The change of change

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Once the dust settles, and everything has been said and done, what remains? South Africa began a long and difficult journey 25 years ago. Many achievements have been made along the way, but similarly, many mistakes as well. In this essay, I will be dealing with several of the concepts mentioned by former President FW de Klerk in his speech, from a legal perspective. These concepts include universal franchise; equality before an independent judiciary; the protection of minorities as well as the freedom of religion. To conclude, an opinion regarding the issue that needs to be remedied will be dealt with.

Universal franchise can be seen as being 'the exten[ding] of the right to vote to all citizens [and]… is a necessary condition for democracy, not a sufficient one.'[1] Hence section 1(d) of the Constitution[2] states, inter alia, that universal adult suffrage is one of the founding values underlying the democratic and sovereign Republic. Due to the country's harsh history of political exclusion and disenfranchisement based on racial lines, it was of utmost importance that the new dispensation afford every citizen the opportunity to engage and participate in matters that would have bearing upon them. Both the cases of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* (NICRO)[3] , and *August and Another v The Electoral Commission and Others*[4] depict how highly this value is regarded. Within both cases, the Constitutional Court refused to support the notion that prisoners should be barred from voting. The Court held that, only the Legislature could limit this right of prisoners, however such limitation has to be justifiable and purposeful.

The Constitution has both vested judicial authority within the courts, and proclaimed them as being independent.[5] Furthermore, everyone is guaranteed equality before the law as well as equal

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[1] Fraser (2013).
[2] Constitution of the Republic of South Africa, 1996.
[3] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 (3) 280 SA (CC).
[4] *August and Another v The Electoral Commission and Other* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999).
[5] Section 165 **Judicial authority**
(1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

protection and benefit of the law. [6] Although this seems to be the *prima facie* case, there are instances where the court has failed to grant complainants the equality so guaranteed. The case of *S v Jordan*[7] clearly illustrates this. In *casu*, the Appellants (who were, respectively, a brothel owner, a brothel employee and a prostitute) claimed that the legislation impugned was violating their rights to, amongst others, equality, because it criminalised their trade. Judge Ngcobo, writing for the majority, found that, with regards to the criminalisation of prostitution, the provision was gender-neutral. Due to this, no direct discrimination could be claimed and due to the common-law providing for the punishment of the customers, no indirect discrimination could be argued either. However, it is the separate minority judgments of O'Regan and Sachs JJ that paints the true reality. Both judges found the provision to be unconstitutional because it specifically targets the prostitute, and merely renders the customer as an accomplice. Based on the fact that most prostitutes are predominantly women, this provision results in gender-discrimination that continues to preserve gender-based stereotypes.

The majority judgment fails to realise that law is a patriarchal construct that aims to preserve the status quo of male dominance and female subordinance. Antiquated morality and an ingrained (white male) value-system are what prevail within the common-law and various modern legal provisions. Prostitutes were deemed as 'lesser women' or 'women of disrepute' because 'good women' were well-behaved, pure and had only their husbands as sex partners. Therefore, the activities of these 'sullied' women were criminalised, because it did not fit into the long-established patriarchal moral paradigm. The punishment of the prostitute's customer comes across as an afterthought, a mere slap-on-the-wrist for the sake of formality. This is an unacceptable double-standard. The majority should have upheld the High Court's ruling of

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[6] Section 9 **Equality**

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[7] *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

unconstitutionality and proceeded to develop the common-law in terms of sections 8(3)(a)[8] and 39(2)[9] of the Constitution.

Apart from the Constitution, which confers various duties upon all persons (both natural and juristic) within the Republic[10], the State also has international obligations that it must perform. Article 27 of the *International Covenant on Civil and Political Rights* pertains to minorities.[11]As a State-party to this treaty, and in terms of sections 39(1)(b)[12] and 233[13] of the Constitution, the State is bound to enact and interpret legislation in conformity with this article. Within his book, the author Steven Wheatley discusses Special United Nations' Rapporteur Francesco Capotorti's definition of what a minority is.[14] According to this definition a minority can be deemed to be '[a] group numerically smaller to the rest of the population…in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards the preserving their culture, traditions, religion or language.' Consequently, it can safely be assumed that if one is a member of a community that falls within this definition, then Article 27 affords exclusive protection to such community.

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[8] Setion 8 **Application**
(1)…
(2)…
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court –
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;…

[9] Section 39(2) '(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[10] Section 8(2) 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

[11] Article 27 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

[12] Section 39 **Interpretation of Bill of Rights**
(1) When interpreting the Bill of Rights, a court, tribunal or forum -
(a)…
(b) must consider international law; …

[13] Section 233 **Application of international law**
'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

[14] Wheatley (2005:18).

Although the Republic is comprised of various ethnic and linguistic minorities[15] it is the plight of the Khoisan that beckons attention. The Khoisan are known to have inhabited the country at the time when different ethnic and cultural groups first arrived, however they have yet to be bestowed the title of 'indigenous peoples' by the Republic[16]. Under the Apartheid regime, the Khoisan were forced to either assimilate into other populations or be classified as Coloured. This had the result of them losing their identity and culture. Post-1994 the expectation amongst the Khoisan was that recognition was finally going to be granted upon them, however this failed to materialise. Their existence remains ignored and the label "Coloured" still attaches itself to them.[17] After many years of attempting to tackle the post-apartheid challenges that the Khoisan experience, progress seemed to have been made with the *National Traditional Affairs Bill* of 2010. Khoisan leadership, councils and communities would be recognised in terms of this Bill[18], however till date this Bill remains just that: a Bill. This has resulted in '[t]he Eastern Cape's Khoi-San leaders [making] an impassioned plea to President Jacob Zuma to keep his word and sign the *National Traditional Affairs Bill* – more than two years after [it was] announced that a bill to recognise and protect indigenous Khoi-San people would be finalised.'[19] The lack of urgency by the State in assisting the community to protect its culture and identity has resulted in a failure to perform in terms of its Article 27 obligations.

Religion is a listed ground upon which non-discrimination applies.[20] The Courts have dealt with section 15 (the right to religion, belief and opinion) in several cases namely, *Christian Education South Africa v Minister of Education*[21], where religion and corporal punishment was dealt with; *Prince v President of the Cape Law Society of the Cape of Good Hope* (the Prince case) [22], saw the limitation of the Rastafarian cannabis-consuming religious practices and *MEC for Education: Kwazulu-Natal and Others v Pillay*[23] dealt with the effect of school rules on certain religious practices, like a nose-stud *in casu*. It is the criticism levelled against the judgment of the *Prince*

[15] Wheatley (2005:19).
[16] Le Fleur and Jansen (2013:2) .
[17] Ibid.
[18] Mphande (2014).
[19] Ibid.
[20] Section 9(3) 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'
[21] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[22] *Prince v President of the Cape Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC).*
[23] *MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC).*

case by Critical Race Theorist, Joel Modiri that is important[24]. The author states that the Court, in reaching its decision failed to consider the impact that Rastafarianism has had on Black people's history, as well as in the struggle against Apartheid. The core of his argument was that Western (white male) ideals were used, when and where they should not have been, which ultimately led to a biased outcome.

To conclude South Africa has achieved, to a certain extent, the vision enumerated by former President FW de Klerk. However, there is still room for improvement. Despite there being universal franchise which enables for State leaders to be democratically elected, an independent judiciary which pronounces on important legal questions and an inclusive Legislature, the problem actually lies within the law itself. As mentioned above, the law is a patriarchal construct and this construct is founded upon the reasoning of white males. The effect of this adversely affects non-whites, women and children. Equality may exist on paper, but in reality, it is still yet to be seen. There can be no free and fair society if the legal framework that governs its citizens, comes from the very same source that caused restriction and unfairness. The Republic's law needs to be reformed so that the reasoning behind rules is that of its multi-cultural and diverse society. The Constitution is the best aid in this regard. Although democracy has been established, what remains is a journey still far from being complete.

[24] Modiri (2012: 380 - 404).