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Gender Justice and Economic Inclusion in South Africa

By Rita N. Ozoemena¹

Abstract

Gender justice as envisaged in the South African Constitution serves as a transformative project intended to engender an inclusive society. The historical antecedent of the transformation agenda created a situation which systematically excluded people particularly women from being productive members of society. By means of the constitutional principle of substantive equality, the court creates avenue to remedy the injustices of the past. Twenty-four years into democracy, poverty and inequality remain persistent with women bearing the huge adverse impact. The restrictions to economic empowerment faced by women are largely due to cultural practices and a labour market that are insensitive to contributions made by women particularly at the household level. Other exclusionary factors that inhibit the socio-economic development of the people include race, gender and ethnicity. The interventions made so far with a view to eliminating poverty and inequality in South Africa by way of substantive equality and affirmative action unfortunately fall short of the desired goal. This article proposes the right to development as a tool to promote and realise economic inclusivity. The Right to Development (RTD) is an appropriate process of development that prioritises the human person and by implication the holistic approach to eliminate poverty in South Africa.

Keywords: gender justice, substantive equality, economic inclusion, inequality, poverty socio-economic development and the right to development

Introduction

In South Africa, eliminating barriers to the full enjoyment of human rights for the majority of women is critical to the socio-economic development of the society. About two decades ago, the majority of women in South Africa were unable to claim their rights and negotiate opportunities for their socio-economic development as well as protect their dignity. Racial and gender inequality were complicit in excluding the majority, placing them at great disadvantage and stripping them of their dignity as well. Gender justice as contemplated in section 9 of the Constitution, therefore, aims to ensure that law reflects the social aspirations of the people, both men and women by removing the barriers that inhibit the realization of their fundamental rights. Inequality and poverty

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are twin factors that have significantly eroded the dignity of majority of women and had made the much anticipated social change with the dawn of democracy seem distant.

The protection of the right to gender equality in terms of the Constitution provides the legal framework needed to ensure the elimination of discriminatory conduct and attitude towards women. South Africa in the 20 years of its democracy has been on a journey of transformation. Hence, the preamble to the constitution enshrines the foundational values of equality, dignity and freedom with a view to realizing social justice for the majority of its people. Thus far, social and economic inclusion is an imperative but, remains however, elusive for many. Despite the inclusion of socio-economic rights in the Constitution such as right to education (s 29), right to equitable access to land (s 25 (5)), right to housing (s 26) and right to health care, food and social security (s 27) , giving effect to the social, economic and political aspirations of the people have been disjointed. Although a number of socio-economic rights cases have come before the Constitutional Court leading to a pro-poor approach to these rights, there are lots of criticisms regarding the Court's adjudication of the substantive content of the rights (Brand, 2012; Bilchitz, 2002). The cases that have so far come before our courts have, however, generated much interests due to its relevance to the socio-economic development of the majority of the people and their quality of lives. Through its adjudication, the Constitutional Court has developed the socio-economic rights jurisprudence thereby making significant progress in the protection of substantive rights and social justice. Despite the progress made in the last two decades, many women still bear the enormous burden of poverty and inequality with the consequence of poor socio-economic status. To address the situation, the Court utilizes the notion of substantive equality to remedy the injustices of the past through using differential treatment where it promotes social justice.

This paper, examines the correlation between economic inclusion and substantive equality which are fundamental elements to promoting social justice and socio-economic development of the majority, particularly women. The author further argues that the notion of substantive equality as developed by the Court enriches the understanding of diversity particularly in the area of customary law. And so, within the content of substantive equality is found inclusion and participation as relevant elements to socio-economic development of women. In many instances, women have been excluded from full enjoyment of their rights, a situation the transformative Constitution seeks to remedy.

By way of structure, this paper firstly engages with substantive equality within the context of transformative Constitution and the developments arising from it particularly, the Constitutional Court equality jurisprudence. Secondly, it draws attention to the economic position of the majority of women with a view to highlighting how their exclusion have adversely affected their socio-economic development. For the majority of women, their social circumstances and environment underpinned by poverty and inequality contribute largely to the opportunities available to them to improve their quality of life. And finally, the chapter draws on the right to development as a relevant tool in addressing the multifarious challenges to economic inclusion of the majority of women.

Substantive / Normative developments relating to gender equality

Since 1994, with the commencement of democratic rule in South Africa, the values of equality, dignity and freedom in terms of section 1 (c) of the constitution became sacrosanct. The Constitution is not just a document detailing rights, values and duties but, it also serves as a solemn pact for transforming the political, social, economic and cultural development of the people. The

transformative agenda was ultimately designed to ensure social justice by breaking away from a system that was exclusionary and discriminatory. To build a society based on values such as freedom and equality, particularly substantive equality was the only viable option hence, the notion of transformative constitutionalism (Langa, 2006). Although it is not explicitly recognized in the Constitution, the transformative nature of the constitution can be found in some provisions such as the one requiring the horizontal application of the Bill of Rights to private actors (s 8 (2) and (3); the discrimination clause in section 9 (2), (3), (4)). Thus, the founding values of the Constitution places the duty on the state to positively or negatively (refrain) protect, promote and fulfil all the rights in the Bill of Rights including particularly the recognition of restitutionary measures where difference in treatment is justifiable under law of general application (section 9 (2). Karl Klare (1998) at 150 defined Transformative Constitutionalism as: ‘a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction’.

As an agenda that revolutionises every aspect of the South African society, Klare (1998) explains that transformative constitutionalism should be understood as ‘an enterprise that would generate large scale social change through nonviolent processes grounded in law’. For South Africa, the racial divisions and separate development trajectory demand a new social contract in which, equality as a value and right are protected for all.

Justice Laurie Ackermann (2013) referred also to the extent of the transformation envisaged through the Constitution as ‘substantive constitutional revolution’. Over the years, the idea of transformative constitutionalism has gained a high status as a South African project of not only ‘an enterprise grounded in law, but also a political project pursued through law’ according to Sibanda in 487 (Sibanda, 2011). Sibanda distinguishes transformative constitutionalism from ‘orthodox or other liberal democratic constitutionalism’ due to the large scale change required in the South African context. Although no single definition can describe the concept of transformative constitutionalism, Justice Langa (2006) as well as other writers (Van Marle (2009); Pieterse (2005); Moseneke (2002) have attempted to define the concept to include ‘economic transformation and a change in legal culture’. It is this element of change which distinguishes transformative constitutionalism from other forms of change which must be able to alter the material conditions and well-being of the people. To achieve this end, the Constitution contains social, economic and cultural rights and when read with substantive equality as developed by the Courts reflect aspects of the conditions necessary to change the quality of lives of the poor (Brickhill & Yan Lieve, 2015). In other words, one of the ways of eliminating poverty, inequality and systemic disadvantage is to move the society in an egalitarian direction. Achieving equality within this transformative project, therefore, demands the eradication of systemic inequality based on race and gender. It also requires the creation and development of equality of opportunities which will allow people to realise their full human capabilities within a positive social relationship (Albertyn & Goldblatt, 1998). Hence, for South Africa, equality is a value as well as a right. Right to equality or the non-discrimination clause as it sometimes referred to, is guaranteed under section 9 of the Constitution. The section prohibits unfair discrimination on grounds such as race, gender, sex, marital status, belief, culture, sexual orientation, age, disability and so forth. By so doing, the section (9 (1)) seeks to ensure that all persons are equal before the law, having full benefit and equal protection of the law. In addition, equality as a value stresses the constitutional commitment to the realisation of social justice which takes into account the vulnerabilities and disadvantages faced by a majority with a view to providing remedial action. The interplay between equality as a

right and a value is that they both act together to give substance to the transformative constitutional agenda of promoting substantive equality.

Substantive equality according to Albertyn & Fredman (2015) takes into consideration the lived socio-economic differences and disadvantages in society. It is common knowledge that people are bound in a variety of relationships within a group and depending on the level and context of the social arrangement, inequality and disadvantage may ensue. According to Martha Minow (1998), difference does not naturally emanate from the individual or group but is evident in the relationship between individuals or the groups. So, it is not that difference is necessarily bad but it becomes so when it perpetuates costly disadvantage. According to critical feminist theorists, lived experiences of people are pertinent to eradicating systemic inequality that generally occur in the way society is structured. Hence, difference and disadvantage are central to substantive equality. Jennifer Nedelsky (1993) aptly said that:

‘the question of equality [captured in constitutional right] is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we are not equal, but vastly different, vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities’ (p 20-21).

In charting the equality jurisprudence based on the transformative constitutionalism project it is imperative to do so, by adopting the notion of substantive equality to remedy past injustices. This is important for South Africa due to the urgent need to take a decisive break from a history in which law sustained difference and disadvantage thereby creating large inequalities (World Bank, 2013).

The South African Constitutional Court in the last two decades has traversed through different dimensions of equality in its quest for a truly transformative equality jurisprudence. By so doing, the Court has brought out a number of valuable principles that provide guidance towards the protection of the right to equality.

Discrimination, dignity and voice

In the South African context, dignity has come in strongly as critical to any analysis of equality rights. This is based on the impact of difference and disadvantage on the dignity of majority of the people which stands at the core of substantive equality. *City Council v Walker* (1998 (2) SA 363 (CC)), was one of the earliest cases on equality that came before the Constitutional Court. This matter dealt with the question of substantive equality and how material disadvantage affected people even those that lived in the affluent white suburb of Pretoria.

For the Constitutional Court, the aim to address the injustices of the past which eroded the dignity of the majority of the people in the most fundamental way was one of the main priorities. So, dignity took a prominent position in analysing the right to equality and in some ways seemed to be an overriding factor. The *Walker* case dealing with unfair discrimination also dealt with dignity, in addition to material disadvantage and voice as other dimensions of equality to be given prominence. In that case, although Walker as a privileged resident of white affluent suburb of Pretoria faced disadvantage and lacked voice in the manner municipal tariffs were imposed, the Court held that the discrimination was not unfair using two stage approach developed in *Harksen v Lane* (1993 (3) SA 300 (CC)). Clearly, in developing the equality jurisprudence, the

Constitutional Court recognises different factors at play in ensuring an egalitarian society based on constitutional values. In other words, promoting substantive equality requires taking into account the multi-dimensional nature of the right to equality (Albertyn & Fredman, 2015). Equality is foundational and as such, is intricately linked to dignity and all other freedoms enshrined in the constitution. Although dignity and respect for human worth are vital to equality, but more importantly, situating difference and disadvantage at the core of protecting the equality right supports the eradication of systemic and structural inequality.

Dignity, Diversity and Material disadvantage

Moving on with its transformative purpose, the case of *Gumede v President of the Republic of South Africa* (2008 ZACC 23) is one of the equality cases that affirmed the multi-dimensional nature of equality. In this case, the Constitutional Court struck down provisions of the Recognition of Customary Marriages Act 120 of 1998 ('Recognition Act') for the adverse impact of materially discriminating against women married under customary law prior to the commencement of the Act.

The recognition of customary law as one of the sources of law for South Africa is one of the areas where the transformative project is visibly noted. So, balancing the constitutional commitment to gender equality, cultural diversity and customary law has remained a huge challenge for the creation of equality jurisprudence that takes into account all the nuances of the South African context.

The *Gumede* case highlighted the difficulties that still exist even after the advent of democracy where pieces of legislation such as the Recognition of Customary Marriages Act ('Recognition Act') was enacted to affirm diversity and engender substantive equality. Regrettably, a number of provisions of the Recognition Act have been impugned due to its sustenance of difference and disadvantage particularly in economic or material exclusion.

In principle, the Recognition Act seeks to redress the differentiation in law regarding marriages conducted under customary law as in *Gumede* and those performed under the common law. However, the *Gumede* case brought into focus the inadequacy and ineffectiveness of certain pieces of legislation in resolving deep cultural issues particularly as it relates to family income and distribution. In mainly rural agrarian Africa where the role of women are mainly reproduction and community-based, financial or economic liberty is more often the preserve of men (Ozoemena, 2013). So, it is common knowledge that any form of contribution by women generally, and more specifically spouses towards the economic development of the household or family is hardly recognised. In fact, many women engage in petty trading to feed the family, but despite the long hours spent in nurturing and keeping the family well, their contributions are hardly acknowledged by society. Moseneke DCJ alluded to this in the *Gumede* case, when he said that the case underscores the impact of patriarchy which, has remained persistent. It also brings into sharp focus the vulnerability of many women during and upon the termination of customary marriage. For example, most African societies are patriarchal and South Africa is no exception and when patriarchy is unchallenged, it leads to gender injustice in South Africa (Ramaphosa, 2017). Often, many women are compelled by their spouses not to seek for employment but to be stay-at-home wives, a position which creates dependency on the part of the woman. Elizabeth Gumede found herself in this kind of position when her husband of over 40 years asked her not to seek formal employment. By 2003 when her husband instituted proceedings for the dissolution of their marriage, Mrs Gumede had little or no means of maintaining herself except occasional funds from her four adult children. So, having dedicated herself to nurturing the family, women such as

Gumede are left in the cold where the society, the system and the people form a grand alliance in delivering the social and financial exclusion of women.

The consequences of social exclusion resulting from customary law was also one of the issues that came out of the *Bhe v Magistrate, Khayelitsha* (2005 (2) SA 395 (CC)). In this case, the Constitutional Court dealt with the customary rule of primogeniture which requires that inheritance devolves along male lines to the exclusion of women and girls. The Constitutional Court declared the rule unconstitutional and invalid to the extent that it excludes women from inheritance, which could be seen as a viable means of financial or economic empowerment.

South Africa is on a journey of transformation and according to Klare (1998), the nature of transformative constitutionalism it has embarked upon is to give effect to social justice. In the preamble to the Constitution, it affirms its commitment to addressing the myriad of injustices of the past to ‘... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...’ (para 6)

So, it is not only forms of exclusion that are prohibited but the Constitutional Court in developing the equality jurisprudence developed the Constitutional principle of rationality where actions considered to be discriminatory are tested for justifiability. This approach of the Court reflects the broader context of gender justice which takes into account vulnerabilities of women and seeks to eliminate the barriers to the enjoyment of human rights. In the two cases already referred to above, it is evident that there are aspects of customary law that constitute hindrance to the socio-economic development of women. The manner in which the Court has engaged with these hindrances points to a socio-legal approach that seeks to balance the law with the daily reality of the people. It remains, however, contested whether the current approach to socio-economic development is in its entirety consistent with constitutional mandate (Young, 2013).

Nonetheless, these normative developments emanating from the Constitutional Court are also in consonant with other international human rights law. For example, South Africa is a State Party to a variety of regional and international human rights instruments that have in various forms declared invalid the manifestation of attitudes and conducts that viciously create and recreate the unequal gender status. The continent through international human rights law such as the Protocol on the Rights of Women in Africa has created further normative framework that ensures that women and men are equal before the law with equal benefits of the law thereby guaranteeing various rights including the right to access to justice and equal protection of the law (art 8 of Maputo Protocol), economic and social welfare rights (art 13 of Maputo Protocol), health and reproductive rights (art 14 of Maputo Protocol) and right to sustainable development (art 19 of the Maputo Protocol).

The Protocol is intended to ensure the protection of specific rights that are crucial for the socio-economic development of the African woman such as right to inheritance, and the right of widows and girls. Many have been denied inheritance rights in Africa, impacting adversely the socio-economic development of the majority of women. Many still lack opportunities to improve their well-being and as a result, poverty and inequality persist despite the guarantees of national constitution, regional and international law.

In the 20 year review conducted by the ruling party, the African National Congress (ANC), a recurring rhetoric is that poverty and inequality remain persistent in South Africa and women are the group that are mostly affected. It is now 22 years since attaining democratic governance yet, practical changes in the lives of the majority of women in South Africa remain a huge challenge. Gender inequality persists due to the non-recognition of the right to development and the core elements contained therein. I argue here that the challenges of social and economic

exclusion faced by majority of women can only be resolved by a combination of elements of participation and non-discrimination rooted in the right to development.

Gender inequality in South Africa

The majority of women are in constant struggle to have access to resources that will improve their quality of life (Ndinda, 2009). A number of factors such as class, race and belief system interact with gender to determine the opportunities available to women (The World Bank Group, 2013). In South Africa, gender inequality is significantly embedded in the fabric of the nation that it has become stubborn to eliminate.

In 2000, the seminal case of *Grootboom v President of the Republic of South Africa* 2001 (1) SA 46 (CC) brought into sharp focus the depth of inequality faced by a majority of South Africans in relation to housing. Grootboom was the face of a group of people who were evicted from the land in which they have called home. The case critically engaged with the nature of the obligation of the state in protecting the socio-economic rights of the people particularly the right to housing guaranteed in section 26 of the Constitution.

The condition of the majority of people in South Africa is the driving force to create the kind of society that promotes and protects the dignity of all who live in it. Hence, the creation of a new social order in which values such as equality, human dignity and freedom reign supreme. These values are what the *Grootboom*, *Gumede* and *Barnard* cases sought to protect. In the case of Grootboom for example, the intolerable conditions in which she and hundreds of other people lived having been on the waiting list for government subsidised housing unit for several years resulted in land invasion. The indignity of their condition was exactly what the new social order sought to eliminate. The state has, therefore, obligations in terms of the Constitution as well as international law towards Grootboom and her people to ensure the promise of the new democratic order. The importance of the state's obligation was emphasized by the Legal Resources Centre, the *amici curiae*, in the case. Also, (Sachs, 2007: 18-19; Budlender, Marcus & Ferreira, 2014: 42) expressed it in this way:

“The amicus intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights, but [the LRC intervention] forced us to consider what the nature of the obligation imposed by these rights was. Although we didn't accept the entire argument of the amici, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.”

From the above, it can be argued that government lacked understanding of how to appropriately translate this right into reality. So, although socio-economic rights are constitutionally guaranteed, grasping the importance of practically realizing those rights as fundamental to the new social order remains a challenge. For example, *Grootboom* case grappled with the enforcement of socio-economic rights in terms of section 26 of the Constitution. The section provides for the right of access to housing and the critical elements that must be taken into account were as follows: (a) taking reasonable legislative and other measures; (b) within available resources; (c) to achieve the progressive realization of this right. In addition, the section provides

for protection against arbitrary evictions. The one of the major issues with the *Grootboom* case was the arbitrary manner in which the Municipality evicted them from the place they called home without any alternative housing arrangement. They were 510 children and 390 adults, many of the adults were poor and unemployed. The exclusion of these people in accessing housing has huge implications for their wellbeing and financial development. More importantly, understanding the depth of the social inequality in the South African context is absolutely relevant in understanding the protection of socio-economic right in its social and historical context. Chaskalson P aptly captured it thus, in *Soobramoney v Minister of Health, Kwa Zulu Natal* (1) SA 765 (CC) 1998 [para 8]:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. The conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

To give effect to this constitutional obligation and commitment to ensuring equality, they must be evident in the socio-economic conditions of the people. Hence, the desperate need to provide critical healthcare and shelter to the people who have been waiting for the provision of these basic needs for so long. So, any constraints to their delivery can only serve to reinforce social as well as financial exclusion.

Thus far, the Court struggles to strike appropriate balance on all the varying needs of the majority in the country. The extent of inequality fueled by the social and financial exclusion have enabled the Court to take a pro-poor approach to socio-economic rights. In as much as the Court has the unenviable position of administering social justice in order to put right the injustices of the past yet people like *Grootboom* continued to live under the deplorable conditions 8 years afterwards and in fact, she died penniless without seeing the fruits of the new social order the constitution was supposed to build for the majority of people like her (Budlender, Marcus & Ferreira, 2014). The broader impact of the case was that government changed its housing policy to create an emergency relief for those in desperate conditions which previously, was not the case. The case in some ways acted as a precursor to the pro-poor jurisprudence of the Constitutional Court thereafter in relation to socio-economic rights. The objectives of socio-economic rights protection is to ensure that the dignity of many are restored and that substantive equality and social change are promoted. So, according to Ray (2012) the lives of the disadvantaged have seen some positive change because of the pro-poor approach of the Court in matters related to the protection of socio-economic rights. Although there has been serious concerns on the Court’s approach to constitutionalisation of socio-economic rights (Quinot & Liebenberg, 2012; Dugard (2012)), the remedies granted should be seen as having restored the dignity of many.

The inclusion of socio-economic rights in the Constitution is geared towards establishing an egalitarian society in which social justice is paramount. So, the question becomes; has the constitutionalisation of socio-economic rights brought any changes to the lives of the majority? A cursory look at the decisions of the Constitutional Court in *Joseph, Mazibuko, Golden Thread, and Olivia Road* will stand as a testament to changes in the lives of many, albeit in a very minimalist

way given the depth and extent of the deprivation of the past. Unfortunately, many still live in poverty and squalor depicting the constitutionalisation of socio-economic rights as a pipe dream. Bilchitz (2010) expressed the same kind of sentiment when he explored the approach of the Constitutional Court in protecting fundamental right whilst examining whether the 'constitutional court is wasting away the rights of the poor. Jacob Zuma, equally expressed dismay in the foreword to the National Development Plan signed by government in 2011 that despite plans aimed at devising policy guidelines to improving the lives of majority of South Africans, it has not yet borne much fruit. These sentiments go to the root of matter which is the promotion of inclusive development based on the principle of gender justice.

Gender justice is, therefore, an imperative to ensure that women who often represent the poor, enjoy substantive equality and greater rights through access to resources and participation in development opportunities. Substantive equality intrinsically rooted in gender justice, recognizes that certain groups such as women, children, people with disabilities, and indigenous people have been greatly disadvantaged, previously, and so efforts must be geared towards redressing past injustices (Munalula, 2006). Gender justice thus, is a response to the multiple and intersecting factors that negatively affect women from being full and active citizens of their countries. According to Goetz (2007) gender justice is a normative principle that seeks to eliminate barriers to women's enjoyment of their human rights and full citizenship with participation and accountability as core elements. By modifying attitudes and customs that create inequality and sustain poverty amongst women, gender justice seeks to engender similar values that the transformative project envisages for South Africa; social justice, equality, dignity and inclusive development.

Economic (In)clusion

Economic as well as social inclusion underscores the protection of socio-economic rights of individuals and groups. So, where the majority of the people are unable to access resources and opportunities that improve their quality of life; they are considered excluded. In much of Africa and in South Africa specifically, many people are so excluded, particularly women (The World Bank Group, 2013). The original source of the exclusion emanated from the past history of the country where the majority were racially excluded politically, socially and economically. This grand exclusionary process involving the majority of African people is commonly seen as the direct cause of their poor socio-economic development. Sen (2000) makes use of constitutive and instrumental analysis to create linkages for significant exclusions. According to him, it is not merely the language of the exclusionary process that is relevant but also the adverse impact. For example, direct and indirect loss or deprivation such as where one cannot take part in the life of his community is constitutive social exclusion. In contrast, the relational deprivations that are not in themselves dreadful but can lead to other forms of deprivation which are of instrumental significance. For example, landlessness suffered by majority of South Africans is an instrumental deprivation due to the impoverishment it caused for them.

The deprivation endured by the majority of the people plays a significant role in the depth and enormity of inequality and poverty faced by many. So, I argue that the developmental goals of the country are hugely challenged due to the structural economic imbalance. The position of women is precarious as they are largely excluded from actively participating in their own development. There are many constraints to women's economic empowerment such as inability to own and control assets; unequal access to financial services and illiteracy as well as lack of skills.

All of these challenges have resulted in women being poorly represented in most sectors of the economy particularly at the management level.

The overall impact of this sustained economic exclusion is loss of dignity and citizenship. So, for a number of women, this position puts them in perpetual dependency, unable to live decently and with dignity. For the most part, women who live in the rural areas, unskilled or devoted their lives for their families bear the biggest brunt of this economic exclusion.

The Gumede case exemplifies the untenable position of women. In a subsistent economy as well as patriarchal society found in many African countries, many women devote their time to taking care of the family because they have been in some cases asked by their husbands to do so. This has a huge impact when the marriage fails as noted in Gumede. Although the husband asked her to be a stay at home mother for the greater part of her life, she still made contributions to the assets and property. But, her contributions were not recognized in terms of customary law and she would have been further disempowered had she not taken the matter to the Constitutional Court. Although the case did not emphasize the unequal status of women under customary law, it shed light on aspects of the current law that is in conflict with the constitutional commitment to substantive equality. It is this exclusionary pattern that permeates the very existence of majority of women; undermining their potential and capability and inhibiting their socio-economic development. The RTD, justiciable under the African Charter on Human and Peoples' Rights promotes socio-economic development and seeks to promote gender justice as a continental focus that is crucial for development.

RTD: Addressing substantive equality and economic inclusion

The Right to Development (RTD) guaranteed under article 22 of the African Charter on Human and Peoples' Rights seeks to ensure the wellbeing of the individual as well as the collective wellbeing of the group. This right has courted a number of controversies regarding whether it is a claimable right under international law, the content of the right and who the subjects of the right are (Kirchmeier, 2006). Of great relevance to the arguments in this chapter is that RTD and economic inclusion are mutually reinforcing. In the previous section, the author discussed substantive equality as a basis for the growth and wellbeing of the individual because it takes into account the vulnerabilities of people particularly those of women. In other words, there is a correlation between advancing the wellbeing of women underscored by the RTD, economic inclusion and substantive equality. The RTD is, therefore, critical to addressing the constraints to women's economic empowerment. Any analysis of the RTD takes into account the wellbeing of the individual particularly in the areas of access to education, access to health care, shelter, food and availability of meaningful employment (UN Secretary General Report, 2013). The issues are vital to socio-economic development, inclusive and sustainable growth; and the advancement of gender equality.

The Right to Development (RTD) from an African perspective derives from Article 22 of the African Charter on Human and People's Rights (ACHPR). According to Okafor (2013), the normative strength of this provision lies in its ability to put forward a right that elaborates on the socio-economic development of the people as an individual and collective responsibility of states. One of the most crucial challenges to people on the continent particularly women in South Africa is the realization of their socio-economic rights. In terms of the South African Constitution, socio-economic rights such as property, housing, healthcare, food, water and social security and the right to education are guaranteed albeit with a proviso that 'the state must take reasonable legislative

and other measures, within its available resources, to achieve the progressive realization of each of these rights (ss 25, 26, 27, & 29 of the Constitution).’ It has been difficult for the Courts to fully engage with the substantive issues related to these rights, nonetheless, there have been a considerable number of judgments that are in favor of the disadvantaged and the poor. It is undeniable that the realization of socio-economic rights is pertinent for the transformation of the society, a project on which the future of the country and the growth of the economy depend on. I will argue that the South African context is an example of a society that is yet to embrace the value embedded in the Right to Development. Art 22 of the African Charter on Human and Peoples’ Rights provides:

- All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

This provision makes it undeniably important to protect socio-economic rights. Unfortunately, In South Africa, large portions of the society still lack access to basic needs resulting in many violent protests which in 2015 alone was about 14, 740 protests across the country of which 2, 289 were violent (Ndinda et al, 2011; The Citizen Online, 2015). In many of these situations, it is mainly women and girls that are adversely affected. Women and children constitute the poor, illiterate and rural population who are mostly excluded from the general scheme of things. For instance in 2014 statistics, according to Statistics South Africa, the poverty levels of women are consistently higher than that of men at 53 per cent between 2006 and 2011. In other words, more women are placed in a position of destitution which invariably results in poor health, inadequate shelter and insufficient food for the majority of the family. Undoubtedly, poverty dehumanises people and makes it impossible for them to live dignified lives.

The RTD, therefore, acts as a guarantor in two specific areas. In the first instance as a bedrock for socio-economic rights, it reaffirms the interdependence of human rights and the need to view development as a human rights issue (Kunayakam, 2013). And, in the second place it recognises development as a process that entitles individual as well as collective right to participation, equity, non-discrimination and choice according to the decision of the African Commission on Human and People’s Rights in the *Endorois* case. In other words, the process of development recognises the individual as a right holder on its own as well as within a collective. This buttresses the fact that the protection of individual rights can occur in a group hence the resilience of many African cultural practices. There has been varied opinions on how some negative cultural practices persist despite the numerous human rights that exist. It is mainly in those situations that certain practices when pitched one against the other result in some being justified in certain circumstances. For example, the issue of the family home and the problems associated with the control and alienating the land at the demise of the principal owner, who in most cases, is the father or husband.

Right to Development and substantive Equality

RTD at the substantive level seeks to eliminate poverty and inequality which hampers the socio-economic development of the majority of people particularly women (Bunn, 2012). Having

regard to gender roles, where majority of women do not engage in economic or income bearing activities, it has become imperative to ground their full enjoyment of rights under the RTD rubric. The case of Elizabeth Gumede clearly illustrates the dilemma faced by many women in marriage at the dissolution of their marriage. In such circumstances, their contributions to the financial growth and success of the family cannot be acknowledged let alone quantified in monetary terms for the purposes of equal distribution of property / resources acquired during the subsistence of the marriage. This position renders majority of women incapable of achieving their full potential as partners in development as well as recognizing them as being the central focus of development.

The RTD has its legal foundation from the United Nations Charter and the International Bill of Rights (UDHR; ICCPR; ICESCR) as well as in African Charter on Human and people's Rights (ACHPR), a regional instrument of the African Continent. The essence of the RTD is to engender justice borne by individual states and in solidarity with other nations (Marks & Andreassen, 2006). It is a right that seeks to ensure the full enjoyment of all human rights through popular participation and befitting in the process of development. In its preamble, the Declaration on the Right to Development adopted by the United Nations General Assembly in its resolution 41 /128 of 4 December 1986 defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom". It follows from this definition that development has a wide scope that affects a variety of aspects of people's lives, requiring a multidimensional approach to ensure its realisation. Three critical points derivable from this definition is that the realisation of the right to development requires:

- An enabling environment in which people thrive in their social, economic and cultural lives;
- A development process that is inclusive and participatory;
- Equity in benefits of development.

The elements of non-discrimination, equity and participation promoted by the RTD have considerable relevance to the concept of substantive equality as espoused by the South African Constitutional Court. Substantive equality pays particular attention to the sites of discrimination and by doing so, creates opportunity for those vulnerable to be placed in a better position taking into account the challenges that preclude them from the full enjoyment of their rights. Some of the different sites of discrimination against women intersect with gender, race, status and custom/religion. The challenge remains on how to modify these patriarchal conduct that continuously recreate these sites of discrimination which substantive equality and the Right to Development seek to eliminate.

Substantive equality as developed in the South African jurisprudence focuses on the disadvantaged group by laying emphasis on remedying the socio-economic disadvantage faced by the majority in the society (Albertyn & Fredman, 2015). The appalling socio-economic conditions of the majority of South Africans due to the exclusionary practices of the past are common knowledge. Further, the Justices of the Constitutional Court in the case of *Union Refugee Women v. Director: Private Security Regulatory Authority* suggested that desperate socio-economic conditions impair dignity and also have adverse financial effect on people, in this instance, refugee women. Equally, the presence of poverty and material disadvantage potentially generate social stigma which has the effect of impairing the dignity of women. Hence, the recognition of

differentiation and disadvantage as elements of the right to substantive equality. The essence, therefore, is to eliminate the systemic structure of patterns of socio-economic disadvantage that are deeply rooted in the institutions and structures of society.

This is where the RTD plays a pivotal role. The RTD as a human right strikes at the very heart of the issues prohibiting persons in Africa, particularly women from the enjoyment of human rights. For example, the exclusion faced by many stems from discrimination which fuels poverty and inequality. In other words, the RTD as a human right, is capable of an extensive reach in resolving the multifarious dimensions of the challenges faced by many. Marks and Andreassen (2006) referred to RTD as a “vector of rights” because it articulates the right as one that protects set of goods and values. Its composite nature seeks to ensure that no right declines where at least one right is improved and where the vector deteriorates; it completely erodes the right to development.

The RTD as a human right, therefore, acts as a measure to counter the adverse impact of social and economic exclusions that underline the poverty faced by majority of women which has the tendency to undermine their human dignity. Poverty is rife in Africa and about 1.5 billion people living on less than a dollar a day are women and, for the most part, women are the face of poverty on the continent and around the world according to Kaka (2013).

Poverty and the RTD

Irene Hadiprayitno (2004), succinctly articulated the enormous challenge posed by poverty when she made the correlation between poverty, the right to development and international human rights law. The human person is protected in the enjoyment of human rights as guaranteed in international law relating to civil and political rights; economic, social and cultural rights. Poverty violates the enjoyment of human rights under the two international covenants particularly with regard to right to adequate standard of living, right to work, right to education, right to health, right to protection of the family, right to life and physical integrity, and right to justice. For women, there is no actual development or agency when they are poor. Socio-economic rights protection serve as a base on which the RTD is built in order to eliminate poverty in all its exclusionary ramifications.

Conclusion

Women are excluded from core economic activities that could empower them financially. There are many reasons for this state of affairs such as uneven power relations between men and women, access to resources and opportunities and poverty. Poverty reinforces the exclusion and recreates the cycle resulting in inability of the majority to extricate themselves from the shackles of poverty and exclusion. The transformative nature of the constitution intends to markedly depart from the historical antecedents to usher in an era that is non-discriminatory.

Gender Justice underpinned by substantive equality, therefore, seeks to address this imbalance with a view to providing equality of opportunity as well as equality of outcome. Substantive equality is the first key to unlocking the inequality experienced by many women. In the South African context, to women’s exclusion or inclusion for that matter requires dealing with various interaction of women, race, gender, custom and religion. In other words, it requires a multi-pronged approach to deal with women’s exclusion from social and economic activities. One such approach is found in the concept of the Right to Development which addresses the issues

holistically. RTD does this by promoting participation, non-discrimination and choice all grounded in the centrality of the human person as the beneficiary of the RTD. The Constitutional Court of South Africa takes the lead in developing equality jurisprudence that takes into account the various issues at play that inhibit the realisation of substantive equality, hence, the Right to Development. The Right to Development, therefore, ensures the inclusion of women at all levels and in all spheres of life as a right individually to be possessed and claimed as well as in conjunction as a member of a group.

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