.2 Discrimination in Sectors of Employment

It is evident that women can also be disadvantaged by industrial segregation of employment. For example, mining was found to be the most extreme sector of female exclusion, where women only comprised between 2.4 percent and 5 percent of the total workforce. The reasons for this include the migrant labour system, traditional conventions about women's work and legal barriers to women working underground in a mine. According to the Mines Health and Safety Act, conditions could be modified to put less restrictions on women's employment in mining only if there can be adequate safeguards to protect women against dangers in the mines.

Women were more likely to be employed in the public sector but even though there is a large number of women in this sector, they still felt discriminated against[24]. By 1994, there were still no women on the Commission for Administration which is the body responsible for the conditions of service for all South African government employees. Married women were also penalized in terms of various benefits[25]. For example married women were not entitled to a housing allowance.

Table II Women distribution of employment by sector in 1991

Sector	Per cent of women	Per cent of African

[24] Barker F S *The South African Labour Market: Critical Issues for Transition* Juta & Co Ltd. (1992) at 35.
[25] Standing G, Sender J, and Weeks J at 413.

		women
Total population	**50.0**	**49.8**
Agriculture & fishing	**27.1**	**28.4**
Mining, quarrying	**3.2**	**1.5**
Manufacturing	**28.9**	**24.2**
Electricity, gas, water	**10.7**	**5.0**
Construction	**6.3**	**4.0**
Trade, hospitality	**40.7**	**39.7**
Transport, communication	**13.9**	**5.5**
Finance, insurance	**47.8**	**14.4**
Social, personal services	**62.4**	**66.5**
Unspecified	**50.1**	**51.5**

SALDRU Living Standard Survey 1991

2.3.3 Discrimination in Working conditions

Women in the South African labour market were found in sectors where income, opportunities, and working conditions were relatively unfavourable. In other words, women were found in what was classified as the secondary labour market. One study has estimated that women farm workers were increasingly casualised due to increasing mechanization, and that this helped to explain the inequality in income between women and men farm-workers. The 1993 survey showed that 13.4 per cent of employed women

were in casual jobs as compared to 9.5 per cent of employed men. The study of local government council employment also found that women predominated in less secure forms of employment.

In 1985, the population census showed that about a third of women were employed in informal activities, and 42 per cent were doing subsistence work. The 1991 census indicated that there had been expansion of the informal sector and those in subsistence work were classified as unspecified and that 54 per cent of those were women, 83 per cent of whom were African. Evidence suggests that a very large number of women were known as domestic workers, and earned less than R200 per week.

Table III Women distribution of employment in specified work status

	African women		All women	
	Regular	Casual	Regular	Casual
Agriculture	**11.6**	**14.6**	**8.7**	**11.5**
Mining	**0.5**	**0.3**	**0.8**	**0.2**
Manufacturing	**12.2**	**8.0**	**13.4**	**8.1**
Electricity, water, gas	**0.1**	**0.0**	**0.4**	**0.5**
Construction	**0.9**	**3.5**	**1.0**	**2.2**
Whole sale, retail trade	**10.3**	**11.7**	**12.1**	**17.5**
Catering, hotels, etc	**4.0**	**1.1**	**3.5**	**6.4**
Transport, communication	**1.3**	**0.7**	**2.8**	**0.4**

Finance	**1.4**	**0.0**	**5.3**	**2.4**
Educational services	**12.2**	**1.6**	**12.8**	**3.6**
Medical services	**9.8**	**0.4**	**10.3**	**2.0**
Legal services	**1.2**	**0.0**	**5.3**	**0.2**
Domestic services	**31.0**	**53.6**	**19.1**	**41.4**
Armed forces	**0.5**	**0.0**	**0.8**	**0.0**
Other services	**2.5**	**3.9**	**4.6**	**4.6**
Other	**0.7**	**0.7**	**2.4**	**2.0**
Total	**100.0**	**100.0**	**100.0**	**100.0**

SALDRU Living Standards 1993

2.3.4 Discrimination in income

One of the major problems faced by women in the South African labour market was lower rates of pay for equal work. This issue was only addressed in 1991 by the Labour Relations Act of 1956 and the Wage Act of 1957 when it became illegal to have separate minimum wages for women and men doing the same job[26]. The 1991 Census indicated that four in five women living in rural areas had no monetary income at all. According to the 1993 SALDRU survey, although women had a higher rate of return to schooling they were receiving much lower incomes from employment in all sectors. A survey of 1 200 workers in manufacturing in 1987 found that overall women were receiving about 73

[26] Nel PS and Van Rooyen PH *South African Industrial Relations: Theory and Practice.* Juta & Co Ltd (1989) at 121.

percent of men's average earnings, even though on average women had slightly more formal schooling[27]. Discrimination in women's income extended to the public sector, especially in the administrative services. The public sector pattern illustrates the more general point that the issue of equal pay for equal work is hard to evaluate, because so much of the discrimination takes place in the occupational allocation of opportunities. However, it is a combination of occupational segregation and unequal incomes that produces the greatest inequalities between the genders. The so-called "women's jobs" are much less well paid than the so-called "men's jobs". Perhaps the most telling cases are those of nurses and engineers, both requiring similar levels of education, the one consisting almost entirely of women, and the other almost entirely of men[28]. The just-qualified engineer would earn 55 percent a month more than a just-qualified nurse.

2.3.5 Unemployment

The unemployment of women was seen as a less serious problem than men's in the South African labour market, just as in many other countries. Women's experience of joblessness is still relatively poorly documented, and there is a general feeling that the loss of a job to a woman is less important than that of a man. However, even given the definitional shortcomings, the official rate of unemployment amongst women increased and began to cause concern in the 1970s.

---

[27] Pillay P "The determinants of the earnings and occupational attainement in the South African Labour Market" *Occasional Paper* No.27 (Durban Unit University of Natal 1993).

[28] Budlender D Human Resource Development and Gender Affirmative Action, Report for the National Education Policy Initiative, Community Agency for Social Enquiry (1992).

The confinement of women to manual work was virtually complete, and constituted a take-for-granted feature of factory life. Men were employed as foremen and supervisors while women were on the assembly line. Women entered the Civil Service in great numbers, but even in this sector discrimination occurred as mentioned above. For example, there were more female teachers than males but men gained more promotion[29].

2.3.6 Sexual Harassment in the past

Sexual harassment was experienced in the labour markets of the world as a whole but it was not dealt with by legislation. While both men and women can be subjected to sexual harassment, more women suffered from it than men[30]. The law started to recognize sexual harassment as a crime with a United States court case which determined that sexual harassment constituted sex discrimination. In this case the woman became a target of her superior's sexual desires because she was a woman and was asked to bow to his demands as the price of keeping her job[31].

It is estimated that in the United States at least one out of every two women has experienced sexual harassment at some point in her working life. Sexual harassment at the workplace is more disturbing, a source of embarrassment and a form of

---

[29] Mahlase S *Women Teachers Under Apartheid.* Sapes Books (1997) at 62.
[30] Thomas A M and *Kitzinger C Contemporary Feminists Perspectives* Oxford University Press (1997) at 100.
[31] Ibid.

discrimination[32]. It can also become a sexual barrier to an individual freedom of movement and full employment or opportunities at work.

2.4 Conclusion

Discrimination against women in South Africa has been influenced by many factors from the pre-Colonial era, Colonialism and Apartheid. During the pre-colonial period, women were regarded a child bearers and men as providers. During the Colonial period, women had to look for jobs and provide for their families. Women found that they were not acceptable at all in the South African Labour Market. They were given inferior jobs.

Discrimination against women was part of the law of the Apartheid Government. It was not only discrimination between men and women that was visible but also discrimination amongst women themselves i.e. white and black. It was the tradition for married women to get fewer benefits than single women, and also white women were favoured as compared to black women. Men received better education than women during the apartheid years, and this disadvantaged women in the labour market. Even those women who managed to receive good education had inferior job opportunities, and they earned less than men for work of equal value. There was no equality at all between women and men in the workplace. There was wage segregation, occupational segregation and skills segregation. Women decided to struggle against these laws by joining the struggle against racism which made race and gender discrimination go hand-in-hand. Many complaints

[32] Ibid.

made by women against sexual harassment at work caused the misconduct to fall under sex discrimination because it is often perpetrated by one person against another person of opposite sex.

Chapter 3

Discrimination on the grounds of Gender, Pregnancy and Sexual Harassment: Application of the Law

3.1 Introduction

In the previous chapter, the historical background of discrimination against women was discussed. In the present chapter, the discussion is about the application of the law in cases of discrimination against women[1]. The anti-discrimination laws prohibit discrimination on the grounds of gender, sex and pregnancy because they are meant to eliminate the imbalances of the past. The anti discrimination laws that are discussed are as follows:

- Constitution Act, 108 of 1996
- The Labour Relations Act, 66 of 1995 (LRA)
- Employment Equity Act, 55 of 1998 (EEA)
- Promotion Equality and Prevention of Unfair discrimination Act, 4 of 2000 (PEPUDA)
- Basic Conditions of Employment Act, 75 of 1997 (BCEA)

Discrimination on the grounds of pregnancy, for example, is prohibited by all of the above-mentioned laws. The example is given because pregnancy in particular is one

[1] Meyerson D "Sex and Gender" (1991) 9 *SAJHR* 291.

major physical difference between men and women that makes it difficult for women to fit in the workplace. Employers fear that they will not get as much productivity from a pregnant women as against men[2]. This is due to the fact that pregnant women often miss many days of work during their pregnancy, and this makes the employers feel uneasy about employing women at all even if they are not pregnant[3]. The reasoning behind this is that they do not know when is she going to get pregnant, while on the other hand they know that a man does not get pregnant and therefore can do his work without interruptions[4]. According to the Constitution, it is sometimes not regarded as unfair discrimination if an applicant is not employed because of her pregnancy as long as there is a valid justification. The justification may be the inherent requirement of a job or economic efficiency. This shows that there is a conflict between equality and economic efficiency[5]. Therefore, there is a need to know how the law protects women against gender discrimination before dealing with the justification for such discrimination. However, sexual harassment is another form of discrimination in the workplace that is not easily eliminated, because the perpetrator usually does it in private where there is only himself and the victim. Sexual harassment refers to the imposition of unwanted and repeated sexual requirements in the workplace[6]. Such practices have the effect of both undermining a person's work performance and of threatening that person's work security

---

[2] O'Regan C *Equality at work and the limits of the law: Symmetry and individualism in anti-discriminatory legislation* Durban: Butterworths (1997) at 69.
[3] Kentridge J. "Measure for Measure: Weighing up the costs of feminist standard of equality at work" *ILJ* 12 (1999)312.
[4] Ibid.
[5] Garbers C "Proof and evidence of employment discrimination under Employment Equity Act 55 of 1998" 2000 12 *SA Merc LJ* 136.
[6] MacKinnon C A *Sexual Harassment of Working Women: A Case of Sex Discrimination* Yale University Press: London (1979) at 1.

and livelihood. The conduct of sexual harassment is distinguished by the fact that it occurs in the context of relationships of unequal power[7]. The consequence of this is that, the submission to, or the rejection of, the sexually harassing conduct by the individual is used as the basis for employment decisions affecting such an individual. Sexual harassment is not confined to physical acts. It may manifest itself psychologically too and is a wrongful act in terms of the Anti-discrimination laws. There is a Code of Good Practice for Handling Sexual Harassment cases, with the objective of eliminating sexual harassment in the workplace[8]. This code provides appropriate procedures to deal with the problem of sexual harassment and prevent its recurrence. Although this code is intended to guide employers and employees, the perpetrators and victims of sexual harassment may include: owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with the business. Discussion on discrimination against women begins by firstly dealing with gender equality because all other discriminations against women emanates from gender.

3.2 Gender Equality

3.2.1 Constitutional Protection against Discrimination on the Ground of Gender

The preamble to the Constitution provides that the people of South Africa recognise the injustices of the past, and therefore through their freely elected representatives, they adopt the Constitution as their supreme law of the Republic. The Constitution was

---

[7] Ibid.
[8] Code of Good Practice for Handling Sexual Harassment Cases contained in Labour Relations Act 66 of 1995.

adopted in order to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'[9]. This provision proves that the Constitution is meant to protect all those who were victimised in the past by apartheid laws including women, as illustrated by cases like *Whitehead v Woolworths*[10]. In this particular case a woman was discriminated against in the sense that she could not get employed in the company where she was seeking employment because of her pregnancy. The woman took the case to court to seek constitutional relief. In the court of first instance, it was held that the employer had acted unconstitutionally because he had discriminated against the woman on the grounds of pregnancy. In the Labour Appeal court it was held that the employer's acts amounted to fair discrimination against the woman because there was a need for the employer to get profit during the time of her employment and that was not possible since the woman would seek maternity leave. However, as a person who was disadvantaged in the past, history cannot be allowed to repeat itself when there is a Constitution to protect those who were disadvantaged and still are. The provisions of the preamble are written in such a way that it could be clear that it is one's responsibility to ensure that the rights entrenched in the Constitution are preserved. Section 9 of the Constitution is the equality clause, which provides that everyone is equal before the law. This section continues to state that no one may be unfairly discriminated against on the grounds of sex, gender, pregnancy, etc . The problem with this section is that people have different interpretations of it. Stereotypes argue that it means people shall be treated equally irrespective of their biological nature, status etc. Goldstone J in the case of *President of the Republic of South*

[9] Act 108 of 1996.
[10] (2000) 21 *ILJ* 571 (LAC).

Africa v Hugo made a clear interpretation of the section, so that it can be understood that equal worth and equal freedom cannot be achieved by insisting on identical treatment[11].

Section 9(3) shows that women should be treated with the same respect as men and should not be discriminated against because of pregnancy, marital status or sex. The proof of the fact that it is a right and not a privilege for women to be protected by other anti discrimination laws such as LRA, EEA and PEPUDA is found in Section 9(4)[12]. According to section 2, the Constitution is the supreme law of this country. Therefore it should be taken into consideration when any law is applied. This means that in terms of the Constitution, women should not be experiencing any kind of discrimination which is unfair because the equality clause prohibits it. The question that follows is how to determine unfair discrimination.

The interim Constitution was replaced by the present Constitution, therefore s 8 of the interim Constitution is replaced by s 9 of the present Constitution[13]. Section 10 provides that everyone has an inherent dignity and the right to have their dignity respected and protected[14]. When a woman is discriminated against unfairly her dignity is lowered which means that it is not only her right to equality that is violated; her right to human dignity is also violated. Women often feel that their rights are being violated every day, because

---

[11] (1997) 6 BCLR 708.

[12] These are the national equity laws that give effect to the provision of s9(4) of the Constitution act 108 of 1996.

[13] Interim Constitution of 1993.

[14] For different view see *George v Western Cape Education Department* (1995) 16 *ILJ* 1529 (IC) and *Association of Professional Teachers & Rademan v Minister of Education* (1995) 9 BLLR 29 (IC). Both these cases held that the refusal to grant housing benefits to married women was unfair labour practice.

when they complain about being discriminated against, the answer is that such discrimination is fair[15]. This is because of the limitation clause within the Constitution which is based on the fact that no right is absolute, meaning that even the equality clause is not an absolute right. Section 36 which is the limitation clause reads as follows: Section 36(1) provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Sometimes the judicial officers do not take into account all the relevant factors when they limit the right of women to equality. For example, some judicial officers do not take into consideration that less restrictive means must be taken to limit the right of a person. The result of this is the continuation of discrimination against women in all sectors of employment, because there are no measures taken to protect them even though the law seems to protect them. Section 36(2) states that, except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. The fact that rights of women are sometimes limited without taking into consideration all the factors in s 36(1) means that s 36(2) is impaired already and this undermines the Constitution.

---

[15] *Whitehead v Woolworths* (2000) 21 *ILJ* 571 (LAC).

3.2.2 Protection under the Labour Relations and the Employment Equity Acts

Gender discrimination is prohibited by the Labour Relations Act (LRA), the Employment Equity Act (EEA), the Promotiom of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[16]. The LRA and EEA are dealt with simultaneously here because they are interrelated. What is not addressed by the LRA is dealt with by EEA, and the latter is more advanced than the former. The Employment Equity Act deals only with issues of employment equity, whereas the LRA deals with all issues of employment. The EEA is said to be more advanced than the LRA because it is advanced on the issues of equity as it was only established for such issues. For example the EEA contains affirmative action measures that are new in South Africa, and are not dealt by the LRA. The LRA is more concerned with the concept of residual unfair labour practices, with its provisions in Schedule 7 item 2. The residual unfair labour practices deal with the conduct of employers against employees under two headings: (1) unfair discrimination, and (2) unfair conduct in certain other forms[17]. This is evidence that women who feel that they have been discriminated against on the grounds of gender are now able to complain under this law.

The EEA was established for the prohibition of unfair discrimination and the institution of affirmative action by means of employment equity plans[18]. There are similarities in terms that protect employees and work seekers against unfair discrimination between

---

[16] Labour Relations Act 66 of 1995, Employment Equity Act 55 of 1998 and Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

[17] Item 2(1)(a) deals with unfair discrimination and Item 2(1) (b),(c) and (d) deal with unfair conduct.

[18] Hepple B "Equality Laws and Economic Efficiency" (1997) *ILJ* 598. De Villiers H. *'Optimising Equity' People Dynamics* David Fulton Publishers Ltd. (March 1996) at 13.

Item 2 of the LRA and s 6 of the EEA. There are only three differences which are: where the prohibition contained in item 2(1)(a) related only to employers, s 6 of the (EEA) prohibits all people from discriminating unfairly against employees and applicants for employment[19]. Section 11 of the EEA shifts the onus of proving fairness to the employer against whom the unfair discrimination is alleged. Employers now are duty-bound to eliminate unfair discrimination in any employment policy or practice. People who are regarded as designated employers in terms of the (EEA) are furthermore required to include in their employment equity plans, measures to eliminate forms of unfair discrimination which adversely affect persons from designated groups.

The EEA also specifically regulates certain practices which have proved controversial in the past, such as harassment which is equated with unfair discrimination[20]. Income differentials are also regulated and medical and psychological testing is permitted only in specified circumstances[21]. It is easier for women who feel unfairly discriminated against to rely on this Act rather than the LRA, because women are specifically stated as falling under designated groups. Sometimes, women are not only discriminated against by employers, but also by other employees and therefore this makes it difficult for one to rely on the LRA[22]. Employers who do not want to find themselves discriminating against women must read the provisions of the anti-discrimination laws carefully, and then learn to change so that they can have new ideas on recruitment.

---

[19] See Cf *Chipenete v Carmen Electrical* CC (1998) 7 LAC 6.11.1.
[20] Section 6(3).
[21] Section 27deals with income differentials, Section 7 deals with medical testing and Section 8 deals with psychological testing.
[22] Section 6(1).

One writer recently commented that employers should handle the recruitment of new employees with great care, as an act of discrimination can be easily committed without the intention to do so[23]. She further argues that the content of recruitment advertisements, as well as the areas chosen, are highly relevant. The proposed guidelines are as follows:

- Be careful not to confine an advertisement to an area which will result in the exclusion of or reduction in the number of applicants from a particular group. Thus use media directed at a range of groups.
- Use neutral column-headings when placing a classified advertisement. Avoid for example employment – males.
- Do not refer to or make use of traditional stereotyped terms such as waitress and postman.
- Choose agencies, job centres and career offices with care.
- The manner of questioning and content and nature of questions that would be permissible will require a certain amount of skill from the interviewer.

Moreover, she suggested that only questions that will establish the suitability of the applicant to perform the duties of the job, such as experience, qualification, skills are relevant[24]. Questions that should not be allowed are those that infringe on the privacy of an individual or which may be interpreted as discriminatory in sex, motherhood, sexual

[23] Bean M. *De Rebus* (April 1996) at 16.
[24] Ibid.

orientation, gender, and pregnancy[25]. Section 6(1) of the EEA states that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds which are mentioned in the Constitution. Section 187 of the LRA renders dismissal on discriminatory grounds automatically unfair. If a woman thinks that she has been dismissed on the grounds of discrimination, these two acts should apply. The EEA contains affirmative action measures within it, and these measures are meant to provide equality at work.

Affirmative action measures are designed to ensure that suitably qualified persons from designated groups have employment opportunities, and are equitably represented in all occupational categories in the workforce of a designated employer[26]. It was established to redress the inequalities of the past in South Africa due to the country's long history of unfair discrimination[27]. Chapter III of the EEA states that designated employers are under a duty to implement affirmative action measures[28]. In terms of s 1 of the EEA designated groups means black people, women and people with disabilities. Chapter III of the EEA protects women against unfair discrimination in the form of affirmative action. Section 15(2) of the EEA states that affirmative action measures be implemented by a designated employer. The problem with the two acts is that there is no punishment for the labour inspectors who ignore the problem of discrimination against women in some companies. Another problem is that even though there is affirmative action in place

---

[25] Questions that will be against s14 which is a right to privacy and s 9(3) a right to equality of the Constitution 108 of 1996 will not be permissible.
[26] Section 15 (1).
[27] *See Explanatory Memorandum to the Employment Equity Bill* (N 1840 in GG 18481 of December 1997) 5.
[28] Section 13(1).

now in South Africa, some employers find other ways of discriminating against women. For instance, some employers get around not employing a pregnant woman by employing women who are not pregnant. This is a kind of discrimination that is not easily seen until it is reported but some people do not report their cases because they fear harassment. Some employers do not like to employ black women and therefore employ few of them and as many white women as possible to give the appearance of is gender equity.

3.2.3 The Promotion of Equality and Prevention of Unfair Discrimination Act

A new law has been enacted in order to prohibit discrimination at work or anywhere else. This law is called the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA)[29]. Women who are discriminated against at work are also protected by this Act because the Preamble to this Act provides that the consolidation of democracy in South Africa requires the eradication of social and economic inequalities, especially those that are systemic in nature. The Preamble refers to those inequalities which were generated in South African history by colonialism, apartheid, patriarchy, and which have brought pain and suffering to the great majority of people of South Africa. Gender discrimination at work is also prohibited by this Act, even though it is not specifically meant for employment issues. Section 6 of this Act provides that neither the state nor any person may unfairly discriminate against any person[30]. This section on its own includes the protection of women against unfair discrimination at work. S 8 states that subject to s

[29] Section 13(1).
[30] Chapter 2 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

6, no person may unfairly discriminate against any person on the grounds of gender, including-

- gender-based violence
- female genital mutilation
- the system of preventing women from inheriting
- any practice including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child
- any policy or conduct that unfairly limits access of women to land rights, finance, and other resources
- discrimination on the grounds of pregnancy
- limit access to services or benefits, such as health, education and social security
- the denial of access of women

PEPUDA is the only anti-discrimination law that states all the grounds under which women should not be unfairly discriminated against. The problem is that it is still possible for any person to argue based on uncertainty of the law that the woman is being unfairly discriminated against on these grounds, which means that discrimination against women will never end as long as there is fair and unfair discrimination. Furthermore, there is often justification given for men to discriminate against women because of the gaps within the law. This has been the case from time immemorial. Why is it still allowed even when the law is said to protect women?

3.2.4 Case Law on Gender Discrimination

In *Harksen v Lane*[31] the Constitutional Court formulated unfair discrimination as follows:

> 'The determination as to whether differentiation amounts to unfair discrimination under S 8(2) of the interim Constitution requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to discrimination and if it does, whether, secondly it amounts to unfair discrimination. It is as well to keep these two stages separate that there can be instances of discrimination which do not amount to unfair discrimination. It is evident from the fact that even in cases of discrimination on the grounds specified in s 8, which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.'

The solution that is stated in the above case is one that creates more problems, because the respondent can easily shift the blame to the plaintiff if his justification sounds valid enough to the presiding officer. It must not be forgotten that even the presiding officer is not an angel. His or her judgement depends on his or her beliefs and background. The only solution for gender discrimination is to enact a law that clearly states acts that amount to unfair discrimination against women with an irrebuttable presumption. An irrebuttable presumption is greatly needed in cases where women are discriminated because of their biological nature.

---

[31] 300 (CC) 1998 1 SA.

In Association of Professional Teachers & another v Minister of Education & others[32], an application for a housing loan by the second applicant was refused on the grounds that she was married, and that her husband was in full-time employment and not permanently and medically unfit to obtain employment. The Court relied on the constitutional limitation clause and considered it an issue of justified discrimination[33]. It held that where the criteria for differentiation or classification are reasonable, justifiable and objective, such differentiation will not constitute discrimination. It is evident that the limitation clause plays a very critical role in a person' s life, as it is a clause within the constitution that determines whether one deserves a certain treatment or not. The decision here implies that judicial officers have still not changed mentally, in that their mentality suggests that women still depend on men for living. The limitation clause in this case is used for the purposes of promoting discrimination against women. Equality in terms of the Constitution means that women and men must be equal in the eyes of the law, whether they are married or not. If single women get certain privileges, married women must also get the same privileges. Furthermore, the case itself is proof that the Constitution could be undermined by constitutional means.

In Public Servants Association of SA v Minister of Justice[34], a decision by the Minister of Justice to reserve a number of vacant posts for appointments that would render the Ministry's staff more representative in racial and gender terms was at issue. In testing its constitutionality, the court started from a premise of formal rather than substantive

---

[32] 1998 1 SA 300 (CC).
[33] Section 36 Constitution 108 of 1996.
[34] (1997) 5 *BCLR* 577 (T).

equality (i.e. equality in the strict sense of identical or similar treatment of individuals or groups). From this standpoint, affirmative action appears as an exception to the basic right of equality. The Minister's decision was struck down on the grounds that it failed to meet the requirements of the Constitution. Women can be protected by affirmative action measures, only if their employers can accept that they are different from men and therefore should be treated differently in cases where equality will only be achieved by different treatment. Van Niekerk argues that the means selected to achieve the stated purpose of affirmative action programme must be:

- Capable of achieving that purpose and
- Adequate both to protect previously disadvantaged employees from past forms of discrimination, and to advance them to the same position as those employees who were previously advantaged[35].

The limitation clause fits well here because affirmative action measures are designed to limit the rights of those who were advantaged in the past, in favour of persons who were previously disadvantaged such as women. The case was decided in a way that promotes discrimination against women and blacks. Any person such as a judicial officer who knows the law is supposed to know that one should interpret cases of equality in a substantive way in order to achieve the purpose of equality, meaning that a judge who does not consider that is failing the Constitution.

---

[35] Andre Van Niekerk "Affirmative Action-three cases, two views" Contemporary Labour Law Vol 7 (1) (August 1997) 9.

In Metro Broadcasting Inc v FCC[36], the respondent Commission adopted a policy intended to increase diversity in broadcasting. One aspect of the policy was that licensing would give preference to businesses with minority ownership and management even if non-minority were otherwise better qualified. The majority of the Supreme Court held that because the programme served an important governmental objective within its sphere of competence and the programme was substantially related to achievement of those objectives, it was permissible. The Supreme Court established a very important precedent even though it is not applying SA law because it showed that affirmative action is a discriminatory measure, but it is applied for the purposes of bringing equality.

In Eskom v Hiemstra NO a private arbitration award declaring the promotion of a coloured woman at the expense of a more highly rated white woman to be an unfair labour practice was upheld on review[37]. The court did not pronounce on the merits of the award, but confined itself to the question whether the arbitrator had committed gross irregularity. Given the court's narrow power of review in voluntary arbitration matters, it was held that an error of law would not constitute adequate grounds for setting aside an award. Had the matter been heard on appeal, the outcome may have been different. The case was decided unfairly against the coloured woman because it is not an unfair labour practice to use affirmative action measures. According to the Employment Equity Act, it is not unfair to apply affirmative action measures against any person who belongs to a group that was advantaged in the past in favour of a person who belongs to a disadvantaged group. People who regard affirmative action as a form of promoting

---

[36] 497 *US* 547 (1990).
[37] (1999) 8 LC 1.11.38.

inequality are the ones who do not want change. It has already been discussed that there was discrimination among women themselves, i.e., black and white women, and such discrimination still exists. White women were preferred over black women in the South African Labour Market, and now if affirmative action is applied black women should be given preference over white women. This case is another example of cases which undermine the Constitution, and which suggest that it does not recognise the injustices of the past.

3.3 Pregnancy at work

3.3.1 Law concerning Pregnancy Discrimination

According to the Basic Conditions of Employment Act (BCEA), every pregnant woman is entitled to a maternity leave[38]. There must be no differentiation on the basis that one is pregnant and has miscarried, as it is stated in chapter I of the EEA that pregnancy includes both these situations. Section 9(3) of the Constitution and s 6(1) of the EEA prohibits unfair discrimination against pregnant women. These sections have already been discussed above on the issue of gender, and therefore it would be a repetition to state them again. All employers who are against employing pregnant women because

---

[38] Section 25 Act 75 of 1997. In *Collins v Volkskas Bank Westonaria Division of ABSA* (1994) 1 *ICJ* 4.2.2 The Industrial Court had been prepared to sanction a limitation on the right to maternity leave contained in a collective agreement on the grounds that it was not so manifestly unfair as to justify the court's intervention. The ruling has now been superseded by s25 of the BCEA establishing a right to maternity leave which cannot be reduced by a collective agreement.

they do not want to loose profit when women go on maternity leave are violating s25 of the BCEA[39].

3.3.2 Case Law on Pregnancy

In Whitehead v Woolworths (Pty) Ltd[40], unfair discrimination on the grounds of pregnancy was the issue. The court held that the applicant who had been discriminated against be compensated. This decision was set aside in the Labour Appeal Court because of the inherent requirements of the job in question. The job required that the person employed be able to continue to work for an uninterrupted period. Pregnancy and economic efficiency are two conflicting aspects because once a woman is pregnant it is impossible for her to be available to work all the way. This is a loss to the employer as the woman is entitled to maternity leave. *In Dekker v Stichting Vormingscentrum Voor Jong Volwassenen*[41], the European Court of Justice held that refusal to recruit because of the financial consequences of absence due to pregnancy must be regarded as being based, essentially on the fact of pregnancy. The court held that because refusal to appoint the best applicant on the ground of pregnancy can apply only to women, it therefore

---

[39] See Madontsela T. "Pregnancy and parental Rights for South African Employees: Theoretical foundations of current Labour Policy and Implications on opportunities for women and in similar situated workers." In Louw C and Basson A (eds) *Seminar on Gender Equality in the Workplace* Cape Town, Juta and Co Ltd (1994) 16.

[40] (2000) 21 ILJ 571 (LAC). See also *Botha v A Import Export International* CC (1999) 20 *ILJ* 2580 (LC); and *Mashara v Cuzen and Woods* (J236/97 unreported LC 9 December 1999) where an employer cancels an employment contract with a prospective employee before she tendered services because it learnt that she was pregnant. The employers in both cases cancelled the contract of employment based on the fact that the women were not yet employees and therefore the cancellation of the contract does not amount to dismissal. It was held that such conduct amounted to unfair dismissal in terms of s 6 of the EEA since the provision applies to applicants for employment in terms of s 9 of EEA.

[41] (1992) ICR 325.

constitutes direct sex discrimination even if all other applicants for the post happen to be women. Such discrimination cannot be justified by financial detriment which the employer may suffer during the woman's maternity leave.

In Hertz v Aldi[42], the European Court of Justice decided that the dismissal of a female worker because of her pregnancy constituted direct sex discrimination in the same way as refusal to recruit because of pregnancy. Hence a woman is protected from dismissal on the ground of her absence during maternity leave from which she benefits under the national law. However with regard to any willingnesses which may appear after the expiry of maternity leave, the court saw no reason to distinguish between illnesses which have their origins in pregnancy or confinement from any other illness. Female and male workers are equally exposed to illnesses. Although certain problems are linked to one sex rather than the other, said the court, the only question is whether a woman is dismissed for absence due to illness on the same conditions as a man. The court held that if the absence due to illness would lead to dismissal of a male worker under the same conditions, there is no direct discrimination on the grounds of sex.

In Webb v EMO Air Cargo (UK) Ltd[43], the House of Lords was faced with a situation which had not yet come before the ECJ. Ms Webb, soon after commencing work as a maternity replacement, discovered that she too was pregnant and would be unable to work during the exact period for which she had principally been employed. At her interview, her employers had indicated to her that although she was being recruited as a

---

[42] (1993) 1 WLR 49 at 53.
[43] [1993] IRLR 27.

maternity replacement, she required six months training for the job, and that her employment would not necessarily be terminated at the end of that period. Ms Webb was keen to return to work after the birth of her baby, but was nevertheless dismissed. The House of Lords affirmed that in general to dismiss or refuse to employ due to actual or possible pregnancy is unlawful direct discrimination.

In Brown v Stockton-on-Tees Borough Council[44], the House of Lords held that selection of a woman for redundancy because she was pregnant and will require maternity leave is a reason connected with her pregnancy. It was also held that if an employer is faced with deciding which of several employees to make redundant, he or she must disregard the inconvenience that will inevitably result from the fact that one of them was pregnant and will require maternity leave. The judgment continued by stating that the law was to be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. Although it is often at considerable inconvenience to an employer to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, that is the price that has to be paid as part of the social and legal recognition of the equal status of women with men in the workplace.

All the cases above following the case of *Whitehead v Woolworths* are the answer to what should have been the judgment in *Woolworth*s case, because the woman who was discriminated against on the grounds of pregnancy was unfairly discriminated against.

---

[44] (1989) AC 20.

The cases following the *Woolworths* case are not binding in South Africa but they have been cited for the purposes of reference. These cases promote pure gender equality because they are bound by the Constitutions of their countries. The *Woolworths* case is one of the cases that proves that there is still much to be done in order to change the patriarchal ideas of the South African people, particularly of judicial officers.

3.4 Sexual Harassment as a form of discrimination at work

3.4.1 Forms of sexual harassment

In terms of the Code of Good Practice, sexual harassment may include unwelcome physical, verbal or non-verbal conduct, and is not limited to the following examples[45]:

- Physical conduct of sexual nature includes all unwanted physical contact ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
- Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex, and unwelcome whistling at a person or a group of persons.

---

[45] Code of Good Practice for Handling Sexual Harassment Cases contained in Labour Relations Act 66 of 1995.

- Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and unwelcome display of sexually explicit pictures and objects.
- *Quid pro quo* harassment occurs when an employer, owner, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.
- Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his or her sexual advances, while other deserving employees who do not submit to sexual advances are denied promotions, merit rating or salary increases.

3.4.2 Guiding principles on sexual harassment

There are some guiding principles for countering particular unwanted sexual behaviour in the workplace which are as follows[46]:

- It is the perception of the recipient which determines whether behaviour is wanted or not.
- Sexual harassment is to do with the abuse of power and nothing about wanting a sexual relationship.
- Sexual harassment is not mutual, genuine sexual attention.
- Sexual harassment is unwanted, unwelcome and unsolicited by the recipient.

---

[46] Herbert C *Eliminating Sexual Harassment at Work* David Fulton Publishers (1994) at 17.

- The intention of the perpetrator should not be taken into account when determining a case of sexual harassment.
- Sexual harassment should be quantified in terms of frequency and not in terms of severity.
- There is no definitive list of behaviours which constitute sexual harassment at all times and in all places.
- Sexual harassment is is largely determined by the relationship or non-relationship between the two parties involved.
- There is no objective criterion for sexual harassment.
- Sexual harassment can be suffered by recipient both directly and indirectly.

In terms of the code of good practice, employers should create and maintain a working environment in which the dignity of employees is respected. The environment in the workplace should also be created in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. The implementation of the following guidelines can assist in achieving a good environment :

- Employers and managers are required to refrain from committing acts of sexual harassment.
- All employers and managers have a role to play in creating and maintaining a working enviroment in which sexual harassment is unacceptable. They should ensure that their conduct does not cause offence, and they should discourage unacceptable behaviours on the part of others.

- Employers and management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business are not subjected to sexual harassment by the employer or its employees.
- Employers and management are required to take appropriate action in accordance with this code when instances of sexual harassment which occur within the workplace are brought to their attention.

The Code of Conduct for Handling Sexual Harassment Cases recognises the importance of collective agreements in regulating the handling of sexual harassment cases. It is not intended as a substitute for disciplinary codes and procedures containing such measures that are the product of collective agreements or the outcome of joint-decision making by an employer and a workplace forum. However, collective agreements and policy statements should take cognisance of and be guided by the provisions of this code.

3.4.3 Consequences of sexual harassment

3.4.3.1 The Victim

Sexual harassment lowers a person's confidence and self esteem, eating away at her ability to do her job, her friendship with work colleagues and her private relationships[47]. In the short term the victim may not only suffer depression, headaches, stomach

[47] Ibid.

disorders, and other stress related illnesses, but the harassment may destroy her self confidence, her trust in people and her ability to do her job.

This may cause her to take time off, begin to come into work late, leave early and have extended hours[48]. Under the stress brought on by sexual harassment the victim may become tearful, nervous, short-tempered and erratic in her behaviour. If her job involves working with machinery, the vexation may result in her temporary loss of concentration causing injury to herself and other workers.

3.4.3.2 The perpetrator

A perpetrator of sexual harassment will also suffer in various ways, although probably not as far-reaching as those of his victim. He will probably not be efficient in his work if he watches for opportunities to follow, touch or harass colleagues. His mind will not be solely on his job. In addition, colleagues of both sexes, disapproving of how he treats certain individuals may avoid working with him and keep away. This may result in his being unable to work effectively in a team situation.

[48] Ibid.

3.4.3.3 The Organisation

It is not just individuals who suffer from sexual harassment; the institution in which sexual harassment happens cannot function well either[49]. One of the things that affects the institution is employee morale. Other employees lose faith in the organisation's ability to lead, to manage and to stop unwanted behaviour such as this. Dispirited employees cause lower productivity and thus a loss of earnings for the business. Staff absenteeism increases, followed by greater staff turnover. Not only do the victims of sexual harassment leave, but so do others who find the working conditions impossible when the incidents of sexual harassment are ignored or are dealt with ineptly[50].

Staff handing in their notice will result in the company having to advertise, recruit, re-train and allow for a period of settling in for the new employee, who if the harasser hasn't been located or disciplined or his behaviour changed, may also end up resigning a few months later. Through sexual harassment a company may lose talented and valued employees.[135] If staff hand in their notice after only a short period of time working in that particular organisation, the business have lost money on the training and professional development of that person. Also attracting responsible and professional employees sometimes relies on the public information about the way in which staff is treated.

---

[49] Rubenstein M *Dignity of women at work* California. Crossing Press (1989) at 214.
[50] Farley L. Sexual Shakedown: *The Sexual Harassment of Women on the Job*. Fontana Paperbacks Ltd. (1980) 11.

3.4.4 Legal implications

3.4.4.1 Investigation and disciplinary action

- Care should be taken during any investigation of a sexual harassment grievance that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be groundless.
- The code of good practice regulating dismissal contained in Schedule 8 of the Labour Relations Act, reinforces the provisions of Chapter VIII of the Act and provides that an employee may be dismissed for serious conduct or repeated offences[51].
- In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Good Practice contained in Schedule 8 to the Act[52].
- The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

[51] Section 208 Act 66 of 1995.
[52] Ibid.

3.4.4.2 Dispute Resolution

Should a complaint of alleged sexual harassment not be satisfactorily resolved by internal procedures, either party may within 30 days of the dispute having arisen refer the matter to the CCMA for conciliation in accordance with the provisions of s 135 of the Act[53]. Should the dispute remain unresolved, either party may refer the matter to the Labour court within 30 days of receipt of the certificate issued by the commissioner.

3.4.4.3 Labour Court Remedies

Specific references to race and sex discrimination were not included in the definition of an unfair labour practice[54]. In spite of this, the Industrial Court continued to characterise sex and race discrimination as unfair. In fact the only two decisions dealing with sex discrimination by means of sexual harassment were decided by the Industrial Court in terms of the pre-1988 definition. Both cases involved unfair dismissal by the aggrieved harassers. In *J v M*, a male employee (manager) both verbally and physically harassed a female employee on a number of occasions[55].

In considering whether or not his dismissal was substantively fair, the court examined the issue of sexual harassment. The judgment proceeded from the premise that sexual harassment is unacceptable at any level in the western society. The court went on to

---

[53] Ibid.
[54] Unfair labour practice definition of Labour Relations Act 28 of 1956.
[55] (1988) 10 *ILJ* 755 at 757 (IC).

uphold the fairness of dismissal of the manager although the complaint against him was withdrawn by the employee who had complained, and other female employees of the company had signed a petition in his support.

In *Mapuru v Putco*[56], the aggrieved harasser, Mapuru, had also been dismissed on ground of sexual harassment. The court found that Mapuru had displayed an intimidating attitude towards junior staff members which made them loath to complain for fear of losing their jobs. In this case, as in *J v M,* the court upheld the fairness of the harasser's dismissal. On the first reading of the unfair labour practice definition, it may seem that this form of redress is available only if the harasser is the employer of, or some other person in a position of superiority to the victim of harassment. What is the position of a victim who is sexually harassed by a co-worker, client or a customer of her employer? From a closer reading of this definition it seems as if there is no barrier to extending the protection against the employer and supervisor sexual harassment to co-worker and non-employee harassment. The Code of Good Practice provides that a non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser where the harassment has taken place in the workplace or in the course of the harasser's employment[57].

However, in order to hold an employer liable for such harassment, it would have to be shown that the employer knew or should have known of the harassment and failed to

---

[56] (Case IC 11/2/21) 1988 Unreported.
[57] Labour Relations Act 66 of 1995.

rectify the situation[58]. The fact that one may sue an employer in the Labour Court for relief in terms of the unfair labour practice determination, does not prevent an award for damages as a result of sexual harassment. Initially, American Federal Courts held that no cause of action existed under Title VII of the Civil Rights Act for sexually harassing conduct[59]. In *William v Saxbe*[60], a district court held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII. Eventually, all Federal Courts recognised sexual harassment as a form of sex discrimination under Title VII.

Some employers abuse their power during the process of hiring and promotion of women. For example, the fact that some employers would sexually harass women in order to employ or promote them amounts to abuse of power[61]. In *Casino v Anthony*[62], the court held that the employee was unfairly dismissed, both substantially and procedurally, after she refused an indirect sexual invitation from her boss. This case shows that the boss was abusing his power of being a senior official because he presented choices to this woman, the choice of accepting his sexual invitation or lose her job. Another case that shows abuse of power is that of *Pretorius v Britz*[63], where an employee who was a personal secretary of Britz was sexually harassed constantly by Britz. She decided to resign and

---

[58] In this case the employer would be vicariously liable where the act fell within the scope of the wrongdoer's employment and would be directly liable on the basis of the employer's duty of reasonable care.
[59] Section 703 Title VII of the Civil Rights Act of 1964.
[60] 413F. Supp 654 (DDC1976).
[61] MacKinnon C A *Sexual Harassment of Working Women: A Case of Sex Discrimination* Yale University Press: London (1979) at 2.
[62] (1997) 1 CCMA 10.8.31.
[63] (1997) 1 CCMA 7.1.94.

this amounted to constructive dismissal, because the employee felt she could not work under such circumstances.

In *J v M* a senior executive in a large company who had authority over 350 employees sexually molested and harassed a female employee. These are the cases that are discriminatory against women, and moreover, they amount to abuse of power because the harasser is often the boss. The courts have tried to make a change in the above cases because all of the harassed women won their cases in court. However harassment of women still exists in the labour market which means that there is a lot that needs to be done to eliminate discrimination against women in the workplace.

3.4.4.4 Criminal Charges

Under criminal law sexual harassment may fall under any one or more of the categories of crimes against the person, such as rape, assault or indecent assault[64]. The concept of sexual harassment as defined is wide enough to include the crimes of *crimen iniuria* and extortion[65]. In criminal law, the action is brought against the perpetrator personally. This works well when the perpetrator is the employer. However, where the victim has been actually harassed by a co-worker, a client or a customer problem may arise when liability is sought to be attributed to the employer as well. He or she may be held liable as an accomplice only and this could lead to the remedy of criminal law not lending itself well

[64] Burchell E M and Hunt P M *South African Criminal Law and Procedure* Juta & Co Ltd. (1982) at 439.
[65] Extortion consists of taking from another some advantage by intentionally and unlawfullysubjecting himself to the taking. Ibid at 693.

to sexual harassment cases[66]. Another disadvantage is the heavy burden of proof that rests on the prosecution because most cases of sexual harassment occur behind closed doors. The victim's testimony is therefore likely to be regarded as uncorroborated evidence.

3.4.4.5 Civil Charges

A further option that is open to sexually harassed women is to sue their employers in the civil court for the damages suffered because of sexual harassment. The damages in this option may only be recovered under a delictual head of *inuiria* for the wrongful and intentional impairment of a woman's physical integrity (*corpus*), dignity (*dignitas*) or reputation (*fama)*[67]. The advantage of this option is that one may sue both the harasser and the employer.

The employer will only be liable here if it can be shown that he or she knew that sexual harassment was being committed by the client or customer and he/she was negligent in failing to take steps to prevent it[68]. Where the harasser is the co-worker of the victim, the employer will be vicariously or even personally liable for the acts of that employee.

---

[66] Dancaster L "Sexual Harassment in the workplace: Should South Africa adopt the American approach?" (1991) 12 *ILJ* 463-4.
[67] Van der Walt J C *Delict: Principles and Cases* Juta & Co Ltd (1979) at 18. Ibid at 464.
[68] The test of negligence is the forseeability of the possibility of harm in general to another. Ibid at 68.

The case here will favour the victim only if sexual harassment happened in the course and scope of the harasser's employment[69]. In the case where the harasser is a supervisor or a person with authority over the victim, the employer will be held liable on the bases of the principle of agency[70]. Another advantage of a delictual action, is that the victim of sexual harassment has control over the action in that she is not at the mercy of the police or prosecutors.

The drawback that can be faced by a victim in delict is that, if she is unsuccessful in her suit, she does not only have to meet her own costs, but she may be ordered by the court to pay the legal costs of the defendant as well. Another disadvantage is that a victim cannot recover damages for loss of employment or promotion opportunities or for reinstatement.

3.5 Obstacles to General Gender Equality: Critique

Within the Constitution there is a limitation clause[80]. This means that it should be borne in mind that even other national laws have their limits[81]. Discrimination against women is not easy to eliminate because of the limits within the law. The limits of the law have been illustrated in *Whitehead v Woolworths*[82] where a woman was an applicant for a job and her selection as a suitable person for the job was withdrawn as result of pregnancy. The

---

[69] Ibid.
[70] Ibid.
[80] Section 36.
[81] Section 6 (2) (b) of the EEA states that it is not unfair discrimination to distinguish, exclude or prefer any person on the bases of inherent requirements of a job. Schedule 7 item 9 of the LRA also states that incapacity on the part of the employee, which may take the form of inability to meet the required standard of performance can constitute a fair reason for dismissal.
[82] (2000) 21 *ILJ* 571 (LAC).

discrimination was held to be justifiable, because the requirement of that job was an uninterrupted job continuity.

The decision taken in this case is lawful even if it needs to be challenged because of s 6(2) of the EEA which states that "it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act, distinguish, exclude or prefer any person on the bases of inherent requirements of a job". Section 187(2) of the LRA also states that "a discriminatory dismissal will not be automatically unfair if it is based on inherent requirement of a job, or constitutes age discrimination if the employee has reached the normal or the agreed retirement age". There is a problem with this defense because sometimes it can be used against women for the wrong reasons such as those mentioned below. Justice O'Regan made a comment in the case cited below, on the defence of inherent job requirement in the sphere of sex discrimination that there is a central difficulty with this defence. Discrimination legislation is aimed at prohibiting the disadvantage caused to women (and men) by sexual stereotyping. The genuine occupational requirement defence may well be used to persist in disadvantaging women because of stereotypes. *In Association of Professional Teachers v Minister of Education*[83], the Labour Court canvassed the issue of inherent job requirements, and it held that in differential treatment, the deciding factor should therefore not be a person's colour or sex, but a person's ability to do the job. Put differently, unless the inherent requirements of a job require differentiation on the grounds of colour or sex, direct differentiation on such inherent human characteristics should not be condoned.

[83] 1998 1 SA 300 (CC) 16.

In Wards Cove Packing Co v Atonio[84], the Labour Court held that so long as the discriminatory criteria served a legitimate employment goal of the employer, they would survive the challenge even though the adverse impact was considerable and the business interest could have been achieved in other less harmful ways. In *Fesel v Masoni*[85]*c,* it was held that male nurses could justifiably be excluded from a maternity hospital despite the presence of male gynaecologists. In the *Diaz* case[86], it was held that reliance on privacy or physical intimacy may be a mask for unfair discrimination or the perpetuation of stereotyping, and therefore discrimination based on sex is valid only when the essence of a business operation would be undermined by not hiring members of one sex exclusively. All the cases discussed above illustrate that it is possible for the employer to use the inherent job requirement for the purposes of perpetuating unfair discrimination on the ground of gender. Stereotypes use inherent job requirement for their own personal purpose such as keeping women out of the labour market. However, the cases mentioned prove that an inherent job requirement is mostly used as an obstacle to the promotion of equality.

Women are still discriminated against because the law that is introduced to protect them can be used again to discriminate against them[87]. For example in the cases above, equality between women and men is blocked, by the use of sections 9 & 36 of the

---

[84] 490 SC 642 (1989).
[85] 447F Supp 1346 (DDel) (1978).
[86] *Diaz v Pan American World Airways Inc* 442 F2d 1273 (9th Cir) (1981).
[87] Ibid.

Constitution, s 6 of the EEA and Schedule 7 Item 2 of the LRA. The effect of these sections will be explained clearly in the paragraphs below.

In the case of *Woolworths,* pregnancy was the core issue for the woman not to be employed for the job because economic efficiency had to be maintained[88]. Women have to be pregnant because of the requirements of nature, and therefore they need to be accepted at work as they are. The fact that she was not hired for the job she applied for because she was pregnant was enough evidence to file for sex discrimination, because if it was a man in her shoes, he would have been hired because a man does not get pregnant. However, economic efficiency is not mentioned in the Bill of Rights, and therefore it does not make sense when it is given more weight than the rights entrenched in the Bill of Rights. This means that women will never be put on an equal footing with men because economic efficiency comes first. If today it is used as an excuse not to hire a pregnant woman, tomorrow it might be used as a ground for dismissal of pregnant women because this case will be used as precedent for future similar cases.

In terms of s 36(1), "rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors"[89]. Cases like the case of *Woolworths* may be justifiable but not reasonable in an open and democratic society based on human dignity, equality and

[88] *Whitehead v Woolworths* note 82 above.
[89] S36(1) of the Constitution Act 108 of 1996.

freedom. The rationale behind this argument is that it is not reasonable to discriminate against women who were discriminated against before because of their ability to bear children, and even today they are still being discriminated against for that reason[90]. Furthermore, this case is not supposed to be used as a reliable precedent for future cases because s 36 of the Constitution also says less restrictive means to achieve the purpose of the limitation should be used[91].

In this case, the employer used harsh means to achieve the purpose of limiting the woman's right to equality and the court condoned the employer's actions. Section 6 of the EEA states that "it is not unfair to distinguish, exclude or prefer any person on the bases of inherent requirement of a job". This should not apply to a job requirement which does not allow the hiring of pregnant women or women who can possibly fall pregnant in the course of employment. If this kind of requirement is allowed by the law it means unfair discrimination is statutorily made fair.

Another problem with the law is that it is not stated in any of the anti-discrimination laws, which conduct is fair and which is unfair. It is left for the courts to decide, and this could be a danger to the designated groups, because presiding officers are human and therefore could discriminate against women if they do not want change. However the law does not state which acts of discrimination are fair to women and which ones are unfair, whereas this needs to be stated when it comes to women so that no one would have the

[90] Meyerson D "Sex and Gender" (1991) 9 *SAJHR* 129.
[91] Section 36(1)(e) of the Constitution Act 108 of 1996.

chance to discriminate against women again. In the case of sexual harassment, the problem is that there is no law that specifically deals with it so that people can see that sexual harassment causes problems in the workplace. This is what can encourage women who experience sexual harassment to come forward and report it. Some people do not even know if sexual harassment is a crime that is punishable, while others do not know what acts constitute sexual harassment. Another problem is that it usually happens privately and therefore it is not easy to prove.

3.6 Conclusion

There are many laws, such as those mentioned above, which are developed to fight unfair discrimination, and women are specially protected by these laws. Economic efficiency seems to be the obstacle to the equality between men and women in the workplace[92]. The limitation clause within the Constitution is another tool that is misused by conservative employers. Affirmative action measures were introduced to solve the problem of discrimination faced by women and other minority groups in the workplace[93]. The affirmative action measures can sometimes be used against women by discriminating against them in a way that is not easy to see, as discussed above. The South African courts seem to favour economic efficiency more than equality when the factor of pregnancy is the issue[94]. The actions which are regarded as fair and unfair discrimination against women are not specified in the anti-discrimination laws, and this is creating a

[92] *Mail & Guardian* April 14-19 2000.
[93] Act 55 of 1998.
[94] Hepple B "Equality Laws and Economic Efficiency" (1997) *ILJ* 598.

loophole for the stereotypes to say the discrimination is fair when it is not. Sexual harassment is another form of discrimination against women, which is not easy to prove in court.

Sexual harassment is a misconduct that is sex discriminatory in that it is often a person of the opposite sex who does the harassment and it is mostly men who sexually harass women in the workplace[95]. This conduct often causes the victim to resign from work, and the resignation constitutes constructive dismissal in terms of the Labour Relations Act[96]. This could be another problem that delays economic progress in South Africa because sexual harassment lowers the morale of employees. The consequence of sexual harassment is the increase in the inefficiency of employees in the South African labour market. It is better for the victim of sexual harassment to lay grievances in terms of the unfair labour practice definition because of its advantages than making criminal charges or delictual claims.

[95] Van der Walt J C note 67 above at 465.
[96] Section 186 of the Labour Relations Act 66 of 1995.

Chapter 4

Law versus practice: Analysis of the Law in Action

4.1 Introduction

The previous chapter gave a critique of discrimination against women at work . The focus here is on the theory and practicality of the law on issues of discrimination against women at work. The right to equality is a constitutional right; therefore, in terms of the equality clause, men and women are equal in the eyes of the law[1]. The right to equality is also promoted by the international instruments, as they are discussed in the next chapter. The current chapter is more concerned with the equality of men and women at work; hence the term employment equity law is used. South African history proves that women had been discriminated against in the pre-1994 period both legally and practically, but this was brought to an end in 1994 with the interim Constitution[2]. The interim Constitution was established in order to bring awareness to people of their rights, because South Africans were used to the workings of the Apartheid regime which did not give them the opportunity to know their rights[3] .

The Constitution of 1996 which is the supreme law of the country followed the interim constitution. This means that when applying the national laws one must take cognisance

[1] Section 9 of the Constitution Act 108 of 1996.
[2] See Chapter 2 of this study.

of the Constitution[4]. On the issue of employment equity, there are national laws which promote equality between men and women in order to promote constitutional equality, and these laws have been discussed in one of the previous chapters[5]. The Employment Equity Act, Labour Relations Act, Promotion of Equality and the Prevention of Unfair Discrimination Act and the Constitution all prohibit unfair discrimination against women[6]. South Africa is known for having the best Constitution in the whole world, but the important thing is the implementation of the law rather than the theory of it. For this reason a survey was conducted to observe as to whether women and men are equal in practice in the South African Labour Market.

4.2 Methodology

The data were collected by way of distributing questionnaires to the target groups[7]. It has already been mentioned in chapter one of the present thesis that the research methodology is the combination of qualitative and quantitative methods for the purposes of ensuring originality. The first target group for this study were female senior officials which included four managers, four directors and four school principals. This group was targeted in order to get different responses from different categories, since it often happens that those who are favoured by a situation tend to differ in opinion from those who are disadvantaged.

---

[3] Interim Constitution of 1993.
[4] Section 2 of the Constitution 108 of 1996.
[5] See Chapter 3 of the present Study.
[6] Ibid.

The second target group was ordinary female employees and the last group were unemployed females. The target groups consisted of only those people with educational qualifications because research plan was to draw one uniform questionnaire for everyone. The data were collected in the Border region of the Eastern Cape Province because this is the region where discrimination against women at work is mostly found. It is also in this region where discriminatory customs are mostly found.

Empirical research has its own challenges even though it is good for testing hypotheses and in proving the originality of research[8]. One of the disadvantages encountered during this research was the lack of co-operation from respondents, for example, missed appointments and the unavailability of those targeted. Another example of lack of co-operation was a lack of interest in the research by some respondents, with the result that the researcher had to beg in order to get required data. Empirical research is also time-consuming.

Another disadvantage of empirical data collection is that the researcher is usually not certain about the truthfulness of the person giving the information, and so one has to take everything said by the respondent in good faith. A further problem that was encountered especially in this research was that white females were threatened by the questions on employment equity and were not co-operative at all. Another disadvantage of collecting data by way of questionnaires is the problem of the interpretation of questions. One last disadvantage is that often, the researcher does not get back all the questionnaires

[7] See Chapter 1 of the present Study.
[8] See Bickman L *Handbook of Applied Social Research Methods* (Eds) (1998) at 485.

distributed. In this research twenty questionnaires were distributed but only fifteen were returned which meant that conclusions were drawn based on 75% of the information expected, and 25% was lost.

The strength of empirical research is that it ensures originality in that the data is not hearsay but information based on the real experiences of the target groups. Secondly, it proves the reality of what is illustrated in the books. Thirdly, the researcher easily sees the emotions such as anger, enthusiasm of the target groups about the topic. Lastly, through empirical research, the recommendations of the people could easily be disclosed to the public in order to effect change. This chapter contains the responses of senior officials, responses of ordinary employees, responses of unemployed women, the hypothesis test and the conclusion.

4.3 Data Analysis

4.3.1 Response of female Senior Public officials to gender discrimination

Out of twelve questionnaires that were distributed to senior officials (ie managers, directors and school principals) only seven were returned (58,3%). This was the most problematic group in the process of the research because they have a lot of responsibility at work, and therefore have little time for other things. Four principals were given questionnaires and three returned them. Another four questionnaires were distributed to directors, but only two returned them. Another sample of four questionnaires was

---

J (Eds) (1998) 485.

distributed to the managers, but only two returned them. Out of seven questionnaires that were distributed to senior officials, six (85,7%) responded by saying that women are not treated as equal to men in the New South African Labour Market and only one (14,3%) disagreed. Their motivation for this response is that statistics prove in most cases that men still occupy superior positions to women in the workplace. The sole senior official who said women are equally treated as men, motivated her answer by saying women are now employed in jobs that were previously only occupied by men. 100% of these senior officials believe that there are still employers with stereotypes who feel that women belong in the kitchen and do not have the ability to do work that is done by men.

The senior officials also said that it is still possible for such employers to avoid employing or promoting women despite the existence of the anti-discrimination laws. Therefore 85,7% of them believe that the law dealing with gender discrimination is not effective enough to solve the problem. 14,3% believe that the law dealing with gender discrimination is effective enough. They all (100%) responded in the affirmative on the question whether it is possible for women occupying senior posts to experience disrespect and disobedience from their subordinates and colleagues because of their gender. Four out of seven (57,1%) senior officials that were interviewed by questionnaires said the way labour courts handle gender discrimination cases does not encourage women to report their cases. Three (42,9%) of the seven female senior officials were positive that the labour courts handle these cases in a way that is encouraging to women.

100% of the senior officials think that there is a need for an increase in the number of female judges, as this could make judgements on discrimination against women fairly decided. There was only one (14,3%) senior official who believe that it is only ordinary women employees who experience gender discrimination at work. 57,1% of senior officials who responded to the questionnaire believed that all women in the workplace experience gender discrimination (i.e. applicants, ordinary employees and senior officials). Five out of seven (71,4%) senior official who responded to the questionnaire said they had experienced gender discrimination in their working lives at least once. Two (28,6%) of them said they had never experienced gender discrimination at work. Five of the seven (71,4%) in this group believed that the rationale behind the employment and promotion of women by certain employers is that such employers felt that they have no option but to abide by the law. Two (28,6%)of them believed that such employers have changed their bad attitudes towards women.

Table IV

Views on gender discrimination	Yes	No	Total
Women and men are treated equally in the South African Labour Market	14,3%	85,7%	100%
There are still stereotyped employers who feel that women belong in the kitchen and do not have the ability to work that is performed by men	100%	0%	100%

It is still possible for such employers to avoid employing women despite the existence of the anti-discrimination laws	100%	0%	100%
The law dealing with discrimination against women is not effective enough to solve the problem	85,7%	14,3%	100%
The number of women who are senior officials in the New South Africa is equal to that of men in such positions.	14,3%	85,7%	100%
It is possible that women occupying senior posts experience disrespect and disobedience from their subordinates and colleagues because of their gender	100%	0%	100%
The way labour courts handle cases of discrimination against women encourages them to report their cases	42,9	57,1	100%
The number of female judges in the labour court is satisfactory	0%	100%	100%
The increase in number of female judges could promote the development of fairly decided cases on gender discrimination	100%	0%	100%
Women are still employed in jobs that were historically known as women jobs.	85,7%	14,3%	100%

See Appendix I part 1 which contains gender discrimination at work

4.3.2 Response of female senior public officials to discrimination on the grounds of pregnancy

57,1% of senior officials said that they are aware that there is fair and unfair discrimination within the anti discrimination laws. 42,9% of them said they know nothing about fair and unfair discrimination. Those who are aware motivated their responses by saying that it is not fair to dismiss or refuse to employ a pregnant woman because the employer fears loosing profit during her maternity leave. 28,6 % of senior officials said even though nature forces women to be the ones who get pregnant and not men, they believe that it is not sex discrimination to discriminate against women because they are pregnant. 71,4% of these senior officials believe that it is purely sex discrimination without justification to discriminate against a woman because she is pregnant. 71,4% again said, women should be accepted as they are in the workplace and not be expected to be like men by not falling pregnant in order to be accepted at work. 28,6% said women should not get pregnant in order to be accepted in the labour market.

Table V

Views on Pregnancy discrimination	yes	No	Total
Aware that there is fair and unfair discrimination within the anti discrimination laws	57,1%	42,9%	100%
It is a fair discrimination to dismiss or refuse to employ a pregnant woman because the employer will loose profit during her pregnancy	57,1%	42,9%	100%
It is purely sex discrimination which cannot be justified, to discriminate on the grounds of pregnancy	71,4%	28,6%	100%
Women should be like men by not falling pregnant in order to be accepted in the work place	28,6%	71,4%	100%

See Appendix I part 2 which contains pregnancy discrimination at work

4.3.3 Response of Senior Public Officials to Sexual Harassment

57,1% of senior officials agree that sexual harassment is the kind of discrimination mostly used by employers to employ or promote women. 42,9% of them disagree with this view. Those who said employers mostly use sexual harassment to discriminate against women believe that such employers are taking advantage of affirmative action which forces them to employ women. They use affirmative action as means of harassing women sexually. 71,4% of senior officials said they never experienced sexual harassment in their working lives. 28,6% of them said they have once experienced sexual

harassment but never reported it because of fear of losing a job and it was also difficult to prove it.

TABLE VI

Views on sexual harassment	Yes	No	Total
Sexual harassment is a kind of discrimination that is mostly used by employers to discriminate against women	57,1%	42,9%	100%
Employers use affirmative action as an opportunity to harass women sexually	57,1%	42,9%	100%
Have you ever experienced sexual harassment in your working life?	28,6%	71,4%	100%

See Appendix I part 3 which contains discrimination against women at work by way of sexual harassment

4.3.4 Response of ordinary employees to gender discrimination

In the target groups for this study, people who are ordinary employees and not senior officials at work were also interviewed by way of questionnaires. Four out of the four questionnaires that were distributed to this category were returned, which means that 100% of the questionnaires were returned. 100% of employees that were interviewed said that women are not treated equally with men in the workplace, equality is just in the

books but never practised. Their motivation for this answer is that there are jobs which are considered men's jobs only, and that women have not achieved the benefits of the new legislation in that most of them are still in middle management positions and not part of decision-making. Three out of four (75%) of these women believe that there are still stereotyped employers who feel that women belong in the kitchen and do not have the ability to do the work that is performed by men. One out of four (25%) of these women does not agree with this. Those who responded in the affirmative said it is still possible for such employers to avoid employing or promoting women despite the existence of the anti-discrimination laws.

Three out of four (75%) of women employees interviewed said that the law dealing with discrimination is not effective enough to solve the problem of gender discrimination. The motivation for this response is that women are too scared to say anything because they might loose their jobs, and also that there is no mechanism in place to look at the companies and their progress since the legislation was implemented. One out four (25%) disagreed. All of the women employees interviewed said that the number of women who are senior officials is not equal to men in the New South Africa. Three out of four (75%) employees said that it is possible that even those women who are senior officials experience disrespect and disobedience from their subordinates and colleagues because of their gender. One out of four (25%) employees responded negatively. Two out four (50%) employees said that the way labour courts handle cases of discrimination does not encourage women to report their cases, and another 50% responded to the contrary. 100%

of these employees said that the number of female judges is not satisfactory, and that therefore there is a need to increase their number.

All the employees who were interviewed said that an increase in the number of female judges in the labour courts could make judgements on cases of discrimination against women to be fairly decided. 75% of these employees think that all women in the workplace experience discrimination. 25 % of them think that it is only applicants for jobs who experience discrimination. 50% of the employees have never been discriminated against because of their gender, while 50% of them have experienced this kind of discrimination. 75% of the women employees said that they think some of the employers who hire or promote women feel that they have no option but to abide by the law. 25% of them said such employers think that women are good managers.

TABLE VII

Views on gender discrimination	Yes	No	Total
In reality women are not treated equally with men in the South African labour market	100%	0%	100%
There are stereotyped employers who still believe that women belong in the kitchen and have no ability to do work that is done by men	75%	25%	100%
It is still possible for such employers to avoid employing or promoting women despite the existence	75%	25%	100%

of the anti-discrimination laws			
The law dealing with discrimination is not effective enough to solve the problem of gender discrimination	75%	25%	100%
The number of women who are senior officials is less than that of men	100%	0%	100%
It is possible that even those women who are senior officials experience disrespect and disobedience from their subordinates and colleagues because of their gender	75%	25%	100%
The number of female judges is satisfactory	0%	100%	100%
There is a need for an increase in their number	100%	0%	100%
The way the labour court handles cases of discrimination against women encourages women to report their cases	50%	50%	100%
The increase in the number of female judges in labour courts could make judgements on cases of discrimination against women to be fairly decided	100%	0%	100%
The number of women who are senior officials is less than that of men in such positions	100%	0%	100%

See Appendix I part 1

The two tables below are the ones which illustrates the choices made by the respondents in multiple-choice questions of the questionnaire. The questions asked were as follows:

Which category of women do you think experience being discriminated against?

TABLE VIII

Applicants	Employees	Senior Officials	All of the above	Total
25%	0%	0%	75%	100%

See Appendix I part 1

What do you think is the reason behind some employers hiring or promoting women?

TABLE IX

They feel they have no option but to abide by the law	75%
They think that women are good managers	25%
They have changed their bad attitudes towards women	0%
Total	100%

See Appendix A part 1

4.3.5 Response of ordinary employees to discrimination on the grounds of pregnancy

100% of employees said that they aware that there is fair and unfair discrimination within the anti-discrimination laws. All of them believe that it is not fair to dismiss or refuse to

employ a woman because she is pregnant. These employees believe that according to the laws of nature it is it is only women who fall pregnant, and therefore it is purely sex discrimination without justification to be discriminated against because of pregnancy. They all think women should not be like men by not falling pregnant in order to be accepted in the workplace.

TABLE X

Views on Pregnancy discrimination	Yes	No	Total
Aware that there is fair and unfair discrimination within the anti-discrimination laws	100%	0%	100%
It is a fair discrimination to dismiss or refuse to employ a pregnant woman because the employer will loose profit during her pregnancy	100%	0%	100%
It is purely sex discrimination which cannot be justified, to discriminate on the grounds of pregnancy	100%	0%	100%
Women should be like men by not falling pregnant in order to be accepted in the workplace	0%	100%	100%

See Appendix I part 2

4.3.6 Response of ordinary employees to sexual harassment

Three out of four (75%) employees said that sexual harassment is the kind of discrimination that is mostly used by employers to employ or promote women. Only one out four (25%) employees did not agree with this. Those who said that sexual harassment is the kind of discrimination mostly used by employers went on to say that such employers take advantage of affirmative action which forces them to employ and promote women. All the female employees interviewed said that they had never experienced sexual harassment in their working lives.

TABLE XI

Views on sexual harassment	Yes	No	Total
Sexual harassment is a kind of discrimination that is mostly used by employers to discriminate against women	75%	25%	100%
Employers use affirmative action as an opportunity to harass women sexually	75%	25%	100%
Have you ever experienced sexual harassment in your working life?	0%	100%	100%

See Appendix I part 3

4.3.7 Response of the unemployed women to gender discrimination

Four women who are unemployed were interviewed by way of questionnaires and all the questionnaires (100%) were returned. All (100%) of these women said in their responses that in reality women are not treated equally with men in the South African labour market. They motivated this by saying that men are still more in senior posts than women, and even the rate of unemployment among women is higher than that among men. They also said that men still dominate the labour market, even though women are the majority in South Africa. They all (100%) believe that there are stereotyped employers who still feel that women belong in the kitchen and have no ability to do jobs that are done by men.

All the unemployed women interviewed said, that it is still possible for such employers to avoid employing or promoting women despite the existence of the anti-discrimination laws. Three out of four (75%) unemployed women said that the law dealing with discrimination is not effective enough to solve the problem of gender discrimination. They motivated their statements by saying every minute there is a woman being treated badly at work or who is harassed sexually, even though there is legislation to protect them. They also said those who are pregnant are still not employed by most organisations once pregnancy is discovered. One out of four of these women said that the law dealing with discrimination is effective. All (100%) of these unemployed women said it is possible that women who are senior officials experience disrespect and disobedience from their subordinates and colleagues because of their gender.

Two out of four (50%) unemployed women interviewed said that the way labour courts handle cases of discrimination against women encourages women to report their cases. Another two (50%) of these women responded to the contrary. They all think that there is a need for an increase in the number of female judges in the labour court. Their motivation is that this could make judgements on cases of gender discrimination to be fairly decided. 50% of these women never felt that they were being discriminated against on the grounds of their gender. Another 50% responded affirmatively to this. 75% of these women believe that women are still mostly employed in jobs which were historically known as women's jobs.

TABLE XII

Views on gender discrimination	Yes	No	Total
In reality women are not treated equally with men in the South African labour market	100%	0%	100%
There are stereotyped employers who still believe that women belong in the kitchen and have no ability to do work that is done by men	100%	0%	100%
It is still possible for such employers to escape employing or promoting women despite the existence of anti-discrimination laws	100%	0%	100%
The law dealing with discrimination is not effective enough to solve the problem of gender discrimination	75%	25%	100%

The number of women who are senior officials is less than that of men	100%	0%	100%
It is possible that even those women who are senior officials experience disrespect and disobedience from their subordinates and colleagues because of their gender	100%	0%	100%
There is a need for an increase in the number of judges in the labour court.	100%	0%	100%
The way labour courts handle cases of discrimination against women encourages women to report their cases	50%	50%	100%
The increase in the number of female judges in labour courts could make judgements on cases of discrimination against women to be fairly decided	100%	0%	100%

See Appendix I part 1

4.3.8 Response of the unemployed women on discrimination on the grounds of pregnancy

Three out of the four (75%) unemployed women interviewed said that they are aware that there is fair and unfair discrimination within the anti-discrimination laws. Only one (25%) of them said that she was not aware of that. Those who are aware of these types of discrimination said it is unfair discrimination to dismiss or refuse to employ a pregnant woman because the employer fears losing profit during her maternity leave. 50% of the

unemployed women interviewed said that it is purely sex discrimination to discriminate against a woman because she is pregnant. Another 50% said discrimination against a pregnant woman can be justifiable in certain cases. All (100%) of these women said that women need not be like men by not falling pregnant in order to be acceptable at work. Therefore women should accepted as they are in the workplace.

TABLE XIII

Views on pregnancy	**Yes**	**No**	**Total**
Aware that there is fair and unfair discrimination within the anti-discrimination laws	75%	25%	100%
It is a fair discrimination to dismiss or refuse to employ a pregnant woman because the employer will lose profit during her pregnancy	25%	75%	100%
It is purely sex discrimination which cannot be justified, to discriminate on the grounds of pregnancy	50%	50%	100%
Women should be like men by not falling pregnant in order to be accepted in the work place	100%	0%	100%

See Appendix I part 2

4.3.9 Response of the unemployed women to Sexual Harassment

All of these women said that sexual harassment is the kind of discrimination that is mostly used by employers in order to employ or promote women. All of the unemployed

women interviewed said that employers who harass women sexually are taking advantage of affirmative action which forces them to employ women. These employers only employ a woman on condition that she accepts his sexual advances. 50% of these women said that they never experienced sexual harassment in the process of looking for a job. Another 50% of them said they experienced sexual harassment but did not report it because it was difficult to prove it.

TABLE XIV

Views on sexual harassment	Yes	No	**Total**
Sexual harassment is a kind of discrimination that is mostly used by employers to discriminate against women	100%	0%	100%
Employers use affirmative action as an opportunity to harass women sexually	100%	0%	100%
Have you ever experienced sexual harassment in your working life?	50%	50%	100%

See Appendix I part 3

4.4 Hypothesis Test

Hypothesis testing may be defined as 'a procedure based on sample evidence and probability theory used to determine whether the hypothesis is a reasonable statement and

should not be rejected, or is unreasonable and should be rejected'.[9] A hypothesis is usually used to prove or disprove what the researcher has stated in the beginning of his or her research as his or her assumption of the situation. The researcher's statement may be true or not, but this will only be proved by empirical data which may be in the form of sampling, but the results will determine what the reality is. The hypothesis of this study was that: currently there is an apparent lack of adequate law to eliminate discrimination against women at work[10]. In chapter two of this research the historical perspective of discrimination against women was discussed to show the background of discrimination against women at work. The current situation of women in the workplace and the kinds of discrimination that are critical at work are discussed in Chapter three to show the laws that are applicable to women who are discriminated against. The international perspective on discrimination against women was discussed in chapter four but this does not give an answer to whether discrimination exists in practice in the South African Labour market or it is only in theory. As has already been mentioned in the introduction, that empirical research has been conducted by way of sampling to prove or disprove whether equality between men and women exists in practice.

Out of 15 employees (senior officials, ordinary employees and the unemployed) who were interviewed by questionnaires, 12 were of the view that there is a lack of adequate laws to eliminate discrimination against women at work. Three of the interviewed employees feel that the law dealing with discrimination against women is adequate enough to deal with this kind of discrimination. This proves that the statement of the

[9] Mason R D and Lind D A *Stastistical Techniques in Business and Economics* Richards Irwin Inc (1993) at 334.

hypothesis of this research is true, because 80% of the employees accept the hypothesis and 20% of them reject it. The result is that the hypothesis has been accepted, because the general perception of women at work is that there is not adequate law to deal with discrimination against women at work. These results prove that the South African Constitution, which is the supreme law of this country, is being undermined[11].

4.5 Conclusion

Equality is one of the most important rights in the Bill of Rights, and therefore there is a need to see it being implemented in the case of men and women[12]. It has already been stated in the previous chapters that the kinds of discrimination that women critically experience at work are discrimination on the grounds of gender, pregnancy and sexual harassment. From the discussions in the previous chapters about discrimination against women there was a need to do empirical research in order to prove what had been stated in the hypothesis. The empirical research conducted was in the form of sampling targeted at three groups of employees (ie senior officials, ordinary employees and unemployed women). Questionnaires were distributed to these employees for their response. However, only 75% of the questionnaires were returned. The responses of the employees are shown above and through these responses the results of the empirical data was given. The results were that the hypothesis that: currently there is apparent lack of adequate laws to eliminate discrimination at work was. These results prove that the anti-discrimination

[10] See Chapter 1 of this study.
[11] See note 4.
[12] Section 9 of the Constitution Act 108 of 1996.

laws and the Constitution are still being undermined in the labour market, in the sense that they are not always given serious consideration in cases of discrimination against women. The next chapter deals with international instruments and a comparative study since this chapter has already dealt with all the important issues relating to the South African contact of discrimination against women at work.

Chapter 5

Application of International Norms: A Comparative Analysis

5.1 Introduction

The previous chapter dealt with empirical research. It is a chapter which illustrates that data were collected and analysed concerning discrimination against women at work[1]. The empirical research produced results which proved the hypothesis that currently there is lack of adequate law to eliminate discrimination at work. However, there is a need to know how the international instruments and how other countries deal with the issue of discrimination against women. Section 39 of the South African Constitution provides that, when interpreting the chapter on fundamental rights, a court must have regard to international human rights law[2]. South Africa is, therefore, committed to taking cognizance of international trends and standards regarding human rights, including women's rights[3].

Furthermore, our courts are obliged to consider international human rights law when dealing with issues such as right to equality. Part of the international human rights law is to be found in United Nations Conventions (UN), International Labour Organisation (ILO) and African Union Conventions. This chapter deals with the ILO, the United

[1] See Chapter 4 of this study.
[2] Section 39 of the Constitution Act 108 of 1996.
[3] Ibid.

Nations Conventions, and the organisation associated with African Union which are of particular relevance to working women[4]. The African Union (AU) was recently formed, and was earlier known as the Organisation for African Unity (OAU)[5]. The AU was formed to develop Africa economically, politically, and socially. Therefore, its major plan is to reduce poverty on the African continent. However women are regarded as the poorest section of the population, which makes the focus to look more on them[6]. The study is concerned with discrimination against women at work, and these women are also included on the agenda of the African Union. It is interesting to look at the actions of member states concerning gender equality. SADC countries are members of the African Union and have made a declaration on Gender and Development which is of importance to this study[7]. A comparative study has been undertaken of the western developed countries (Britain, United States of America, and Germany) and African developing countries (Namibia and Kenya). The developed countries chosen for this study were chosen because they have been independent for a long time, and there is a need to see how they have been dealing with discrimination against women at work[8]. These developed countries got their liberation long before South Africa. As a result South Africa can learn a lot from these countries, and see how far it has gone as compared to other countries. Namibia was chosen because it is a member of SADC, just like South Africa, and there is a need to see how far South Africa is today as compared to Namibia

---

[4] Aaron B, Blanc-Jouvan X, Giugni G, Ramn T, Schmidt F, and Wedderburn K. *Discrimination in Employment: The Comparative Labour Law Group.* Almquist Wiksel International. (1978) at 494.
[5] www.au2002.gov.za.
[6] Ibid.
[7] www.sas.upenn.edu/african_studies?org_institutes/sadcgendr.html.
[8] Aaron B note 4 above at 154.

in dealing with discrimination. Kenya was also chosen because it is an African country and there is also a need to know how far South Africa is in dealing with discrimination against women, as compared to other African countries and to find out if South Africa can learn from other African countries.

A country becomes a party to a United Nations Convention only when it accepts that Convention as part of its law[9]. The process which ensures that the convention becomes part of a country's law is called ratification[10]. Usually a country signs a convention and then ratifies it at a later stage. Normally it does not form part of a country's law if it is only signed but not ratified. However, human rights activists argue that a government is morally bound to the ideals of a convention once it has signed it.

In January 1993 the South African government signed the United Nations Convention on the political rights of women, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and others which are not of much importance to this study. On 15th December 1995, CEDAW became the first of these conventions to be ratified by the South African government.

---

[9] Ibid.
[10] Ibid.

5.2 The United Nations (UN) approach in dealing with issues of discrimination at work

5.2.1 The Convention on Political Rights of Women

This convention is significant to the study of discrimination against women at work, in that the political rights of women are the rights that give women equal representation in every sphere of government[11]. The political rights of women also enable women to say what they think is supposed to be done by the government for women. The problem with this Convention is that it only mentions the political rights of women without elaborating more on the details of the right. For example, in most countries, women vote for the parties they like but when the party is in the government, few women are appointed to high government posts. The Convention does not mention anything about the guarantee it gives to women such as penalties should equal representation of women not be realised after elections. Its aim should be to implement the principle of equality of rights for men and women, which is contained in the United Nations Charter[13].

Furthermore, the Convention recognises that men and women should have equal opportunities to exercise their political rights, for instance, participating in the government of their country, directly or indirectly, through freely chosen

[11] Convention on Political Rights was adopted and opened for signature, ratification accession by General Assembly resolution 34/180 of 18 Dec 1979. *Human Rights-A compilation of International Instruments.* United Nations Publications. (1988) at 358.
[13] Convention on Political Rights of Women came into force on July 1954. It was signed by South African government in July 1993 but not yet ratified. Its aims are found in the Preamble.

representatives[14]. In terms of this Convention, women are entitled to vote in all elections on equal terms with men and be eligible for elections to all publicly elected bodies on equal terms with men. The provision given above illustrates the abuse of women in the political arena, in the sense that they are just used for the purposes of increasing the number of electoral votes without any corresponding benefits in representation. The Convention on Political rights of women also guarantees women an equal opportunity for holding public office and exercising public functions, but the process of equal opportunities is a very slow process in practice.

5.2.2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

5.2.2.1 General Provisions

The importance of CEDAW to the study on discrimination against women at work is that its aim is to eliminate discrimination against women in all fields which include employment[15]. It is one of the best conventions in dealing with discrimination against women, because it gives details for every form of discrimination that is known to affect women[16]. However, the details given are not so broad that, states cannot continue to discriminate against women. This is why there is a need for the submission of recommendations. It was signed by the South African government in January 1993,

[14] See Human Rights note 11 above.
[15] See Preamble.
[16] See Article 1-15 below.

ratified on 15 December 1995, and became operational 30 days later. As was said above, CEDAW is the most important and most comprehensive international document dealing with equality for women. The Convention envisaged that its aims would be achieved by means of legislation and other means. The other means would, for instance, include provisions in the Constitution, and national machinery for advancement of women[17]. Many international documents such the ones mentioned in the present chapter provide that men and women have equal rights. CEDAW goes further than other international documents by requiring that states which sign CEDAW do the following: embody the principle of equality of men and women in their national constitution or other laws, and ensure the practical realization of the principle of equality[18].

States which make CEDAW part of their law must take action, through laws as well as other measures, to address inequality in all aspects of women's lives in order to ensure that women enjoy and exercise their human rights on the basis of equality with men. CEDAW points to various areas of inequality which have to be addressed. It also provides a framework for addressing gender discrimination, and inequality by explaining what steps should be taken by the countries which adopt it. CEDAW further states that in order to eliminate discrimination, states should make the principle of equality of men and women part of their Constitution and laws.

---

[17] Aaron B note 4 at 137.
[18] Article 2(a).

Governments may not discriminate against women, and must ensure that no public authorities or institutions do so either[19].

Furthermore, CEDAW requires states to ensure that no private person, organization or business does so, either. All existing laws, regulations, customs and practices which constitute discrimination against women must be changed. A guarantee of basic human rights and fundamental freedoms is given by CEDAW, in that states must agree to ensure that women have opportunities to develop and advance fully in any field whether it be political, social, economic or cultural. If necessary, laws must be passed which ensure that women may exercise their human rights and fundamental freedoms on a basis of equality with men[20].

In terms of CEDAW using affirmative action for the purposes of gender equality is not discrimination, even though affirmative action programmes treat women and men differently[21]. Programmes must be developed to teach people that both child-bearing and child-rearing are important social functions, and are vital to the development of a healthy balanced society. Both women and men must share responsibility for the upbringing of children[22]. CEDAW is important to this study because it pushes states to take all the appropriate steps to ensure that women are not treated as objects that can be bought and

[19] Article 1.
[20] Article 3.
[21] Article 4.
[22] Article 5.

sold[23]. Gender equality at work is an important issue because if this is not the case, women will not have a say in the government because of under-representation[24].

Women's participation in international affairs is also important for the purposes of promoting gender equality, because women will be able to learn more from other countries. The participation of women in international affairs will also promote gender equality at work, in the sense that in the past women were not employed in sectors that would make them participate in international matters. CEDAW is also important to the study because it states that women must be assured of equal rights with men with regard to equal access to education[25]. As a consequence, if women get the same education as men, there will no longer be an excuse for not employing women in formal jobs, too.

Another point that is significant to the study is that the Convention also deals with employment equity issues directly, in that it says exactly what should be done by states to promote employment equity. Men and women must have equal rights to all kinds of training, to job choice, promotions, job security, job benefits and conditions of employment. The requirement that men and women must have the right to equal pay and equal benefits for work of equal value is very important, as it promotes gender equality at

---

[23] Article 6.
[24] Article 7.
[25] Article 10. In this article equal access to education includes: he same courses of study; the same examinations; teaching staff with the same qualifications; school building and equipment of the same quality; the same kinds of career and vocational guidance; equal opportunities to receive bursaries and other study grants; equal access to adult education and literacy programmes; equal opportunities to participate in sport and physical education other study grants; equal access to adult education and literacy programmes; equal opportunities to participate in sport and physical education.

work even in matters of remuneration. Furthermore, CEDAW's importance to this study comes from the fact that it urges states to ensure that the employers of working women do not discriminate against them in the areas of health care[26]. Women must also have access to appropriate health care services during pregnancy, at the time of giving birth and after the birth of the baby.

CEDAW has significance to the study of discrimination against women at work, because it addresses the economic needs and the social benefits of women, which includes the acceptance of women in the labour market[27]. Special concern for rural women is expressed in this Convention, and this helps rural women in finding employment like men, so that they can take care of their families[28]. States are also urged to pay special attention to the problems of rural women and the important role that they play in the economic survival of their families. Another significant aspect of this Convention to this study is that it ensures that women's equality with men before the law is maintained[29]. For instance, women must be treated equally at all times during a court trial if they complain about being discriminated against at work. Any contract or agreement that tries to restrict the legal powers of women will not be enforced[30].

[26] Article 12.
[27] Article 13.
[28] Article 14.
[29] Article 15.
[30] Ibid.

5.2.2.2 Enforcement of CEDAW

An International Committee on the Elimination of Discrimination against Women monitors the progress of nations which have ratified the CEDAW Convention the members of this committee are nominated by participating nations[31]. The committee meets every year to consider the reports that the different nations have submitted to it, and in turn submits these to the General Assembly of the United Nations in order to monitor progress made in eliminating discrimination against women in each of these nations. Problems faced by the committee are as follows:

- The committee cannot consider complaints by state parties or individuals. It also cannot go beyond the limits of the reporting system;
- The committee lacks information from non-governmental organizations (NGO'S). Even though many NGO'S attend meetings and observe, they have no specific role to play in CEDAW;

One of the most serious criticisms against CEDAW is its inability to force states to obey the provisions set out in the CEDAW[32]. There is no international court which deals specifically with discrimination against women, and which may penalise countries if they do not comply with their obligations in terms of CEDAW[33]. The report-back system depends entirely on a specific country's willingness to co-operate. A state is supposed to submit a report at least once every four years. In practice, however, very few of the countries which have signed and ratified CEDAW have submitted any reports, and no

[31] Article 15(3).
[32] www.un.org/womenwatch/daw/cedaw.
[33] Ibid.

mechanisms exist to force them to do so[34]. Many countries have placed reservations on the Convention. In fact, at least 25 states have made a total of 68 reservations to important provisions of the Convention.

Despite serious flaws, CEDAW may be applied in South Africa effectively, in the sense that it can be used to provide some substance and guidance to gender policies and development programmes. It needs to be used creatively in order to ensure that it can become a framework and a tool for the delivery of real equality. Furthermore, it can serve as a yardstick to indicate how far we have come and how far we still have to go.

5.2.2.3 Draft Optional Protocol to CEDAW

It has already been mentioned that one of the drawbacks of the CEDAW Convention is that when countries do not take their obligations under the Convention seriously, people in these countries cannot present their individual complaints to the CEDAW Committee. Early in 1996, the United Nations Commission on the Status of Women adopted a resolution aimed at remedying this situation, and making it possible for individual complaints to be brought to the CEDAW Committee. The Commission proposed that a draft optional protocol to the Convention be drawn to make an individual complaints procedure available to women and interest groups whose countries had ratified CEDAW but had in some way failed to give effect to it. Countries that signed an optional protocol would not be allowed to enter reservations against it. Both a Communications and

---

[34] Ibid.

Enquiry Procedure were proposed[35]. If the United Nations adopts the Draft Optional Protocol, there will be a communication procedure, which is discussed below.

5.2.2.4 Communication Procedure

Communication (that is to say, complaints) would have to be in writing and be submitted to the CEDAW Committee by an individual or group claiming to have suffered from a violation of any right in the Convention, or to be directly affected by the failure of their government to comply with its obligations under the Convention[36]. Before people or groups do this, however, they would have to try and solve their problems by using remedies available to them in their own country. When the CEDAW Committee receives a Communication, it would have to inform the government concerned, but it would not tell that government who it was that had complained, unless the complainants agreed to this[37]. The Committee would have to be willing to act as a facilitator between the parties.

5.2.2.5 Inquiry Procedure

If it receives a complaint that a government (which had agreed to the Optional Protocol) had committed a serious and systematic violation of rights set forth in the Convention, the committee would have to ask that government to co-operate with it, so that the complaint could be examined. One or more members of the Committee might hold an

---

[35] www.un.org/womenwatch/daw/cedaw/protocol/index/html.
[36] Article 17 of the CEDAW.

[37] See note 35.

inquiry, and report back to the Committee. There might also, if necessary, be a visit to the government concerned, but only if that government agrees to the visit. After the committee has told the government about its findings, that government would have to respond within three months. Inquiries would be confidential. It is hoped that the protocol is adopted by the United Nations General Assembly soon. The chief difficulty in the way of its adoption is that certain countries are happy for its individuals to have the right to complain, but not so anxious for groups to have that same right[38].

5.2.2.6 Beijing Declaration and Platform for Action

In the Beijing Declaration and Platform for Action, which came out of the United Nations Fourth World Conference on Women, promotion of equality of men and women is the main object [39]. This Declaration and Platform for Action are very important to this study because of their concern for gender equality in all fields, which includes equality of women and men at work. For example it is expressed in this declaration that women of the world once again urge governments to realize the goals expressed in the CEDAW Convention as quickly as possible. It has already been discussed and shown above in the discussion on CEDAW that it is concerned with women and men at all levels, which include employment. All governments which took part in the Conference, including South Africa, adopted the Platform. The Platform named key obstacles to the advancement of women worldwide, and set priorities for action by the governments and

[38] Article 19.
[39] The Declaration was held in Beijing in September 1995.

the United Nations between 1996 and 2001. It was emphasized that it is governments, particularly, which must see to it that the Platform is implemented. The South African government undertook to adopt all parts of the Platform, so government departments must ensure that all their policies and actions are in accord with it, and must take steps to ensure the empowerment of women[40]. This platform of Action is also one of the most important actions because other actions following it show commitment to it. The only problem is that it takes time for countries that have been promoting discrimination against women through their laws, to change those laws and the attitudes of their people. It is even more difficult for change to occur in the case of working women because working used to be a man's role in the family.

In summary, the relevance of the above sub-headings is that there is proof that the United Nations has done something to improve the status of women at work by introducing CEDAW. Discrimination against women has been a worldwide problem; hence, the international community decided to take action against it. Regrettably, all the efforts made by UN are not effective enough, because there are no effective enforcement measures against the states which still practice discrimination against women. Other actions have been taken to realize the goals expressed in CEDAW.

[40] See note 35.

5.2.3 Declaration on the Elimination of Discrimination Against Women

The General Assembly considered that the people of the United Nations have in the UN Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women before it proclaimed this declaration[41]. Another consideration was that the Universal Declaration on Human Rights asserts the principle of non-discrimination, and proclaims that all human beings are born free and equal in dignity and rights, and that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind, including any distinction as to sex[42].

The Declaration on the Elimination of Discrimination Against Women has also taken into account that there are resolutions, declarations, conventions and recommendations of the United Nations, and the specialized agencies, designed to eliminate all forms of discrimination and to promote equal rights for men and women. The General Assembly was also concerned that, the United Nations Charter, the Universal Declaration of Human Rights, International Covenants on Human Rights and other instruments of the United Nations and the specialized agencies, though having made progress in the matter of equality of rights, there was still considerable discrimination against women[43]. It was also considered by the General Assembly that discrimination against women is incompatible with human dignity, and with the welfare of the family and of society, that

[41] The Declaration was Proclaimed by General Assembly Resolution 2263 (XXII) of 7 November 1967.

[42] Human Rights note 11 above at 108.

[43] Ibid.

it prevents their participation, on equal terms with men, in the political, social and cultural life of their countries, and that it is an obstacle to the full development of the potentialities of women in the service of their country and of humanity[44].

The General Assembly bore in mind the great contribution made by women to social, political, economic and cultural life, and the part they play in the family and particularly in the rearing of children[45]. The General Assembly was also convinced that the full and complete development of a country, the welfare of the world, and the cause of peace require the maximum participation of women as well as men in all fields[46]. Furthermore, the General Assembly considered that it is necessary to ensure the universal recognition in law and in fact of the principle of equality of men and women at work.

The significance of the Declaration on the Elimination of Discrimination Against Women to this study is that it urges states to realize that discrimination against women at all levels, which includes employment, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity[47]. This particular Article in the Declaration has more significance in the study of discrimination against women at work, because they feel that they are as important in the world as men, and this kind of discrimination makes them worthless. It was declared that all appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal

[44] See Preamble of the Declaration on Elimination of Discrimination Against Women.
[45] Ibid.
[46] Ibid.
[47] Article 1.

protection for equal rights for men and women, in particular:(a)the principle of equality of rights shall be embodied in the constitution or otherwise guaranteed by law; (b)the international instruments of the United Nations and the specialized agencies relating to the elimination of discrimination against women shall be ratified or acceded to, and fully implemented as soon as practicable[48].

This Declaration is also important because it urges states to take all appropriate measures to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women[49]. It is stated in the Declaration that all appropriate measures shall be taken to ensure that women are on equal terms with men, without any discrimination:(a)The right to vote in all elections, and be eligible for election to all publicly-elected bodies;(b)The right to vote in all public referenda;(c)The right to hold public office and to exercise all public functions. Such right shall be guaranteed by legislation[50].

The Declaration on the Elimination of Discrimination Against Women is also important because states are urged to see to it that all provisions of penal codes which constitute discrimination against women at work shall be repealed[51]. All appropriate measures, including legislation, shall be taken to combat all forms of illicit trafficking in women

[48] Article 2.
[49] Article 3.
[50] Article 4.
[51] Article 7.

and exploitation of, and prostitution of, women.[52] Women should not be treated as prostitutes at work by way of sexual harassment. Many countries do not take this issue of discrimination against women at work by way of sexual harassment seriously, in that they do not have special legislation to deal with it. All appropriate measures shall be taken to ensure for girls and women, married or unmarried, equal rights with men in education at all levels, and in particular:(a)equal conditions of access to, and study in educational institutions of all types, including universities and vocational, technical and professional schools;(b)the same choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are co-educational or not;(c)equal opportunities to benefit from scholarships and other study grants;(d)equal opportunities for access to programmes of continuing education, including adult literacy programmes;(e)access to educational information to help in ensuring the health and well-being of the families[53]. This will give women the same qualification with men, and therefore qualify them for jobs of the same status and value.

States are urged to take all appropriate measures to ensure for women, married or unmarried, equal rights with men in the field of economic and social life, and in particular: (a) the right, without discrimination, to receive vocational training, to work, to a choice of profession and employment, and to professional and vocational advancement;(b) the right to equal remuneration with men, and to equality of treatment in respect of work of equal value;(c) the right to leave with pay, retirement privileges, and

---

[52] Article 8.

provision for security in respect of unemployment, sickness, old age, or other incapacity to work;(d) the right to receive family allowances on equal terms with men[54].

This Declaration also shows its importance to this study by stating that in order to prevent discrimination against women on account of marriage or maternity and to ensure their effective right to work[55], measures shall be taken to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment, and to provide the necessary social services, including child-care facilities. Measures taken to protect women in certain types of work for reasons inherent in their physical nature, shall not be regarded as discriminatory[56]. The principle of the equality of rights of men and women at work demands implementation in all states in accordance with the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights[57]. Governments, non-governmental organizations, and individuals are urged, therefore to do all in their power to promote the implementation of the principles contained in this Declaration[58]. Some governments pretend to promote and implement these principles through their national laws, but when one looks carefully at it, practically it does not happen. Something must be done to make states see the need to follow international instruments such as this one.

---

[53] Article 9.
[54] Article 10(1).
[55] Article 10(2).
[56] Article 10(3).
[57] Article 11(1).
[58] Article 11(2).

5.2.4 Equal Remuneration Convention

The General Conference of the International Labour Organisation was convened at Geneva by the Governing Body of the International Labour Office, and held its thirty-fourth session on 6 June 1951[59]. The Equal Remuneration Convention, a product of this conference, decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value, which was the seventh item on the agenda of the session[60]. The Equal Remuneration Convention seems to be working more effectively than others because in most countries if not all, the problem of discrimination against women is no longer that of women not getting the same payment as men for work of equal value. The problem only lies in the fact that employers do not want to employ women in better posts because they underrate their intelligence or they fear that women might get pregnant and absent themselves from work for some time. The content of this Convention is shown below to see why it is working more effectively as compared to other conventions.

The Equal Remuneration Convention also determined that these proposals take the form of an international Convention[61]. For the purposes of this Convention, the term "remuneration" includes the ordinary, basic or minimum wage or salary, and any

---

[59] Adopted on 29 June 1951 by the General Conference of the International Labour Organisation at its thirty-fourth session.

[60] See *Human Rights* note 11 above *at 104.*

[61] Preamble.

additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment[62].

The term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex[63]. Each member state shall, by means appropriate to the methods in operation for determining rates of remuneration, promotion and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value[64]. The principle may be applied by means of: (a)national laws or regulations;(b)legally established or recognised machinery for wage determination;(c)collective agreements between employers and employees;(d)a combination of these various means[65]. In cases where such action will assist in giving effect to the provisions of the Equal Remuneration Convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed[66]. The method to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or where such rates are determined by collective agreements, by the parties thereto. Differential treatment between workers, which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed, shall not be considered as being

[62] Article 1(a).
[63] Article 1(b).
[64] Article 2.
[65] Article 2(2).
[66] Article 3.

contrary to the principle of equal remuneration for men and women workers of work of equal value.

Each member state shall co-operate with the employer's and worker's organisations concerned with the purpose of giving effect to the provisions of this convention[67]. The Equal Remuneration Convention shall be binding only upon those members of the International Labour Organisation whose ratifications have been registered with the Director-General[68]. It shall come into force twelve months after the date on which its ratification of two members have been registered with the Director-General. Thereafter, this Convention shall come into force for any member twelve months after the date on which its ratification has been registered.

Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of article 35 of the Constitution of the International Labour Organisation shall indicate: (a)the territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;(b)the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;(c)the territories in respect of which the Convention is inapplicable, and in such cases the grounds on which it is inapplicable;(d)The territories in respect of which it reserves its decisions pending further consideration of the position[69]. The undertakings referred to in

[67] Article 4.
[68] Article 6.
[69] Article 7.

subparagraphs (a) and (b) shall be deemed to be an integral part of the ratification and shall have the force of ratification[70].

Any member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of article 9,communicate to the Director-General a declaration and state the present position in respect of such territories as it may specify. Article 8 provides that declarations communicated to the Director-General of the International Labour Office in accordance with paragraphs 4 and 5 of the International Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention are to be applied subject to modification. It shall also give details of the said modifications. The member, members, or International Authority concerned, may, at any time by subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

The member, members, or international authority concerned, may, at any time at which this Convention is subject to denunciation in accordance with the provisions of article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention. A member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International

[70] Article 7(2).

Labour Office for registration[71]. Such denunciation shall not take effect until one year after the date on which it is registered. Each member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this article.

The Director-General of the International Labour Office shall notify all members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by members of the Organisation[72]. When notifying the members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the members of the Organisation to the date upon which the Convention will come into force.

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles[73]. At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the

[71] Article 9.
[72] Article 10.
[73] Article 11.

working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part[74].

Should the Conference adopt a new Convention revising this Convention in whole or in part, then unless the new Convention otherwise provides:(a)the ratification by a member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of article 9 above, if and when the new revising Convention shall have come into force;(b)as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the members[75].

This Convention shall in any case remain in force in its actual form and content for those members which have ratified it but have not yet ratified the revising Convention[76]. It is stated in article 14 that the English and French versions of the text of this Convention are equally authoritative. International instruments that promote gender equality at work in Africa had to be discussed in order to see how Africa deals with the issue of discrimination against women.

[74] Article 12.
[75] Article 13.
[76] Article 14.

5.3 African Union Approach to dealing with discrimination against women at work

5.3.1 Southern African Development Community (SADC) Declaration on Gender and Development (1999)

The SADC Declaration on Gender and Development is significant to the hypothesis of this study because it shows how African countries try to deal with discrimination against women, but it still has a long way to go. The fact that it is difficult for these countries to eliminate discrimination against women is shown below in the comparative study where the laws dealing with discrimination against women are examined. It is easier for international states to show how they wish to eliminate discrimination against women, but practising it is another thing. The African Union was also formed to deal with issues of poverty and development in Africa, which includes dealing with discrimination against women in all fields[77]. The study concentrates on discrimination against working women because most women did not work in the past, and even those who worked, they were mostly in the informal sectors[78]. Therefore if the world's challenge now is women and poverty, there is a need to start by dealing with the acceptance of women in formal employment. Many African countries have begun to deal with discrimination against women, but have not yet dealt effectively with discrimination against women at work. The ineffectiveness is illustrated in their laws, most of which deal with discrimination against women generally, and not with discrimination against women at work. This

---

[77] www.au2002.gov.za.
[78] Standing G, Sender J, and Weeks J. Restructuring the Labour Market: The South African Challenge. *An ILO Review*.(1996) at 397.

generalisation leads to the conclusion that in such countries women are still seen as child-bearers and home makers.

The Declaration of the SADC on Gender and Development also tries to deal with issues of discrimination against women at work, but surely there is a gap within it, which prevents member states from dealing with this kind of discrimination effectively. The content of the declaration is shown below and the gaps are also pinpointed. The heads of states of the Southern African Development Community are convinced that gender equality is a fundamental human right and the intergration of gender issues into the SADC programme of action is the key to sustainable development of SADC region[79]. Since all SADC countries have signed and ratified the UN Convention on the Elimination of All Forms OF Discrimination Against Women (CEDAW), they decided to propose a Declaration on Gender and Development.[80] The declaration was also made because heads of states were concerned that while some member states have made progress towards gender equality, there are still disparities between men and women in the areas of legal rights[81].

Therefore, by this declaration the member states of the SADC reaffirm their commitment to the Nairobi Forward Looking Strategies, Africa Platform of Action, Beijing Declaration and Platform of Action[82]. The SADC member states declared that they commit themselves to promoting the human rights of women and involving women in

[79] www.sas.upenn.edu/african_studies/org_institutes/sadcgendr.html.
[80] Preamble of SADC Declaration on Gender and Development of 1999.
[81] Ibid.
[82] Ibid.

decision-making of member states and SADC structures at all levels[83]. The member states also commit themselves to repealing all laws and amending Constitutions and social practices that promote discrimination against women and enact gender-sensitive laws. The gap in this declaration is in its wording. The fact that women will be involved in decision-making and structures at all levels does not necessarily mean that there will be equal representation of men and women in each structure. This can cause a problem of under- representation of women in certain structures, and no representation of women at all in other structures and at the end of the day the states will report that they have women representatives in their decision-making. The gap that is pinpointed above may be a cause of delay in eliminating discrimination against women at work in other states. Another problem is in the reporting of progress by each state. It is possible that when the states report their progress on gender equality they just report what they have done and not the percentage of women they have employed in the formal sectors of employment. Even in the decision-making process of each state there are fewer women than men, and this causes domination and silencing of women. There is also no penalty in the declaration for states that show no interest in the promotion of equality of women and men at work. The comparative study discussed below is done in order to see if international instruments are respected or not by countries of the world.

[83] See note 79.

5.4 Comparative study of Britain, USA, Germany, Namibia and Kenya-General Observations

5.4.1 Introduction

All of the International instruments declare that a country which is a member of the Convention must implement the provisions of the Convention through its own national legislation and other measures[84]. The five countries selected for comparative study showed their respect and observance of the international law through their own national laws as discussed below. The comparative study is divided into two, with one part focusing on developed countries (Britain, USA and Germany) and the other one on developing countries (Namibia and Kenya). During the early years of this century, women in large numbers took up clerical work in banks, insurance companies and offices[85]. As a result, employers adopted the view that female workers should leave their employment when they marry or at their first pregnancy[86]. Probably the situation in the USA was different since women there were emancipated earlier there than was the case in Europe. The requirement that a female worker leave her employment upon getting married would have been considered a violation of her constitutional rights.

These countries took different measures to combat discrimination against women. However, equal pay is one of the measures which must be taken if women are to achieve

[84] International Instruments such as Equal Remuneration Convention, Declaration on the Elimination of Discrimination against Women, Convention on the Elimination of All forms of Discrimination against Women.
[85] Aaron B note 4 above at 154.

equal standing with men because it is enshrined in numerous international documents[87]. It is not permissible to pay women workers less than men where women and men are employed side by side on an assembly line and perform identical jobs.

People in all these countries have become inclined to question every differentiation between women and men at work, and in many respects those in power are prepared to go one step further than just creating equal conditions of work. Measures are adopted which actually favour women in preference to men in order to compensate for women's handicaps, whether these are dependent upon social evaluations or upon actual differences in capacity[88]. However, measures which secure special privileges for women are still very few except for rights enjoyed by women during pregnancy or mothers wishing to take care of their children. The principle of equal pay for men and women is enshrined in numerous international documents[89]. Therefore the principal goal for each of these three countries is to reach a situation where women and men are assured equal pay for work of equal value.

---

[86] Ibid.
[87] Ibid at 137.
[88] Ibid.
[89] See *Human Rights* note 11 above at 103.

5.4.2 Studies in the Developed Countries

5.4.2.1 Equal Employment Opportunities in Britain

The British Equal Pay Act was passed by Parliament in 1970 and came into operation on 29th December 1975. The official reports on progress towards equal pay indicated the great differences between men's and women's wages that still existed in 1970[91]. The period of five years between the passing of the act and its coming into existence was intended to give employers an opportunity to adapt themselves gradually to the principle of equal pay[92]. Some pessimists claimed that many employers made use of this transitional period to find ways of avoiding the new legislation[93]. When a woman is employed, her contract of employment is deemed to include an equality clause. The clause ensures that where she performs like work to that performed by men, she is entitled to terms not less than those under which a man would be employed. It also gives the woman worker the right to take a complaint to a local industrial tribunal which complaint may include a claim for arrears of remuneration or for damages[94]. In cases where a complaint has been presented to an industrial tribunal under the equality clause, a copy of the complaint has to be sent to a conciliation officer. The duty of the conciliation officer will then be to endeavour to promote a settlement of the complaint without it

[91] Office of the Manpower Economics. *Equal Pay. First Report on the Implementation of Equal Pay Act 1970, Department of Employment Gazette,* August 1972.Progress towards Equal Pay, *Department of Employment Gazette*, August 1975. Further Progress towards Equal Pay.
[92] Hewitt P *A step-by-step Guide to Rights for Women* Cambridge University Press (1975) at 3.
[93] Ibid.
[94] Section 2(1) of the Equal Pay Act of 1970.

being determined by an industrial tribunal[95]. A party can appeal from an industrial tribunal on a question of law to the Employment Appeal Tribunal[96]. The British legislator has furnished those concerned with a sizeable arsenal of means of enforcement. This is done so that the principle of equal pay does not rely exclusively upon an individual court's actions. Where there has been a case of contravention, and it would not be reasonable to expect the women workers concerned to take steps themselves, the minister may refer the case to an industrial tribunal and proceed on their behalf[97].

There is a special procedure to ensure that collective agreements comply with the principle of equal pay. A party to an agreement may refer the agreement to a Central Arbitration Committee of the Advisory Conciliation and Arbitration Service. In addition, the minister may by his own motion refer an agreement to the Committee. The Central Arbitration Committee may make a declaration on what amendments need to be made to the agreement in order to remove discrimination between men and women[98]. In trades where no effective bargaining exists there are wage councils which decide wages and conditions of employment.

The Wage Council is a joint body set up under the Wages Councils Act, 1959 or the Agricultural Wages Act, 1948. Wages Councils have something of a temporary character, since it is intended that they should disappear when the parties are able to see to it themselves through collective bargaining that employees are guaranteed a decent

[95] S 64(1) of the Sex Discrimination Act 1975.
[96] This is a court instituted under s 88 of the Employment Protection Act 1975.
[97] S 2(2) of the Equal Pay Act 1970.
[98] S 3(1) of Equal Pay Act 1970.

minimum[99]. The Council issues a recommendation which is given legal effect by a Wages Regulation Order to the Industrial Arbitration Board for necessary amendments. Prior to the coming into force of the Industrial Act, 1971 both parties to the contract of employment were free to give notice of termination at any time[100]. There was no requirement that the employer provide a just cause[101]. People might have guessed that the Sex Disqualification Act of 1919 would have meant abolition of the marriage bar. This was not the case, in the sense that during the 1920's a number of lady teacher cases came before the courts.

In *Price v Ronda UDC* there was a dismissal of 58 married women teachers, among whom was the plaintiff[102]. The dismissals were part of a general policy of dispensing with the services of married women teachers, arising partly from a desire to provide employment for unmarried women teachers. The dismissals also came from a feeling that married women's absences from work rendered their employment inappropriate on educational grounds[103]. It was argued that the dismissals were contrary to the public policy of the Act, but this argument was rejected due to the absurdity to which it might lead. The present provisions for the protection of women in the event of marriage are to be found in the Sex Discrimination Act, 1975[104].

---

[99] Wedderburn K W *The Worker and the Law*, 2nd ed. Caledon Press (1984) 207-211
[100] Hepple B A and O'Higgins P *Indinidual Employment Law* (1971) at 15
[101] Ibid.
[102](1923) 2 Ch, 372.
[103] Creighton W B. "Whatever happened to Sex Disqualification Act?" *The Industrial Law Journal* (1975) 156.
[104] Section 3.

Those applicable in the case of maternity leave are contained in the Employment Protection Act, 1975[105]. As explained in the British Government's white paper, it is true that the nature and consequences of racial and sex discrimination share important features[106]: adverse treatment of someone on grounds irrelevant to that person's intrinsic qualities and qualifications, the morally unacceptable and socially harmful nature of such conduct, and the pressures of prejudice, custom and conformity which encourage discrimination on either ground. The objectives of the law are also essentially similar in both fields: to eliminate anti-social practices, to provide remedies for the victim of unfair discrimination; and directly to change the prejudiced attitudes expressed in discrimination. It might be added in this context that in several international anti-discriminatory documents, sex is mentioned next to race and colour.

5.4.2.2 Sexual Harassment in Britain

According to the Sex Discrimination Act of 1975, an employer is liable for any act of sexual harassment committed by one employee on another where the harassment took place in the scope of the harasser's employment[107]. The employer will not be liable in this

[105] Section 34-51.
[106] *Equality for Women*, September 1974. Cmnd. 5724. The quotation is from No.20.
[107] Section 41 of the Sex Discrimination Act 1975.

way if he or she has taken all reasonable steps to prevent the discriminatory conduct[108]. Employers should be persuaded that a policy on sexual harassment combined with its strict implementation is thus in the interests of both the employer and the employees. However, where the harasser is a senior official, the employer is liable for the harassment. *In Crane v C Link*[109], Mrs Crane was a sales representative whose supervisor, the sales manager began to harass her both physically and by making a number of requests for sexual favours. When she refused him, she was given a warning letter stating that she would be dismissed if her performance did not improve. Her supervisor, when he was handing her the letter, told her that she could ignore its contents if she would go away with him. Shortly afterwards she was dismissed. An industrial tribunal found that her employer was liable for the sexual harassment. The harassment occurred in the course of the sales manager's supervisory duties, and the employer had taken no steps to ensure that such harassment did not occur. Their liability was not affected by the fact that the sales manager wore a self-employed label. Where the person harassed complains to the superior who refuses to take any adequate action, the employer will be liable for any further harassment which occurs. The refusal itself may be sexually discriminatory.

Furthermore the transfer of the harassed employee away from the harasser may amount to sex discrimination. The dismissal of an employee wholly or in part because she has complained of sexual harassment will amount to victimisation under Sex Discrimination

---

[108] Ewing K D and McColgan A *Law at Work* 2nd ed Free Press (1994) at 187.
[109] *Crane v C Link* (1989) 3 Ch 421.

Act. This may be the case even where the dismissal is motivated by her refusal to work with the alleged harasser. So far as the person is guilty of sexual harassment, the policy should state clearly, that such conduct will not be tolerated. It should also be stated that complaints will be investigated and that anyone found guilty will be liable to disciplinary procedures, including dismissal. There are cases which suggest that dismissal for sexual harassment would be fair. An employee who is thus either dismissed or disciplined in some way for sexual harassment would have little cause for complaint, provided that proper procedures were followed and that adequate steps were taken to investigate the complaint against him. In *Marland v Sheffield MDC*[110], a school teacher complained that M, the school-caretaker, persistently tried to fondle and kiss her, would press himself against her on the stairs and would make suggestive remarks. Some of the incidents were observed by pupils and reported to parents. An industrial tribunal held that the dismissal was fair. It was quite impossible to say that a lesser penalty would have sufficed. Sexual harassment can also amo*unt to the criminal offence of* assault. *In COHSE Journal* it was reported that a "bottom pinching" patient at Royal Hampshire Country Hospital was jailed for one month for having assaulted a nurse[111]. The man who had been a patient at the hospital, said that the incident had been 'a joke' but the court did not agree.

---

[110] (1978) 2 Ch 290.
[111] *COHSE Journal*, September/October 1991.

5.4.2.3 Equal Opportunities in United States of America

The American Federal Equal Pay Act is part of the Fair Labour Standards Act, 1938 (FLSA)[112]. As happens with the rest of the FLSA, the Equal Pay Act is administered and enforced by the Department of Labour. This task is dealt with by the Wage and Hour Division of the Employment Standards Administration. The FLSA provides a variety of remedies. In terms of this Act, wages which have been withheld in violation of the equal pay provisions are deemed to be unpaid overtime compensation and can be recovered in the same way[113]. In consequence, all provisions dealing with administration and enforcement are to apply.

The individual employee has a right to sue in federal court on his own behalf and on behalf of employees in a similar situation[114]. In most cases, it must be more convenient for the individual to rely on the services of the federal agency set up for the enforcement of the Act. With this remedy the employee first files a complaint at the Wage and Hour Area Office. A complaint officer will then investigate his or her case, and if it is found that a violation has taken place, will try to persuade the employer to agree to comply with the law. At a later stage the case may be referred to the regional solicitor's office for court enforcement. If the authority decides to take action in court, and to collect wages on behalf of the individual, the individual's right to become a plaintiff ceases[115]. On the other hand, if the authority finds that there appears to be no violation the individual will

[112] American Equal Pay Act 1963.
[113] Section 206(d)(3) of the Fair Labour Standards Act 1938.
[114] Section 216(b).
[115] Ibid.

be informed and advised that a private suit may be brought. The employer who violates the equal pay provisions is liable to the employees in the amount of their unpaid minimum wages or their unpaid overtime compensation.

The amount to be paid by the employer is an additional equal amount as liquidated damages which means double damages[116]. However, claims for punitive damages seldom occur since the department of labour believes that employers who violate equal pay provisions do not do so willfully. A more practical reason is that the employer is entitled in the event of such claim being made to a trial by jury which is a more time consuming process. Wilful violation can be prosecuted criminally[117]. Nevertheless cases very rarely result in criminal prosecution. It is interesting to know that American Equal Pay Act is directed to unions, too[118].

There is an Interpretive Bulletin-a publication of the department of labour, in which official policies are summarised. In this Bulletin it is stated that unions share responsibility with the employer for seeing to it that wage rates required by collective agreements are not such as will cause the employer to make payments which are not in accordance with the equal pay provisions. Thus where equal work has been performed, a wage differential which exists between male and female employees cannot be justified on the grounds that it is the result of negotiations between the union and the employer. There

---

[116] Ibid.
[117] Section 216(a).
[118] Section 206(d)(2).
[119] See *Hodgson v Sagner, Inc*, 326 F. Supp. 371(D. Md. 1971). See also Hodgson Clothing Workers, Balt. Jt. Bd, 462 F. 2d 180 (4th Cir. 1972).

have been court decisions in which the union has been held liable jointly and severally with the employer for back payments of wages to women[119].

It is expressly laid down in the American Equal Pay Act that the employer is not entitled to make the existence of a wage differential an excuse for a reduction of pay to male employees[120]. In the *Defrenne case,* the community court declared that provisions of the ILO Convention No. 100 vests in individuals a right to equal pay for equal work in the narrow sense (that is, jobs which are similar with regard to their external characteristics)[121]. In *Capper Pass Ltd v Lawton,* the Tribunal dismissed an appeal by the employer[122]. Mrs Lawton worked as a cook in the kitchen from which the directors and their guests were served. The Industrial Tribunal granted Mrs. Lawton equality of treatment with two male assistant chefs in the kitchen serving the canteen at the employer's factory. The main differences were that Mrs Lawton cooked on a domestic scale, working a 40-hour week, whilst the two chefs cooked in an Industrial canteen, working a 45-hour week and one Saturday in three, preparing food in advance on a large scale. According to Mr Justice Phillips, the work should be regarded as like work unless the differences were plainly of a kind which the tribunal in its experience would expect to find reflected in the terms and conditions of employment. In terms of the American Equal Pay Act, the employer is not allowed to pay an employee at a lower rate than he pays the employee of the opposite sex for equal work on jobs, the performance of which requires

---

[120] Section 206(d)(1).
[121] This case was decided by the Community Court on May 25, 1971.
[122] *Capper Pass Ltd v Lawton* (1976) I.R.L. 366.

equal skill, effort and responsibility, and which are performed under similar working conditions.

In *Schultz v Wheaton Glass Co*, the Wheaton Co employed male and female selector packers who worked at long tables and visually inspected glass bottles as these emerged on a conveyor from the oven[123]. The male selector packers used a small proportion of their time for other jobs such as lifting cartons which regardless of weight were bulky or difficult to handle, tying stacks on cartons, and moving wooden pallets fully loaded with stacks of cartons. It was proved that when women were first hired as selector packers the employer at the initiative of the union had carved out from the overall job of selector packer a new role as female selector packer which was paid at a lower rate. The Circuit Court held that the Secretary of Labour had established a prima facie case and that the company had failed to prove that the discrimination in wages paid to female selector packers was based on any other factor than sex. The judgement of the District court was reversed and a direction was given to that court to enter an appropriate judgement in favour of the secretary of labour

In the United States, a great number of laws and regulations deal with the elimination of discrimination because of sex. Executive orders have been issued requiring government contractors not to discriminate when dealing with employees[124]. Even here, as in other countries, measures to combat discrimination because of sex have followed prohibitions

[123] 421 F. 2d 259 (3rd Cir. 1970).
[124] Executive Order 11246 of 1965 forbids discrimination because of race and in 1967 it was extended to cover sex by virtue of Executive Order 11375. In addition Executive Order. 11468 of 1969 reaffirms the Federal government's intention of providing equal employment opportunities in government employment.

against discrimination because of race. Executive order 11246 of 1965 forbids discrimination because of race and requires affirmative action by federal contractors and entrepreneurs on construction works which are financed wholly or in part out of funds from federal government.

In 1967 this Order was extended to cover sex by virtue of Order 11375. In addition, Executive Order 11468 (1969) reaffirmed the federal government's intention of providing equal employment opportunities in government. In 1972, both Houses of Congress adopted an amendment to the Constitution to the effect that equality of rights under the law shall not be denied or abridged by any state on account of sex. The principal provisions of employment discrimination are embodied in Title VII[125]. Subsection 1 deals with refusal to hire, discharge or other discriminatory acts with respect to compensation, terms, conditions or privileges of employment. Subsection 2 concerns limitations, segregations, or classifications of employees or applicants for employment. Other parts of s 703 deal with unlawful practices by employment agencies and by labour unions. Title VII is also applicable to equal pay claims. According to Title VII, a person's sex may constitute a *bona fide* Occupational Qualification, when the quality of being a woman or a man is reasonably necessary to the normal operation of that particular business.

The American EEOC interpreted an exception in s703(e) narrowly. The commission refused to consider as BFOQ any characteristic of women as a group. According to the guidelines s 1604.2(a)(1) sex is not a BFOQ in the following cases:

[125] Section 703(a) Title VII of the Civil Rights Act 1964.

(1) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on a stereotyped characterisation of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment;that women are less capable of salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities, and not on the basis of any characteristics generally attributed to a group.

(iii) The refusal to hire an individual because of the preferences of the co-workers, clients or customers.

The guidelines seem to have been accepted by the courts on all essential points. In *Weeks v Southern Bell Telephone & telegraph Co*, the company had precluded women from holding jobs which required lifting of more than 30 pounds[126]. The court considered this an unlawful practice. The court stated that the defendant company introduced no evidence that the duties of a switchman were so serious that all, or substantially all, women would be unable to perform them. In addition, Mrs Weeks produced testimony to the effect that she was capable of performing the job. The EEOC adopted a view that:

It shall not be a defence under Title VII to a charge of sex discrimination in benefits that the costs of such benefits is greater with respect to one sex than the other. In *Manhart v*

[126] 408 F. 2d 228 (5th Cir. 1973).
[127] 387F. Supp. 980(C.D.Cal. 175).

City of Los Angeles, the court took the same view[127]. The Los Angeles Department of water and power required its female employees to make greater contributions to a pension scheme than their male counterparts in order that they should receive the same benefits. The court issued a temporary injunction against this arrangement. Title VII prohibited discrimination against pregnant women, because the basic approach had been a claim for equal treatment. The EEOC declares in its guidelines that written and unwritten employment policies involving matters such as commencement and duration of leave, the accrual seniority, and other benefits and privileges, shall be applied to disability due to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary disabilities. In certain situations, a female complainant can rely on her constitutional rights. Disability because of pregnancy does not entitle an employee to any special leave or sick leave.

In *Holthaus v Compton and Sons Inc,* the court however found that the employer allowed his employees to remain on vacation or to remain on leave without pay while ill[128]. Under those circumstances, he could not refuse leave because of pregnancy without violating Title VII. *In Cleveland Board of Education v Lafleur,* the school board required every pregnant teacher to take maternity leave without pay beginning five months before the expected birth[129]. Lafleur wanted to continue teaching until the end of the school year, but had to leave her job in March. The interests in continuity of education and of keeping physically unfit teachers out of classrooms were put forward as reasons for this policy.

---

[128] 514 F. 2d 651(8th Cir. 1975).
[129] 414 US 632 (1974).

The court considered the case under the aspect of personal choice in matters of marriage and family life, which is one of the freedoms protected by the Due Process Clause. Lafleur's action was upheld.

5.4.2.4 Sexual Harassment in USA

When a supervisor of one sex requests sexual favours from employees of opposite sex, this will be considered sex discrimination within the meaning of Title VII if:

(1) the request is or is reasonably perceived as, a term or condition of employment, and (2) the person making the request can be said to be acting with the actual or constructive authority of the employer. It is sex discrimination because presumably the request is a condition that would not be imposed were the employer of the opposite sex. In the case of *Barnes v Costle,* the court held that these were conditions imposed because of this employee's gender[130]. If the employer becomes aware of the subordinate's misconduct and fails to take appropriate remedial action, the omission is sufficient to state a claim against the employer[131]. Furthermore, persons like supervisors who have the power to make effective employment decisions, legally are acting for the employer and thus may bind the employer when they impose employment conditions based on sexual activities, even if the corporate management is unaware of the harassment and has rules forbidding such conduct[132].

---

[130] 561 F. 2d 983(D.C. Cir. 1977) 129.
[131] 568 F. 2d 1044(3d Cir. 1977) 129.
[132] Player M A *Federal Law of Employment Discrimination* London press (1991) at 159.

5.4..2.5 Equal Employment Opportunities in Germany

In Germany, there is no special enactment on equal pay[133]. The provision in article 3(2) of the German Constitution is binding upon the courts. Thus in a decision of 2nd March 1955, the German Federal Labour Court declared that article 3 has direct effect as law and that this effect includes the principle of equal pay. In the opinion of the court, collective agreements establish legal norms and should for that reason be considered laws within the meaning of article 3(2) of the Constitution.

Therefore, the collective agreements must comply with the principle of equal pay[134]. There are two issues involved here. First, the question of whether a certain clause is void as violating the principle of equal pay, and secondly, the question of whether a woman worker who was paid less than a male worker for the same work is entitled to bring a claim for the difference. The decisions of 1955 answered only the first question. Clauses in collective agreements which were inconsistent with the principle of equal pay were made void. The question of whether the female worker has a right to claim the difference in wages between what the male employee received and what she herself received was answered in the affirmative by the federal labour court in its decision of 11th April 1974 (AZR/567/73). 18 women and 25 men were employed at a spinning shop. All the men were paid a monthly sum of not less than DM 104 above the tariff rate. One of the female

[133] Aaron B note 4 above 143.
[134] The summary of the decisions in the two cases is taken from the opinion of the Supreme Labour Court in its decision of the 6th April 1955 (1 AZP. 365/54).

workers brought an action in court for additional pay in that amount. The federal court ruled in favour of the plaintiff. In its opinion, the court referred both to article 3 of the Constitution and to s75(1) of the *Betriebsverfassungsgesetz*, which prohibits different treatment for men and women.

It is of particular interest to note that the court rejected the argument put forward by the defendant that women were more expensive to employ because of restrictions in protective laws (e.g. regarding work by night). It has already been established by the court that differences with regard to pay were not justified for the reason that as a possible effect of women workers, protection of women workers had less market value than men. Women workers in Germany are less emancipated than in some other countries included in this study[135]. During the Nazi period, the Ordinance on Public Employees entitled the employer to give notice of termination to a married woman when it was proved that her support was permanently guaranteed[136]. Germany was the first of the three countries to introduce employment protection for workers in general[137]. According to the *Kudigungsschutzgesetz* of 1951 (re-enacted in 1969), a dismissal will be void if it is socially unjustified. The fact that a worker has married would not as such justify termination since under article 3 of the Constitution women have equal rights to those of men. However, it would seem that the idea of the husband as the head of the household and as the principal breadwinner, and the corresponding idea of payment according to

[135] Aaron B note 4 above at 156.
[136] Tarifordnung fur Angestellte des offentilichen Dienstes.
[137] Aaron B note 4 above at 156.

need, has left its impress on the legal system[138]. In case of a layoff the needs of the individual may be taken into account.

The argument is employed that a married woman because of her right to support from her husband, will be caused less harm by a layoff than would a married male with a large family. The constitutionality of this practice has not been tested by the courts. Incidentally, in public service, salaries are partially related to status. A German married public official receives additional pay, the idea being that he has to support a family[139]. Since 1975, this same additional pay has been given to a person who is with another person whom he supports because he is legally or morally bound to do so. When both man and wife are in public service, the additional pay will be split between them. Germany was the first country to recognise the need for the protection of the young mother[140].

Through an 1878 amendment to the Trade Act (*Gewerbeordnung*), a prohibition was placed on employing a worker during the three weeks following delivery. One of the consequences of the Berlin Conference of 1890 was the extension of this leave to four weeks, brought about by an Act of 1891. In the fifth and the sixth week after delivery, the employee was not allowed to work, unless there were no objections to her taking up work again and, such fact was stated in their medical certificate. In 1910, the period of

---

[138] Ibid.
[139] Bundesbesoldungsgesetz para. 40 section 2.
[140] Aaron B note 4 above at 171.

compulsory leave was extended to eight weeks, of which six were to be taken after delivery.

Under the Act of 1927 Germany implemented ILO Convention No. 3, with the effect that the period of leave became extended to cover a further two weeks. During the nineteenth century, Germany was the pioneer in the field of social insurance. The right to receive pay during the period of compulsory leave was one of the many benefits under the public social insurance scheme. In consequence, until the end of the Second World War, the position of female workers in Germany was more favourable than in most other countries. The law of the German Federal Republic has remained more or less as it was during the Weimar Republic. There was a period during which the woman worker must not be employed (ordinarily running from six weeks before until eight weeks after delivery). Upon delivery, the young mother is allowed to have periods off for the nursing of her child[141]. She may extend her leave of absence to four months after delivery without giving cause to termination. The Trade Unions have made a claim for the period of leave to be extended to six months.

5.4.2.6 Sexual Harassment in Germany

There is nothing much to discuss about sexual harassment in Germany, because there is no law which is specifically developed for it[142]. The German Constitution is the only law that eliminates sexual harassment since it prohibits discrimination against certain groups

[141] Mutterschutzgesertz sections 3, 6 and 7.
[142] Aaron B. (note 4 above) 171.

of people including women[143]. Even in Germany, sexual harassment is regarded as a form of discrimination though no case has been reported on this form of misconduct[144]. A lot of changes have been happening in Germany concerning the empowerment of women and their development, but the issue of sexual harassment is still not very prominent because of a lack of complaints. There are measures such as affirmative action which are developed in Germany for the development of women[145]. The German Constitution provides that no one shall incur prejudice or favour because of their sex, birth, race, language, national or social origin, faith, religion, political opinions, nor may anyone be discriminated against on account of their disability[146].

5.4.3 Studies in Developing Countries

5.4.3.1 Equal Employment Opportunities in Namibia

Namibia is one of the SADC countries which seeks to implement human rights as the international instruments have provided[147]. Most Namibian women still do not work, and also are under-represented in managerial positions of the country due to the fact that they

---

[143] Section 3 of the Bonn Constitution of 1949.
[144] Ibid.
[145] Aaron B at 171.
[146] See Bonn Constitution note 143.
[147] www.sas.upenn.edu/african_studies/org_institutes/sadcgendr.html.
[148] Ibid.
[149] Ibid.

are bound by customs and practices that discriminate against them[148]. Today women in Namibia engage themselves in programmes for women empowerment so that they can rely on themselves even if they are not educated[149]. There is legislation in Namibia that now protects women from being discriminated against, which is called Employment Act by means of Affirmative Action[150].

Women in Namibia can now challenge discrimination against them. For the purposes of this Act "affirmative action" means a set of affirmative action measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment[151]. Women fall under the category of the designated groups, and therefore are protected by this section. In filling employment vacancies, the relevant employer must give preferential treatment to persons of designated groups[152]. In terms of this Act, employers are required to have employment equity plans to make sure that persons of designated groups, which include women are equally represented in the workplace. Employers are required to have training programmes to train those persons who do not have the necessary skills and who belong to the designated groups[153]. This shows that employers should have no excuses why women cannot be employed because they lack educational skills. The fact that women in Namibia are still under-represented in managerial job levels, and are also few in formal employment shows that the law is not as effective as it is supposed to be.

---

[148] Ibid.
[149] Ibid.
[150] Employment Act 29 of 1998.
[151] Section 17.

[152] Section 19.
[153] www. Sas.upenn.edu/african_studies/org_institutes/sadcgendr.html.

5.4.3.2 Sexual Harassment in Namibia

Sexual harassment at work in Namibia is not as big a problem as it is in most developing countries because there are still not large numbers at work[154]. Most women in Namibia still believe in patriarchal customs, which make them child-bearers and rearers of children. It is only their husbands who work[155]. This prevents them from being victims of sexual harassment at work. However, the problem is that those who are in employment might experience it but fear loosing their jobs if they complain. The fact that the law that protects women at work is new may mean that women still are not aware of their rights as far as sexual harassment at work is concerned. Most African countries including Namibia are not very concerned about problems of women at work. As a result there is no law specifically dealing with sexual harassment. The only problems that are vital to the country, concerning women are violence against women within their communities, and rape[156]. The fact that sexual harassment is not regarded as an issue of importance in Namibia, makes women unaware whether it falls under discrimination against women or not. Furthermore one can conclude that this is one of the reasons why there are no lawsuits in this area. This whole issue of discrimination against women makes one wonder how other African countries deal with it, and therefore in this study Kenya will be another example.

---

[154] Ibid.
[155] Ibid.

5.4.3.3 Equal Employment Opportunities in Kenya

Women form a significantly low percentage of the total number of employed persons in Kenya[157]. Between the years 1970 and 1983, the number of female employees increased from 14% to 20% of the total number of persons engaged in any form of employment[158]. A number of reasons are given for this very low representation of women in employment, and these include lack of equal education and skills training compared with men, cultural attitudes about women working, or family obligations. Kenya's employment law is provided by the Employment Act, which does not specifically provide for employment as a right[159]. There is an underlying implication that it is, however, gender central. Bearing in mind that the constitution condones sex discrimination, one can see that the gender neutrality of the employment law may be undermined by such a provision. Often it is in the workplace where women face discrimination by virtue of their sex, even though there is no explicit law disallowing such practices[160]. In such situations, many employees feel that they do not have any means of legal access[161]. The Employment Act does make provision for specific working hours for women, nor the forms of employment they can undertake[162]. It is argued that these provisions are in line with the ILO convention on the focus of employment and working conditions for women.

---

[156] Ibid.
[157] www.ielrc.org/content/A95011T_7.html.
[158] Mcai-Kattambo V, Kabeberi-Macharia J and Kameri-Mbote P. *Law and Equity in Kenya.* Janet Kabeberi_Macharia ed (2001) 108.
[159] Employment Act of 1984.
[160] See note 157above.
[161] Ibid.
[162] Section 20.

No woman or juvenile can be employed in an industrial undertaking between 6:30 p.m. and 6:30 a.m., unless firstly, where working in unforeseen emergencies which are not of recurring nature[163]. Secondly, where the nature of their work involves raw materials which may deteriorate, if not preserved immediately. Thirdly, women managers, or medical personnel, are exempted from the provisions of this section. Other than prohibiting women from working in mines at all times and in industrial undertakings (at certain hours) the Employment Act fails to consider the protection of women in other fields of employment[164].

One area that is raising concern is export processing zones which provide work for women. In these zones, women are often preferred due to the nature of the work, but studies have shown that they are underpaid and overworked. Also, there are no trade unions permitted in such zones, which make labour very cheap and working conditions fairly poor[165]. It is important that laws be enacted to protect workers from exploitation in these zones, and conditions of their work place determined before the zones become fully operational. Employers in Kenya do not like to employ women for the simple reason that it is uneconomical to employ them[166]. Some employers therefore prefer women who are past child bearing or who do not intend to have children.

One issue that continues to generate a lot of bitterness amongst women employees and the Government and public sectors is the issue of housing allowance. Government civil

[163] Section 7 of Employment Act of 1984.
[164] See note 157above at 109.
[165] Ibid.
[166] Ibid.

service regulations (L31) exclude married women from earning a housing allowance unless they can show they are the sole supporters of the household[167].Women employees are also guaranteed maternity leave for two months though they are supposed to forfeit their annual leave the year they take up maternity leave. Maternity has often been used as an excuse to deny women appointment to certain posts.

In practice women have not been sufficient catered for[168]. Deliberate measures are, therefore urgently needed to ensure that practices which tend to promote sex discrimination are eliminated. If women are to fully participate in policy making and implementation, it is important that impediments which prevent their participation are eliminated. A number of these arise from societal attitudes on the role and place of women. Others can be found in roles which place barriers against the advancement of women. Moreover, there is need to continue conducting research on women and the law in order to expose the constraints and practices that obviate women's empowerment and advancement.

---

[167] Ibid.
[168] V Mucai-Kattambo at 109.

5.4.3.4 Sexual Harassment in Kenya

There is no law specifically enacted for dealing with the sexual harassment of women in Kenya[169]. Possibly some women experience sexual harassment but they do not know how to deal with it, and therefore they keep quiet about the matter. If the Employment Act cannot deal with clear sex discrimination, how can it deal with sexual harassment which is not clearly categorised as a form of sex discrimination or criminal act. However, in order for women to report sexual harassment it must be written in the statutes as wrongful and punishable.

5.4.4 Conclusion

The international instruments such as the Equal Remuneration Convention, Declaration on the Elimination of Discrimination Against Women, Convention on the Elimination of Discrimination Against Women, Convention on the Political Rights of Women, etc have been dealt with in this chapter to show how other countries observe these instruments concerning the discrimination against women[170]. The countries used for this study are Britain, the United States of America, Germany, Namibia and Kenya. They use their own statutes to show respect for the international law. It has been shown how each country dealt with equal pay, equal opportunities and sexual harassment. This chapter draws concludes that even though states ratify and sign international instruments, they only

[169] Ibid.
[170] *Human Rights* (1988) at 103, 108, 112, 358 and 361.

pretend to respect them. In practice, they ignore these very instruments. It is clear that discrimination against women in employment is a major problem that needs separate attention because countries act as if they promote gender equality through their laws and yet practically this is not the case. This also shows that the international instruments which promote gender equality also fail in doing their tasks.

Chapter 6

Conclusion and Recommendations

6.1 Introduction

The analysis of the data in chapter four together with the findings of the comparative study in the previous chapter supports the conclusion that the laws that protect working women against discrimination are not effective enough. Women in the South African labour market are still discriminated against in every way[1]. The historical background of discrimination against women in chapter one illustrates that women are discriminated against currently due to the influence of Colonialism, Christianity, Apartheid etc. The pre-colonial period has its influence towards discrimination against women but in a different way because during that time women and men shared responsibilities. The sharing of responsibilities was done in such a way that men used to hunt for food to provide for their families while women looked after the children and did the cooking. Then during Colonialism the sharing of responsibilities was changed into discrimination against women, and this continues to date. South Africa is one of the countries in Africa that shows respect for the International Human Rights Instruments by incorporating them into its Constitution[2]. Although, the Constitution in South Africa is the Supreme Law,

[1] O'Sullivan M "Submission on the Employment Equity Bill to the Portfolio Committee on Labour" (Women and Human Rights Project, Community Law Centre, University of Western Cape: 1998 unpublished at 10-11.
[2] Section 39 of the Constitution Act 108 of 1996.

respect for international norms is not implemented in practice[3]. This shows that the Constitution itself is being undermined and therefore not effective enough to protect women in the labour market from being discriminated against. This concluding chapter is made up of general conclusions from the previous chapters and recommendations.

6.2 The Impact of South African history on the current discrimination against women

In chapter two of this research it was concluded that discrimination against women in South Africa has been influenced by many factors such as Pre-Colonial era, Colonialism, Christianity, Apartheid etc. During the pre-colonial period things were different from what they are today, but it is not easy to see the difference. One may say that discrimination against women was practiced even during the pre-colonial period, but the truth is that it was true equality. For example, women and men shared responsibilities during the pre-colonial era; men were food providers and women were responsible for cooking and looking after the children. The problem started during the Colonial period when women had to look for jobs and provide for their families. Women found that they were not accepted at all in the South African Labour Market, in that they were given inferior jobs and treated unfairly.

Discrimination against women was also part of the laws and policies of the Apartheid Government. It was not only discrimination between men and women that was visible,

[3] See D du Toit, D Woolfrey, J Murphy, S Godfrey, and S Christie *Labour Relations Law: A Comprehensive Guide*. Third Edition. Butterworths.(2000) at 437. See also chapter 4 of this study.

but also discrimination amongst women themselves i.e. white and black. It was the tradition for married women to get fewer benefits than single women and also white women were favoured as compared to black women. Men received better education than women during the apartheid years and this disadvantaged women in the labour market. Even those women who managed to receive a good education had inferior job opportunities and earned less than men for work of equal value. There was no equality at all between women and men in the workplace. There was wage segregation, occupational segregation, skills segregation etc. Women decided to protest against these laws by joining the struggle against racism, making race and gender discrimination go hand-in-hand. Many complaints made by women against sexual harassment at work resulted in the misconduct being recognized as sex discrimination because it is often done by one person to another person of the opposite sex.

Worldwide, women suffer from discrimination at work because of their social responsibilities[4]. The social responsibility of a woman is to do all the domestic chores in addition to looking after the children. This means that she is the manager of her home[5]. This social responsibility comes from the fact that during the pre-colonial period women and men had different responsibilities. Men were the providers, because they provided food for the family and women bore and reared the children[6]. This was not wrong because it promoted equality; everybody knew his or her responsibilities and did not complain. Today women have to go to work to provide for their families in addition to

---

[4] Bender L "A Lawyer's Primer on Feminist Theory and Tort" (1988) *30 Journal of Legal Education* 5-6.
[5] Ibid.
[6] Hichter H African Women David Fulton Publishers (1984) at 2.

their traditional roles because the cost of living is extremely high. This is where the problem starts. There is a need to accept change, and accepting change means accepting women in the labour market. This history of women being in the kitchen affects social life of today because even in social gatherings men are usually seen together doing activities outside the home while women are often gathered in the kitchen cooking for the family. Among certain ethnic groups, women are expected to respect men socially and serve them; that is why men at work are not able to accept women as their bosses[7]. Some employers do not even want to employ women because they still think women are supposed to be domestics[8].

In the comparative study, it has also been illustrated that even in the developed countries that have been fighting discrimination against women for a long time before South Africa, discrimination still exists[9]. This is because it is very difficult to change one's mindset, especially on issues that involve one's social life. The recommendation on this is to have workshops, conferences and other means of education in schools, churches, and workplaces, in order to educate people about the value of women and changing times. This is the only way of working hand in hand with the law because it is difficult to apply the law to people who do not even understand the reasoning behind the anti-discrimination laws. It will be a good idea for everyone to ask the question: if women are

---

[7] Fine R and Davis D *Beyond Apartheid* Juta & Co Ltd (1990) at 7.
[8] See O'Regan C *Equality at work and the limits of the law: Symmetry and individualism in anti-discriminatory legislation* Yale University Press (1995) at 69.

[9] Chapter four of the present study.

good managers at home, why can't they be good managers at work? Then everyone will see the value and the power of women in building the South African economy.

6.3 Courts of Law

It has been discussed above that, historically, women have been discriminated against not only at work but generally without challenging this in courts[10]. It is true that history influences the present, because it takes years to change the attitudes of the people against a custom that has been practiced for decades. Women had not been protected by law in the Colonial period and during the Apartheid era against discrimination at work[11]. Chapter three concluded that after 1994 everybody was said to be equal in the eyes of the law, and this was what put women on an equal footing with men. The situation is still the same because the Constitution provides for this[12]. The decisions in cases of discrimination against women illustrate the opposite of what is stated in the Constitution, which is equality of women and men[13]. Women do not feel protected in the courts of law, because when they report that they are being discriminated against at work, the courts use justification of economic efficiency[14].

This behaviour promotes discrimination against women at work, and usually happens to pregnant women who seek employment and don't get employed because they are pregnant. The behavior of labour court judges in such cases is influenced by their

[10] Fine R and David D at 8.
[11] Ibid.
[12] See section 9 of the Constitution Act 108 of 1996.
[13] See chapter four of the present study.

attitudes towards women, their attitudes make them think that women belong at home and not in the labour market. Judges with such views often condone the actions of stereotyped employers who discriminate against women at work. The only problem with this is that such judges often use gaps that are found in legislation to condone such discrimination. One of the findings of this study is that there are few female judges, and this shows inequality within the judiciary[15]. If there is inequality within the judiciary, there is no hope that the judicial officers will be able to promote equality. The under-representation of women in the judiciary proves the rigidity of the field. It shows that the judiciary itself is not flexible enough to change. Sexual harassment is another problem that is difficult for the courts of law to judge because it is difficult to prove.

Sexual harassment is a misconduct that is sex discriminatory, in that it is often a person of the opposite sex who harasses another, and it is mostly men who sexually harass women in the workplace[16]. This conduct often causes the victim to resign from work and the resignation constitutes constructive dismissal in terms of the Labour Relations Act[17]. This could be another problem causing delays in the economic progress in South Africa because sexual harassment lowers the morale of the employees. The consequence of sexual harassment is an increase in the number of inefficient employees in the South African labour market. It is better for the victims of sexual harassment to make

[14] See *Whitehead v Woolworths* (pty) Ltd (2000) 21 *ILJ* 571 (LAC).
[15] See Chapter four of this research.
[16] Van der Walt JC at 465.
[17] Section 186 of the Labour Relations Act 66 of 1995.

grievances in terms of the unfair labour practice definition[168] because of its advantages than to lay criminal charges or delictual charges.

It is recommended that more measures be taken to educate and change the attitudes of men against women within the judiciary. This should be done because the judgement of each judge is influenced by many factors including his or her attitude towards the relevant matter. There must be policies that are meant to educate judges about the value of women in the labour market. This can also result in an increase in the number of female judges. It does not help to have a law that promotes the equality of men and women, if the attitude of the members of the Legal profession has not changed in support of the law. Promoting change could be done by way of seminars, workshops and conferences which promote gender equality, and these should be compulsory for members of the Legal profession to attend.

The next step is to close the gap within the law which allow judges to justify discrimination against women at work; for example, in cases where a woman is not employed because the employer fears pregnancy or a possible pregnancy in the future which could have impact on production. The law should state clearly that women should not be discriminated against because of their nature. There must be no justification for discriminating against women because of their biological nature. This is recommended because no justification is valid for discriminating against a person because of the way he or she is created. It should be stated that discriminating against a woman because of her biological nature is unfair. This will make it clear even to judges what is fair and what is

not fair, because it seems they use every opportunity they are given to interpret the law against women. Women could then be encouraged to report cases where they feel that they are being discriminated against at work[18].

Concerning sexual harassment, it is recommended that sex education be given to all by means of posters, workshops, conferences and classes. Lawyers should also have special classes and workshops on sex education so that they can take some issues into consideration when making a judgement. For example some women do not even know that sexual harassment is a form of discrimination on the grounds of sex. The *maxim ignorantia iuris neminem excusat* (ignorance of the law is no excuse) applies in terms of the law, but the government should make sure that women in the labour market get education on issues of gender and sex discrimination at work. This can put an end to unreported cases of sexual harassment, and may sound as an encouragement for women to report them.

The study draws an inference that most women know little about the law. Hence women are abused most in the labour market[19]. It is also recommended that the anti-discrimination laws clearly state that sexual harassment is another form of discrimination at work. This will bring awareness to both men and women about sexual harassment and its consequences. Sometimes men do it because they are not aware that their actions constitute sexual harassment. Awareness may lead to less problems in the labour market

[18] Ibid.
[19] See Chapter four of the present study, the response of senior officials is disgraceful because a senior official is the who acts as an employer in most cases, therefore if she does not know what the says surely the rights of her subordinates will be violated.

as the consequences of sexual harassment have already been discussed in chapter three. It is also recommended that a special law for sexual harassment be enacted in order to illustrate the seriousness of government in eliminating sexual harassment at work.

6.4 Undermining the law

Undermining of the law is usually seen in cases where the employer is a stereotype who does not want to employ women because of their reproductive nature. In chapter three, it was also concluded that stereotyped employers often employ as few women as possible and then employ many others who fall under the category of designated groups[20]. These employers use affirmative action to avoid employing many women in their workplace, which means that they violate the law by means of the law. Discrimination against women is very difficult to detect because employers use a very beautiful strategy, which is affirmative action.

It is recommended that in order to see to it that women in the workplace are protected it must be clearly stated in the Employment Equity Act that a designated employer must employ a specified minimum number of black women and white women. This should be done also to make sure that an employer employs both black and white women. In cases where the employer does not want to employ a woman because she is pregnant, the excuse should not be economic efficiency, because economic efficiency is not catered for in the Bill of Rights. Furthermore, a woman has the right to be treated equally to a man,

---

[20] See response of respondents in chapter four of this study.

and if this right is limited because of economic efficiency, less restrictive means to achieve economic efficiency should be used[21]. In this case, less restrictive means may be to hire the pregnant woman and, when she is on maternity leave, to find a temporary worker in her place so as to make sure that production is not hindered.

6.5 Recognition of International Instruments

Section 39(1)(b) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. In South Africa some of the international instruments that have been discussed in the previous chapter have been ratified and form part of domestic law. International instruments such as the Equal Remuneration Convention, the Declaration on the Elimination of Discrimination Against Women, the Convention on the Elimination of Discrimination Against Women and the Convention on the Political Rights of Women are dealt with in this chapter to show how other countries observe these instruments concerning the discrimination against women[22]. The countries used for this study were Britain, the United States of America, Germany, Namibia and Kenya. These countries use their own statutes to show respect for the international law, but discrimination against women at work still persists. Information on how each country has dealt with equal pay, equal opportunities and sexual harassment was given. Chapter five concludes that even though states ratify and sign international instruments, they pretend to respect them because discrimination against women still exists. It is clear that discrimination against women in employment is a major problem

[21] See section 36(1)(e) of the Constitution Act 108 of 1996.

that needs separate attention because countries conduct themselves as if they promote gender equality through their laws, and yet practically this is not the case. The persistence of discrimination against women also illustrates that the international instruments which promote gender equality are also failing in doing their tasks. The Constitution of South Africa covers everything that is important to protect its nationals, but in practice this protection is barely seen[23].

The recommendation on this problem is that strict measures be taken to make sure that each state that has ratified a convention makes a report on the progress it has made. There must be a commission sent to each state to see if the report given is actually true. The nationals must be given the opportunity to give reports to the commission. Strict measures must also be taken against states that act in violation of the convention.

6.6 New Legislation

The conclusion in chapter four provides that after the enactment of the Constitution Act 108 of 1996, there was a need for the enactment of new laws that are consistent with the Constitution. For example the Employment Equity Act[24] was one piece of legislation among others which was established to promote equality at work. Furthermore, this act is consistent with section 9 of the Constitution, because both the Constitution and the EEA

---

[22] Human Rights (1988) at 103, 108, 112, 358 and 361.
[23] See Chapter four of this study.
[24] Employment Equity Act 55 of 1998.

prohibit unfair discrimination against anyone. Equality is one most of the important rights in the Bill of Rights, and therefore there is a need to see it being implemented in the case of men and women. It has already been stated in the previous chapters that the kinds of discrimination that women critically experience at work are discrimination on the grounds of gender, pregnancy and sexual harassment. Out of the discussions that were undertaken in the previous chapters about discrimination against women there was a need to do more empirical research in order to prove what has been stated in the hypothesis. The empirical research that was conducted was in the form of sampling three target groups of employees (i.e. senior officials, ordinary employees and unemployed women). Questionnaires were distributed to these employees.

However, only 75% of the questionnaires were returned. The responses of the employees are shown above and through these responses the results of the empirical data was given. The results were that the hypothesis that: currently, there is apparent lack of adequate law to eliminate discrimination at work is accepted. These results prove that the anti-discrimination laws and the Constitution are still undermined in the labour market in the sense that they are not given serious consideration in cases of discrimination against women. The empirical research was a great step, because it is now possible to see where the gap is in the legislation, a gap which causes a continuation in discrimination against women at work.

There is a need for the development of new legislation for dealing specifically with discrimination against women at work. The development of new legislation is

recommended because the laws that are meant to deal with discrimination in general are more general, and therefore do not deal effectively with the issue of discrimination against women. For example, in Britain there is the Sex Discrimination Act[25] which deals specifically with discrimination on the grounds of sex. This recommendation can make a great difference, because the new legislation can be clearer about all the issues of discrimination against women at work.

6.7 Conclusion

It was discussed in chapter one that discrimination against women in South Africa has been influenced by many factors such as Pre-Colonial era, Colonialism, Christianity, Apartheid etc. Women and men shared responsibilities during the pre-colonial era; men were food providers and women were responsible for cooking and looking after the children. The problem started during the Colonial period, when women had to look for jobs to provide for their families. Women found that they were not acceptable at all in the South African Labour Market. They were given inferior jobs and treated unfairly. Discrimination against women was also part of the laws and policies of the Apartheid Government. It was not only discrimination between men and women that was visible but also discrimination amongst women themselves i.e. white and black. There was wage segregation, occupational segregation, skills segregation etc. The history of women being at home affects the social life of today, because even in social gatherings men are usually seen together in activities outside the home while women are often gathered in the

[25] Sex Discrimination Act of 1975.

kitchen cooking for the family. Women are expected to respect men socially and submit to them, that is why men at work are not able to accept women as their bosses[26]. Some employers do not even want to employ women because they still believe that women are supposed to be at home for their husbands and children[27]. The recommendation on the problem is to have workshops, conferences and other means of education in schools, churches and workplaces in order to educate people about the value of women and changing times. This is the only way of working hand-in-hand with the law because it is difficult to apply the law to people who do not even understand the reasoning behind the anti-discrimination laws.

In chapter three the discussion was that after 1994 everybody was said to be equal in the eyes of the law, and this was what put women on an equal footing with men. The situation is still the same because the Constitution provides for this[28]. The decisions in cases of discrimination against women illustrate the opposite of what is said in the Constitution, which is equality of women and men[29]. Women do not feel protected in the courts of law because when they report that they are being discriminated against at work, the courts justify such discrimination on the grounds of economic efficiency[30]. This behavior promotes discrimination against women at work, and usually happens to pregnant women who seek employment and don't get employed because of their pregnancy.

---

[26] Robert Fine and Dennis Davis *Beyond Apartheid* Juta & Co Ltd (1990) at 7.
[27] See O' Regan Equality at work and limits of the law: Symmetry and individualism in anti-discriminatory legislation Yale University Press (1995) at 69.
[28] See section 9 of the Constitution Act 108 of 1996.
[29] See Chapter four of this study.
[30] See *Woolworths v Whitehead* (2000) 21 *ILJ* 571 (LAC).

The behavior of labour court judges in such cases is influenced by their attitudes towards women. Their attitude makes them think that women belong at home and not in the labour market. Judges who entertain stereotypes often condone the actions of stereotyped employers who discriminate against women at work. Sexual harassment is another problem that is difficult for the courts of law to judge because it is difficulty to prove. This conduct often causes the victim to resign from work, and the resignation constitutes constructive dismissal in terms of the Labour Relations Act[31]. The consequence of sexual harassment is the increase in the number of inefficient employees in the South African labour market. It is better for the victims of sexual harassment to make grievances in terms of the unfair labour practice definition because of its advantages than to lay criminal charges or delictual charges.

It is recommended that more measures be taken to educate and change the attitudes of men against women within the judiciary. This should be done because the judgement of each judge is influenced by many factors including his or her attitude towards the relevant matter. There must be policies that are meant to educate judges about the value of women in the labour market, as this can also result in increase in the number of female judges. It does not help to have a law that promotes the equality of men and women, if the attitudes of the members of the Legal profession have not changed in support of the law. The change could be promoted by way of seminars, workshops and conferences

[31] Section 186 of the Labour Relations Act 66 of 1995.

which promote gender equality, and these should be compulsory for members of the Legal profession to attend.

The next step is to close the gap within the law which allows judges to justify discrimination against women at work. For example, in cases where a woman is not employed because the employer fears pregnancy or possible pregnancy in future which could have impact on production. The law should state clearly that women should not be discriminated against because of their nature. There must be no justification for discriminating against women because of their biological nature. Concerning sexual harassment it is recommended that sex education be given to all by means of posters, workshops, conferences, classes etc. Lawyers should also have special classes and workshops for sex education so that they can be more considerate when making a judgement. For example, some women do not even know that sexual harassment is a form of discrimination on the grounds of sex. It is also recommended that the anti-discrimination laws clearly state that sexual harassment is another form of discrimination at work.

The law is undermined where the employer with stereotypical perceptions does not want to employ women because of their reproductive nature. Stereotyped employers often employ as few women as possible, and then employ many others who fall under the category of designated groups[32]. These employers use affirmative action to avoid employing many women in their workplace, which means that they violate the law by

[32] See response of respondents in chapter four of this study.

means of the law. Discrimination against women is very difficult to detect because employers use a very beautiful strategy, which is affirmative action. It is recommended that a clear statement on employment equity be made to protect women in the workplace, in that a designated employer must employ a specified minimum number of black women and white women. This should be done also to make sure that the employer employs both black and white women.

In cases where the employer does not want to employ a woman because she is pregnant, the excuse should not be economic efficiency, because economic efficiency is not catered for in the Bill of Rights. Furthermore, as a woman she has the right to be treated equally with a man and if this right is limited because of economic efficiency, less restrictive means to achieve economic efficiency should be used[33]. In this case, less restrictive means may be to hire the pregnant woman and when she is on maternity leave, then find a temporary worker in her place so as to make sure that production is not hindered.

Chapter five draws an inference that even though states ratify and sign international instruments, they pretend to respect them because discrimination against women still exists. It is clear that discrimination against women in employment is a major problem that needs separate attention because countries conduct themselves as if they promote gender equality through their laws and yet practically this is not the case. The persistent existence of discrimination against women also illustrates that the international instruments which promote gender equality are also failing in doing their tasks. The

[33] See section 36(1)(e) of the Constitution Act 108 of 1996.

recommendation to this problem is that strict measures must be taken to make sure that each state that has ratified a convention makes a report on the progress. There should be a commission that is sent to each state to see if the report given is actually true, and nationals be given a chance to give their reports to the commission. Strict measures must also be taken against states that act in violation of the convention.

In chapter four empirical research was conducted by way of samples that targeted three groups of employees (ie senior officials, ordinary employees and unemployed women). Questionnaires were distributed to these employees out of which 75% were returned. The response of the employees is shown above, and through these responses the results of the empirical data has been given. The results were that the hypothesis that: currently, there is an apparent lack of adequate law to eliminate discrimination at work is accepted. These results prove that the anti-discrimination laws and the Constitution are still being undermined in the labour market, in the sense that they are not given serious consideration in cases of discrimination against women. The empirical research was a great step for the study, because it made it possible to see where there are gaps in the legislation, that encourage a continuation of discrimination against women at work. The development of new legislation is recommended because the laws that are meant to deal with discrimination in general are too general, and therefore do not effectively deal with the issues they were intended to address.

According to the findings of this study, South Africa meets the required international norms and standards on paper in terms of respecting women's rights at work, but in

practice this is not the case. This means that South Africans are not as respectful of women's rights as it should be and cannot join the groups of developed and prosperous countries in the world until it respects the rights of working women. South Africa will continue to be a third-world country until the above recommendations are given serious consideration.

APPENDIX 1

QUESTIONNAIRE

EMPLOYMENT EQUITY LAW AND WOMEN IN THE NEW SOUTH AFRICA

University of Fort Hare

Department of Constitutional and Public International Law

Faculty of African and Democracy Studies

Questionnaire No.

Status of interviewee	
Qualifications	
Province	
Town	
Date	

Part I

1.Gender Discrimination

1.1 Do you think that in reality women and men are being treated equally in the new South African Labour Market?

Yes
No

1.1.1 Motivate your answer

_____

_____

_____

1.2 Do you believe that there are still stereotyped employers who feel that women belong in the kitchen and do not have the ability to do work that is performed by men?

Yes

No

1.2.1 If yes, is it still possible for such employers to escape employing or promoting women despite the existence of the anti discrimination laws?

Yes
No

1.3 Is the law dealing with discrimination against women effective enough to solve the problem?

Yes
No

1.3.1 Motivate

_____

_____

_____

1.4 Do you believe that the number of women who are senior officials in the new South Africa is as equal to that of men in such positions?

Yes
No

1.5 Is it possible that women in senior posts experience disrespect and disobedience from their subordinates and collegues because of their gender

Yes
No

1.6 Do you think that the way labour courts handle cases of discrimination against women encourages women to report their cases?

Yes
No

1.7 Is the number of female judges in Labour Court satisfactory?

Yes

No

1.8 Do you think there is a need for an increase in the number of female judges?

Yes
No

1.8.1 If yes, do you think this could make judgements on discrimination against women to be fairly decided

Yes
No

1.9 Which category of women do you think experience being discriminated against at work?

Applicants
Employees
Senior Officials
All of the above

1.10 Do you believe that women are still mostly employed in jobs which were historically known to be female jobs?

Yes
No

1.11 What is the estimated rate of unemployment of women as compared to that of men?

High rate of unemployed women than men
High rate of unemployed men than women
The rate of unemployment is the same for men and women

1.12 Have you ever felt that you are being discriminated against because you are a woman at work or in the process applying for a job?

Yes
No

1.12.1 If yes, how?

By sexual harassment
Emotional abuse
Dismissal
None of the above

1.13 What do you think is the reasoning behind some employers to hire/promote women into higher ranks of employment?

They feel they have no option but to abide by the law
They think women are good managers
They have changed their bad attitudes towards women

1.14 What is the estimated ratio of men who are senior officials as compared to women?

_____

_____

_____

Part II

2. Pregnancy Discrimination

2.1 Are you aware that there is fair and unfair discrimination in our law?

Yes
No

2.1.1 If yes, is it a fair discrimination to dismiss or refuse to employ a pregnant woman because the employer will lose profit during her absence?

Yes
No

2.2 According to the laws of nature, it is only women who fall pregnant and not men, therefore, do you believe that it is purely sex discrimination without justification to be discriminated against because of pregnancy?

Yes
No

2.3 Do you think that women should be like men by not falling pregnant in order to be treated equally with men in the labour market?

Yes
No

Part III

3. Sexual Harassment

3.1 Is sexual harassment a kind of discrimination used by most employers to employ or promote women?

Yes
No

3.1.1 If yes, do you think they are taking advantage of affirmative action measures to promote women?

Yes
No

3.2 Have you ever experienced sexual harassment at work or in the process of looking for a job?

Yes
No

3.2.1 If yes, did you report it?

Yes
No

3.2.2 If no, why not?

It was difficult to prove it
Fear of losing a job
You knew nothing about your rights
Other (specify)

4. Findings and recommendations

4.1 What do you think is the cause of persistent discrimination against women despite the existence of anti-discrimination laws?

_____

_____

_____

4.2 What do you recommend should be done to combat discrimination at work?

_____

_____

_____

_____

BIBLIOGRAPHY

Books

Bagilhole B — *Women, Work and Equal Opportunity*. London: Gower Publishing Co Ltd (1994).

Barker F S — *The South African Labour Market: Critical Issues for Transition*. Cape Town: Juta & Co Ltd (1992).

Benjamin A — *Discrimination in Employment: Group*. Blanc-Jouvan X, Giugni G, Ramn T, Schmidt F and Wedderburn L. Almquist Wiksel International: *Comparative Labour Labour Law* (1978).

Bennett T W — *A Sourcebook of African Customary Law*. Cape Town: Juta & Co Ltd (1991).

Bickman L — *Handbook of Social Research Methods*. D J Rog (Ed) (1998).

Bravo A and Cassedy E — *The 9 to 5 Guide to Combating Sexual Harassment*. New York:John Wiley & Sons Inc (1992).

Burchell E M and Hunt P M — *South African Criminal Law and Procedure*. Cape Town: Juta & Co Ltd (1982).

Date-Bah E — *Promoting Gender at Work*. Milton Keynes (Ed) Open University Press (1997).

Davis S M — *Women in Management Worldwide*. New York University Press (1997).

De Villiers H — *'Optimising Equity' People Dynamics*. London: David Fulton Publishers Ltd (March 1996).

Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S. *Labour Relations Law. A Comprehensive Guide*. Third Edition. Durban :Butterworths (2000).

Ewing K D and McColgan A *Law at Work*. 2nd ed. London: Free Press (1984).

Farley L *Sexual Shakedown: The Sexual Harassment of Women on the Job*. London: Fontana Paperbacks Ltd (1980).

Fine R and Davis D *Beyond Apartheid*. CapeTown: Juta & Co Ltd (1990).

Herbert C *Eliminating Sexual Harassment at Work*. London: David Fulton Publishers Ltd (1994).

Hewitt P — *Step-by-step Guide to Rights for Women.* Cambridge University Press (1975).

Hichter H — *African Women.* Oxford: Oxford University Press (1984).

Innes D, Entridge M and Perold H — *Reversing Discrimination. Affirmative Action in the Workplace.* California: Crossing Press (1993).

Jacobs J A — *Gender Inequality at Work.* New Haven: Yale University Press (1995).

MacKinnon CA — *Sexual Harassment of Working Women: A Case of Sex Discrimination.* New Haven Yale University Press (1979).

Mahlase S — *Women Teachers Under Apartheid.* Durban Sapes Books (1997).

Mason R D and Lind D A — *Statistical Techniques in Business and Economics*. Richard Irwin Inc (1993).

Mcai-Kattambo V, Kabeberi-Macharia J — *Law and Equity in Kenya.* Janet Kabeberi_Macharia eds (2001) and Kameri-Mbote P.

Mqeke RB. — *Customary Law and the New Millenium.* Love Dale Press: Alice (2003).

Murray C — *Gender and the New South African Legal Order*. Cape Town: Juta & Co Ltd (1994).

Nel P S and Van Rooyen P H — *South African Industrial Relations: Theory and Practice*. Cape Town: Juta & Co Ltd (1989).

O' Regan C — *Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-discriminatory Legislation*. Durban: Butterworths (1997).

O'Regan C and Thompson B — *Unionisation of Women Workers in Different Sectors in South Africa*. Durban: Butterworths (1993).

People's College Book — *Working Women* (1990).

Peres R — *Dealing with Employment Discrimination*. London: Sapes Books (1978).

Player M — *Federal Law of Employment Discrimination.* London: Pandora Press (1991).

Rampele M — *Treading the Thorny Path to Equity.* W James, D Caliguire, K Cullinan (Eds) (1996).

Rubenstein M — *The Dignity of Women at Work.* California: Crossing Press (1989).

Sedly A and Benn M — *Sexual Harassment at Work.* California: Crossing Press (1984).

Societats-Verlag — *Facts About Germany* Berlin Press (1996).

Sumrall A C and Tylor D — Sexual Harassment: Women Speak Out. London: Crossing Press (1992).

Thomas A M and Kitzinger C — *Contemporary Feminists Perspectives*. Oxford: Oxford University Press (1997).

Van der Walt J C — *Delict: Principles and Cases.* Cape Town: Juta & Co Ltd (1979).

Walker C — *Women and Resistance in South Africa.* London: Pluto Press (1982).

Wedderburn K W — *The Worker and the Law*. 2nd ed. London: Calendon Press (1984).

Other Sources

1. Journals, Reports and Other Articles

Bean M — De Rebus (April 1996) at 16.

Bender L — A Lawyer's Primer on Feminist Theory and Tort. *Journal of Legal Education .30 (*1988) 5-6.

Cohen T — Justifiable Discrimination-Time to Set the Parameters. *South African Mercantile Law Journal* 12 (2000) 255.

Dancaster L — Sexual Harassment in the Workplace: Should South Africa adopt the American Approach? *Industrial Law Journal* 12 (1991) 150.

Explanatory Memoranndum to the Employment Equity Bill (N 1840 in GG 18481 of December 1997) 5

Friedman S — *The Long Journey: South Africa Quest for a Negotiated Settlement* (1993)

Garbers C — Proof and evidence of employment discrimination under the Employment Equity Act 55 of 1998 (2000) 12 (1) *SA Merc LJ* 136.

Hepple B — Equality Laws and Economic Efficiency. *Industrial Law Journal* 10 (1997) 400.

International Labour Office (Geneva) — Apartheid and Labour (1991).

Institute of Development and Labour Law — *Equity and Labour* (1999) (University of Cape Town)

Kentridge J — Measure for Measure: Weighing up the costs of Feminists Standards of Equality at Work. 10 (1) *SA Merc LJ* (1991) 85.

Koyana DS. — Chieftainship and headmanship are not hereditary. *Speculum Juris vol.16 No.1* June (2002) 145.

Meyerson D — Sex and Gender. *South African Journal for Human Rights* 9 (1991) 20.

National Man Power Commission — Annual Report (1991).

Obeng M. — Culture and South African Constitution: An Overview. *Speculum Juris vol.16 No. 1* June (2002) 111.

O' Regan & Thompson — Collective Bargaining and the Promotion of Equality: The case of South Africa. *Industrial Law Journal* 11 (1994) 512.

O'Sullivan M — Submission on the Employment Equity Bill to the Portfolio Committee on Labour. Women and Human Rights Project . Community Law Centre. University of Cape Town. Unpublished (1998).

Standing G. Sender J and Weeks J — Restructuring the Labour Market: The South African Challenge. *An ILO Review*.(1996).

2. List of Cases

South Africa

Association of Professional Teachers & Another v Minister of Education & Others (1995) 15 *ILJ* 1048 (IC) at 1089G.

Casino v Anthony (1997)1 CCMA 10.8.31.

Collins v Volskas Bank Westonaria Division of ABSA (1994) 1 ICJ 4.2.2.

Eskom v Hiemstra NO (1999) 8 LC 1.11.38.

Harksen v Lane NO 1998 1 SA 300 (CC) at 337D-I.

Incorporated Law Society v Wookey 1912 AD 623.

J v M Ltd (1994)1 ICJ 8.25.1.

J v M (1998) 10 ILJ 755 at 757.

Mapuru v Putco (Case IC 11/2/2136) Unreported.

President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC)

Pretorius v Britz (1997) 1 CCMA 7.1.94

Public Servants Association of SA v Mnister of Justice (1997) 5 BCLR 577 (T)

Ryland v Edros (1997) 2 SA 690 (C) at 708-709.

Sigcau v Sigcau 1944 AD 67.

Wards Cove Packing Co v Antonio 490 SC 642 (1989)

Whitehead v Woolworths (1999) 8 LC 6.12.4

United States of America

Barnes v Costle 561F 2d 983 (D. C. Cir. 1977) 129

Capper Pass Ltd v Lawton (1976) IRL 366

Cleveland Board of Education v Lafleur 414 US 632

Defrenne Case (Decided by Community Court on May 25 1971)

Diaz v Pan American World Airways Inc 442 F2d 1273 (9th Cir) (1981)

Fesel v Masonic 447P Supp 1346 (Ddel) (1978)

Holthaus v Compton and Sons Inc 514F 2d 651(8th Cir. 1975)

Manhart v City of Los Angeles 497 US 547 (1990)

Phillips v Marietta Corp 387F Supp. 980 (C.D. Cal. 175)

Schultz v Wheaton Glass Co 421F 2d 259 (3rd Cir. 1970)

Tompkins v Public Serv Electric & Gas Co. 568F 2d 1044 (3rd Cir. 1977) 129

Weeks v Southern Bell Telephone & Telegraphs Co 408F 2d 228 (5th Cir. 1973)

William v Saxbe 413F. Supp 654 (DDC 1976)

Great Britain

Brown v Stockton-on-Tees Borough Council (1989) AC 20

Dekker v Stichting Vormingscentrum Voor Jong Volswassenen (1992) ICR 325

Hertz v Aldi (1992) ICR 332 at 335D-E

Price v Ronda UDC. 1923, 2 Ch, 372

Webb v EMO Air Cago (UK) Ltd (1993) 1 WLR 49 at 53

3. List of Statutes

South Africa

Basic Conditions of Employment Act 75 of 1997

Constitution Act 108 of 1996

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Wage Act 5 of 1957

United States of America

American Equal Pay Act of 1963

Executive Order 11246 of 1965

Executive Order 11375 of 1967

Executive Order 11468 of 1969

Fair Labour Standard Act of 1938

Title VII of the Civil Rights Act 1964

Great Britain

Agricultural Wages Act of 1948

British Pay Act of 1970

Employment Protection Act of 1975

Industrial Act of 1971

Sex Disqualification Act of 1919

Sex Discrimination Act of 1975

Wages Councils Act 1959

Germany

Bonn Constitution of 1949

Kudigungsschutzgesetz of 1951

Mutterschutzgesertz of 1927

Trade Amendment Act of 1878

Namibia

Employment Act 29 of 1998

Kenya

Employment Act of 1984

4. List of Relevant International Instruments

Beijing Declaration (1995)

Convention on Elimination of All Forms of Discrimination Against Women (1967)

Convention on Political Rights of Women (1979)

Equal Remuneration Convention (1951)

Southern African Development Community (SADC) Declaration on Gender and Development

5. List of Websites

www.au2002.gov.za

www.sas.upenn.edu/african

www.un.org/womenwatch/daw/cedaw

www.un.org/womenwatch/cedaw/protocol/index/html

www.sas.upenn.edu/african_studies/org_institutes/sadcgendr.html

www.ielrc.org/content/A95011T_7.html

List of Acronyms

ANC	African National Congress
ANCWL	ANC Women's League
AU	African Union
BCEA	Basic Conditions of Employment Act
BFOQ	Bona Fide Occupational Qualification
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CODESA	Conference for the Democratic South Africa
COSATU	Congress of South African Teachers Union
EEA	Employment Equity Act
EEOC	Equal Employment Opprtunities Covernant

FLSA	Fair Labour Standard Act
FSAW	Federation of South African Women
ILO	International Labour Organisation
LRA	Labour Relation Act
MPNP	Multi-Party Negotiation Process
NGO	Non Governmental Organisation
OAU	Organisation for African Unity
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SA	South Africa
SADC	Southern African Development Community

SADWU	South African Workers Union
UK	United Kingdom
USA	United States of America