

GENDER RIGHTS IN SOUTH AFRICA: THE DIVERGENCE BETWEEN CONSTITUTIONAL GUARANTEES AND REALITY

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Introduction:

The South African Constitution embodies values that provide the foundation for (and inspired by the creation of) a free and democratic South Africa. Enshrined in the *Freedom Charter* are values of democracy, human rights and equality. Yet despite the rights, and protections included in the Constitution, violence against women and children remains a great concern in this country. In view of the recent events of femicide and gender-based violence in South Africa, it is perhaps opportune to examine the plight of women in our country. Despite the guarantees of the rights that women should enjoy to life, equality, dignity, safety and security; gender-based violence and gender inequality still persist in this country.

Constitutional protection assured to women

South Africa's history is characterised by a patriarchal and oppressive history, devoid of formal recognition of women as equal citizens. It was not until the introduction of the Bill of Rights that the rights of women were given full recognition. Women are entitled to all the rights and freedoms in the Bill of Rights, including the rights to dignity and life. However, the following provisions are *specifically* applicable to them:

- Section 1 which recognises non-sexism as a foundational value;
- Sections 9(3) and 9(4) which prohibit unfair discrimination against anyone *inter alia* on the grounds of gender, sex, pregnancy, marital status and sexual orientation;
- Section 12(2) which recognises that everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction; and security in and control over their body;
- Section 27(1)(a) which recognises the right to have access to health care services, including reproductive health care;
- Section 174(2) which recognises the need for the judiciary to reflect broadly the racial and gender composition of South Africa;
- Section 187 which establishes a Commission for Gender Equality to promote respect for gender equality and the protection, development and attainment of gender equality;
- Section 195(1)(i) which requires that public administration must be broadly representative of the South African population... and the need to redress the imbalances of the past to achieve broad representation.

Progress on gender issues

In the recent years, South Africa has made some significant progress in advancing women's rights and gender equality in the country. Since 1994, women's representation in Parliament has increased to 42.7% - one of the highest percentages in the world. Moreover, for the first time in history, half of South Africa's cabinet consists of women.

Progress is also being made with gender transformation in the Judiciary. There had only been a 20% representation of women in the Judiciary between 1994 and 2013. However, by 2017, women's representation in the Judiciary had increased to 35% - despite the fact that, 75% of the 24 leadership positions occupied by Senior Courts were still held by men.

There have been a number of policy implementations and laws that give practical expression of women's rights and the protection thereof. Such examples are the *Domestic Violence Act*, the *Sexual Offences Act* as well as customary law. There also exist several gender-responsive laws around

reproductive health and care such as the *Choice of Termination of Pregnancy Act*.

Most important is the inception (of the inception) of the *Commission for Gender Equality (CGE)*. CGE is an independent Chapter 9 institution with a mission to enhance, promote and protect gender equality in South Africa. It draws its mandate from the Constitution and has the responsibility of fulfilling it by undertaking research, legislative initiatives, public education, policy development and effective monitoring and litigation. However, over the past years, CGE has received much scrutiny for its failure to deliver its mandate.

Continuing abuse of women's rights

Essentially, 26 years since the inception of constitutional democracy, it appears that despite the progress that has been made, the actual empowerment and protection of women in South Africa remains uneven.

Gender-based violence

Now more than ever, South African women remain profoundly vulnerable to the injustices of violence, inequality and oppression. Beyond lack of opportunities and representation, women are faced with an even more agonising obstacle; the vehement perpetuation of gender-based violence. The overwhelming statistics show it all. In June 2018, a Crime against Women in South Africa report revealed that in South Africa, femicide is five times higher than the global average. A woman is killed every three hours in South Africa. Gender-based violence reached new heights in the 2018/19 period with 179 683 attacks against women reported. Crimes against women and children amounted to 53 837 in Gauteng, 46 092 in the Western Cape and 33 667 in KwaZulu-Natal.

Rape

Rape continues to be a major problem. According to the country's crime statistics, published by the Ministry of Police, 33 125 women were victims of rape in the 2018/19 financial year. The Gauteng province recorded the highest rape incidents in the country, with 8 417 reported rape cases. This figure shows a 4.4% increase from the 8 062 cases recorded in the 2017/18 financial year. The statistics show that out of the 8 417 cases recorded in Gauteng, 6 734 of the victims were women. KwaZulu-Natal ranked second highest with 7 667 cases out of which 5 895 were women. Eastern Cape recorded 7 304 cases in the 2018/19 financial year, and 5 986 of those victims were women.

The 2018/19 statistics show that in South Africa, 144 sexual offences occur daily - which is a 5% increase from 2017/18. There were total of 524 200 cases reported in the 2018/19 - which indicates a 4.6% increase from the 2017/18 financial year. In the 2018/19 period, 24 387 cases of sexual assault were reported. There were 18 586 reported cases of rape against children in the 2018/19 financial year.

Notwithstanding the fact that these statics reflect the plight of women in South Africa, it should be noted that rape is hopelessly underreported. Furthermore, crime statistics are notoriously outdated and unreliable. It is a rather difficult task to gather optimum accuracy from these statics because; the common practice of releasing the statistics at least six months after the final recorded reporting date means that by the time they are published they are unreliable and; outdated dates reflect neither current events nor patterns.

The relentless physical and sexual abuse of women in South Africa made huge headlines in 2019, both nationally and internationally. This was brought on by the horrific rape, bludgeoning and subsequent murder of a 19-year-old University of Cape Town student, Uyinene Mrwetyana. The 42 year old man who lured her into the Post Office after hours was a worker at the Post office, despite having had a

criminal record.

Government Response

In the same month, a joint media briefing on gender-based violence and femicide that took place in Parliament revealed that 30 women had been murdered by their partners in August 2019 alone. Fed up and enraged, tens of thousands of citizens took to the streets of parliament in protest against the brutal physical and sexual abuse perpetuated against women and girls. Despite gender-based violence having been a prominent feature in President Cyril Ramaphosa's first State of the Nation Address (SONA) in February 2019, Ramaphosa received much criticism for his inaction during the week of protests. On 5 September 2019, Ramaphosa finally addressed the nation on the matter and made several promises and listed various actions that would be implemented in order to curb the scourge of gender-based violence in the country. Included in these promises was harsher minimum sentences for those guilty of rape and murder of women and children. However, in February 2020, a man who served 20 years in prison for rape was released on parole and raped and murdered 8-year-old Tazne van Wyk shortly after his release. This puts into question the implementation of the actions promised by the president during his address.

The failure to uphold women's rights and equality in South Africa can be attributed to a number of factors, ranging from poor legislation and implementation to cultural attitudes that are deeply embedded in its society.

The role of power relations and traditional values

Women's equality and freedom have long been curtailed by the balance of social power, which has always been tilted in favour of men. For many years, South African women were subject to the societal, cultural, economic and legal control of their fathers and husbands. Their deprivation of the formal recognition as equal citizens on account of conservative notions of gender roles was deeply rooted in their experience of patriarchy and oppression.

Traditional customs are often harmful, demeaning and based on the primacy of male authority, thus perpetuating the patriarchal narrative that women are undeserving of recognition and significance. Furthermore, cultural practises such as virginity testing - which is permitted in the *Children's Act* - violates girls' right to equality and dignity. What is most alarming is the increased incidents of child marriages in South Africa. Some communities still force young girls to be married, mostly to older men. In 2018, it was reported that 91 000 children under the age of 14 were forced into marriage in South Africa.

Despite the introduction of the *Bill of Rights* and other laws, policies and programmes that are meant to give expression to women's rights, it appears women and girls are often still viewed as 'possessions' and are frequently denied the basic human right to dignity - among other rights.

Very often the oppression, inequality and abuse experienced by women stems from their dependency on men. Therefore, the most effective way to change this, and to achieve sustainable equality is through tackling illiteracy and poverty among women. Women (especially rural women) ought to be economically empowered as this is the foundation for their independence and dignity.

Inadequate performance of the justice system and government

Another factor that perpetuates gender-based violence is the leniency of our criminal justice system. According to *SA Medical Research Council*, 47.7% of all rape cases are not prosecuted by the courts; research data shows that a guilty verdict is reached in less than one in 10 rape cases. Atop that, legislation pertaining to gender-based violence is commonly faced with many gaps and challenges that

hinder its effective implementation.

To begin with, the attitudes of the South African Police Service (SAPS) is notoriously passive and negative, which contributes greatly to victims feeling discouraged when reporting abuse. In addition, police officers often do not understand the provisions of the various legislations, which contributes to some of the sexual offences not being filed properly and subsequently not resulting in successful prosecution.

Worst of all, government departments and institutions that have been tasked with tackling gender-based violence often fail to understand or prioritise gender issues. Take for instance the utterances of the deputy minister of the *Department of Social Development* regarding who has contributed to political atmosphere in which abuse against women occurs. Tackling violence against women falls under the mandate of the department of social development, yet deputy minister Hendrietta Bogopane-Zulu proudly expressed her opinion that women 'contribute equally' to the violence and abuse perpetuated against them.

The grievousness of this kind of thinking by a custodian of the Constitution cannot be overstated. It is also quite problematic that there are inconsistencies between what members of government promise to do about the issue and their actions. Too often we hear members of parliament express their grief and condemnation regarding the abuse of women, yet their colleagues have been accused on countless occasions of assaulting women and they have neither been called out nor prosecuted.

The failure of the Commission for Gender Equality

The *Commission for Gender Equality (CGE)*, tasked with the mandate of curbing gender-based violence and inequality, has also failed dismally to uphold that mandate. With its array of legal powers, *CGE* has the power to significantly impact the narrative of women's rights and equality in South Africa. Yet it has, instead, been characterised with maladministration and financial impropriety. What is most concerning is that its strategic objectives are devoid of practical steps to uplift women from poverty.

CONCLUSION

Notwithstanding some of the significant progress that has been made by South Africa to advance women's rights and equality, there is still a lot of work to be done. South Africa's legal framework regarding women's rights and equality is profoundly comprehensive. Therefore, the issue is not legal; it lies in setting priorities and in implementation. The following action should be considered:

- South Africa has many institutions and departments with overlapping objectives on women's equality and protection. However, it behoves these institutions and departments to prioritise and effectively implement their mandates. This can be done through the establishment of oversight committees that will be specifically tasked with monitoring and evaluating implementation. These committees should also comprise of professionals who have skills, experience and a deep understanding of gender issues.
- Government should shift its focus to advancing the effectiveness of existing institutions - instead of establishing new ones. While increasing the budgets of these institutions is crucial, it seems to serve very little purpose to do so without precise planning on how this will increase the capacity of government institutions and departments to achieve their mandate.
- Furthermore, laws and legislation pertaining to women's rights should be reviewed by a panel consisting of government officials, gender issues professionals and civil organisations.
- The *CGE* ought to be resuscitated. Its right to subpoena any person (including government) and to initiate litigation make it an extremely powerful tool in the war of gender-based violence and

inequality. Moreover, *CGE* needs to be more impactful in its objectives. It should partner with similar departments and institutions to promote gender rights and equality across the country. South Africans need to see the *CGE* in action through public campaigns and programmes.

The South African Constitution proclaims the incontestable equal worth of all persons - including women and girls. Thus, the persistence of violence against and abuse of violates their rights to human dignity, life and equality that are enshrined in the Constitution. The problem is not legal; it is societal. Patriarchal attitudes towards women prevent women from enjoying the rights that are stipulated in our Constitution - rights that they are entitled to from birth. Despite some progress made by the country in advancing women's empowerment and emancipation, South Africa still has a long way to go. The alarming statistics on gender-based violence ought to prompt government to implement solutions that will protect women. It is not enough to merely pass laws; the state should ensure that they are priorities and effectively implemented.