

Engendering Economic, Social and Cultural Rights in South Africa

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Thanks

I would like to thank the International Commission of Jurists (the ICJ) and the Centre for Applied Legal Studies (CALS) for the organisation of today's conversation and for inviting me to open the conversation. As a Commissioner member of the ICJ, I strongly believe that the organisation's fierce defence of international human rights law standards in domestic contexts, as well as the work it does protecting human rights defenders and promoting the rule of law, are vital to the strength of constitutional democracy globally and within Africa.

Introduction

Toni Morrison, a novelist, activist and one of the greatest writers of our time passed away last week. As she has served as an inspiration to so many women around the world, I'd like to begin by quoting her. Morrison says, on reading, writing and living: "if there's a book that you want to read, but it hasn't been written yet, then you must write it."

We as women in South Africa should take Morrison's advice: we must continue to write our own books. We dare not let others do so, because, if history is anything to go by, they are likely to write us out of our own books! Similarly, just as we did in the drafting of the Constitution, in which women were intricately involved,¹ we dare not let others take the lead in its interpretation. To do so risks limiting the transformative power embedded within the Constitution to contribute to the dismantling of patriarchy and the achievement of gender equality. It is to this task of gender-informed constitutional interpretation that I now turn.

The Transformative Constitution

The Preamble to our Constitution makes it clear that the purpose of South Africa's supreme law is to bring about "social justice" by improving the "quality of life and freeing the potential of each person".² In its second line, the Preamble also calls on all of us to "recognise the injustice of past", a stark and early reminder to its readers to keep this past in mind when dealing with the present and planning for the future. This is crucial because, as Cameron J's concurrence in *Daniels v Scribante* reminds us: "the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice."³

These animating purposes and contexts bleed through the founding values of the Constitution, which include respect for inherent human dignity as well "the achievement of equality". They run like a golden thread through the rights in the Bill of Rights and, in terms of section 39 of the Constitution, which mandates interpretation and development of law in line with the "spirits, purports and object" of the Bill

¹ C Albertyn 'Women and the Transition to Democracy in South Africa' (1994) *Acta Juridica* 39; S Meer 'Feminist Contributions, Challenges and Claims' (2013) 27 *Agenda: Empowering Women*

for *Gender Equity* 1, 4. See also S Hassim *The ANC Women's League: Sex, Politics and Gender*

(2014); T Madonsela 'Beyond Putting Women on the Agenda' (1995) 11 *Agenda: Empowering Women*

for *Gender Equity*.

² Constitution, Preamble.

³ *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017), per Cameron J at para 154.

of Rights, must filter into all law in South Africa. Simply put, the law in South Africa must be drenched in constitutionalism and human rights principles and values.

In *Khosa*, in a judgment that I authored, the Constitutional Court noted in summary that "a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational."⁴ This brings us to so-called "socio-economic rights", which are the Constitution's clearest indications of where we should start in determining what "the basic necessities of life" are. Basic necessities, the widespread absence of which, the Court noted in in *Soobramoney* leave the Constitution's aspirations and protections with a "hollow ring".⁵

However, before delving into the nitty gritty of socio-economic rights, because the Constitution is conscious of the different needs of different individuals and groups it protects the "right to be different"⁶ it therefore does not treat all individuals and groups as the same. It celebrates that, as the Preamble says, we are a country "united in diversity". The founding values themselves highlight "non-racialism and non-sexism" in particular and the equality clause outrightly prohibits discrimination on a long list of grounds including both "sex" and "gender". The protection against both sex **and** gender discrimination, consistently with international human rights law, ensures that the Constitution provides protection to a larger category of persons than "women" and "girls" and includes importantly the full range of gender-related minorities including persons from LGBTIQ communities.⁷

From the outset then, before we even get to a discussion about socio-economic rights of women, the Constitution provides a clear backdrop for interpreting and understanding the need for a separate investigation of and solution to ensuring that the state in particular may take "reasonable and effective" measures to "respect, protect, promote and fulfil" women's socio-economic rights.⁸

Socio-Economic Rights

True to these transformative commitments, the Constitution provides a range of protections for provision of basic necessities through a large set of justiciable socio-economic rights. These include, in chronological order, the rights to:

- fair labour practices,⁹
- an environment that is not harmful to health or well-being,¹⁰

⁴ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), per Mokgoro J at para 52.

⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), per Chaskalson CJ at para 8.

⁶ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), per Sachs J at para 59.

⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html>, para 32 reads: "Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."

⁸ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), per Moseneke DCJ and Cameron J at para 189.

⁹ Constitution, s 23.

¹⁰ *Id*, s 24.

- land and legal security of tenure of that land,¹¹
- adequate housing,¹²
- healthcare services,¹³
- sufficient food and water,¹⁴
- social security,¹⁵
- appropriate social assistance,¹⁶
- children specific rights,¹⁷
- basic education and further education,¹⁸ and
- culture and religious practice.¹⁹

It is worth noting too, that in terms of other provisions, the Constitution places duties on the state to provide "basic municipal services". The Constitutional Court has interpreted this to effectively include sanitation, electricity and other basic services such as refuse removal in the package of socio-economic rights.²⁰ All constitutional obligations, including these, must be performed "diligently and without delay".²¹

The Constitution then imposes the primary burden of fulfilling access to socio-economic rights on to the state (which includes the executive, the legislature and the judiciary), though as the Court has reminded us private parties have a role to play too.²² That burden on the state, though varying between what the Court has called "immediately realisable" obligations and "progressively realisable" obligations at very least requires the state to take "reasonable measures" within its "available resources" to ensure that socio-economic rights are "made more accessible not only to a larger number of people but to a wider range of people as time progresses".²³

Adding to the state's obligations are the range of international conventions, which, seeking to allow South Africa to "take its rightful place as a sovereign state in the family of nations" South Africa has signed and/or ratified. This includes, for our purposes most importantly, the International Covenant on Economic, Social and Cultural Rights, (signed in 1994 and ratified in 2015), the Convention on the Elimination of All of Forms of Discrimination Against Women and the African Charter on Human and

¹¹ Id, s 25.

¹² Id, s 26.

¹³ Id, s 27.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id, s 27.

¹⁷ Id, s 28.

¹⁸ Id, s 28.

¹⁹ Id, s 31.

²⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004); *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC) (19 November 2009).

²¹ Constitution, s 237.

²² Id, ss 2, 7-8.

²³ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), per Yacoob J at para 45.

People's Rights. As early as *Grootboom*, even prior to South Africa's ratification of the ICESCR, the Constitutional Court acknowledged that its provisions, as well as the General Comments of the Committee on Economic, Social and Cultural Rights, should at least be considered in "plumbing the meaning" of the socio-economic rights in the South Africa Constitution.²⁴

A final point is that in addition to being a useful resource in interpreting socio-economic rights in the South African Constitution, the ratification of ICESCR clearly brings with it some expanded rights protections. As examples, "the right to work" (Articles 6-8) and the "right to an adequate standard living" (Article 11). Though components of both of these rights are protected by the Constitution, all branches of government are now compelled to grapple with how the ratification of ICESCR may expand even further South Africa's obligations in terms of the range and depth of socio-economic rights. What, for example, are the implications of the right to work in a country burdened by severe unemployment? What does the right to an adequate standard of living mean for the level and coverage of social grants and the National Minimum Wage? These are questions the Committee on Economic, Social and Cultural Rights' Concluding Observations to South Africa now force us to ask and ask seriously.²⁵

We also know, from the outset of the Constitutional Court's jurisprudence, that socio-economic rights are "justiciable" or enforceable in courts. When law, policy or conduct of one arm of the state or state entity falls short of the standard set by the Constitution and international human rights law, the brunt of such failures is felt by the most poor and vulnerable in our society who are often desperate for access to basic services. People in this position in South Africa have the right to approach courts and appropriate domestic, regional and international tribunals for the vindication of their socio-economic rights. The judiciary, in such instances, is often called upon to determine whether socio-economic rights have been adequately protected by what are often colloquially called "service delivery" failures", and must grant effective and appropriate relief which is "just and equitable".²⁶

Courts are called upon to play a complementary (rather than contradictory) role in the process of realising social justice and an improved quality of life. It is the obligation of all three arms of the state to ensure realisation of the rights in our Constitution and when one arm falters, it is the obligation of the other arms to step-up and ensure that state's constitutional obligations are met.

Overall, lawyers, activists (who I will refer to in the language used by the ICJ as "human rights defenders") and the judiciary have done a formidable job in advocating for and adjudicating cases relating to the desperate needs of persons in South Africa.

Nevertheless, poverty, inequality and unemployment remain rampant. Moreover, regrettably, we have not done enough to combat what experts call the "feminization of poverty", which results in women, and poor black women in particular, experiencing the sharper, even less compromising edges of the many daggers of poverty. The indignities faced by women as a result of the neglect of their socio-economic rights are graphic, trauma inducing (what some human rights defenders and feminist activists refer to

²⁴ Id.

²⁵ The Committee's Concluding Observations to South Africa are available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en.

²⁶ Constitution, s 172; *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997).

as 'triggering') and all encompassing. They litter our newspapers and law reports and hang like a heavy cloud over our heads even when they are not specifically named as gendered socio-economic rights violations.

The dire nature of the position of women in our patriarchal society, warrants specific attention. The economic and social transformation, which is promised to all by the Constitution, must be made to mean something for women and girls too. As today's event implicitly acknowledges a "neutral" discussion about socio-economic rights, which fails to understand the specific experiences, realities and needs of women and girls, may unwittingly prop up the patriarchy, which, as the Constitutional Court has acknowledged, "the Constitution so vehemently condemns".²⁷

Women's Socio-Economic Rights

As early as 1995 the United Nations Development Programme acknowledged that "[f]or too long, it was assumed that development was a process that lifts all boats ... and that it was gender neutral in its impact".²⁸ The reality, as all women know, is that being a woman specifically shapes a person's experience of poverty and inequality. Adding to this, as international human rights law acknowledges, different forms of discrimination "intersect" and "compound" to harm women with multiple identities in multiple ways.²⁹ As a result, discrimination based on race, poverty, rurality, sexual orientation, marital status, age and disability, as examples, "compound" gender discrimination faced by women.

Women in South African society, as the saying goes "hold up half of the sky". Indeed, as we will see, probably more than half! We can be proud of the increased number of women in Cabinet and Parliament. But we should equally acknowledge the daily economic, social and emotional burdens women carry throughout South Africa. A list will never do women's incredible contribution to South African society justice, but it helps paint the picture:

- Women remain primarily responsible for childcare, elder-care and housework, while at the same time, being required to contribute to the income of the household through paid work. No economic value is given to these literally life-giving activities and so this form of women's work remains largely invisible.
- Women's income earning work remains disproportionately concentrated in part-time and precarious work (such as domestic work, informal trade, sex work and seasonal farm work),

²⁷ *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997), per Kriegler J at para 80.

²⁸ United Nations Development Programme *Gender and Human Development* (1995) 1 available at <http://hdr.undp.org/en/reports/global/hdr1995/chapters>.

²⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, at para 27. Intersectionality has also been briefly recognized by the Constitutional Court. See *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014) at para 153, per Van der Westhuizen J:

"Privilege often manifests in an individual in a multiplicity of different, intersecting and mutually constructive or destructive ways. One must account for interactions between the different aspects of identity and privilege when reviewing whether an affirmative measure was acceptably implemented. Because Ms Barnard's traits sit at the intersection of privileged and under-privileged identities, she might suffer harm in unique ways compared to members of other groups, designated or not. A woman in her position has probably not suffered the unfair discrimination that black women did, but also not enjoyed the privilege of white men. Her position and history of privilege are undeniably different from that of a black man and may require more promotion in some contexts and less in others."

which generally pays less money and provides less security and benefits. Many such jobs are exploitative.

- Women face a range of discrimination in formal workplaces, including a worryingly high level sexual harassment, and occupations remain highly segregated. "Glass ceilings" which limit women's promotion and progress abound.
- Women also participate in democratic elections at a higher rate than men. Nearly 2.5 million more women than men voted in the recent national elections.³⁰ This despite women having less time to participate in politics and inform themselves as voters.

So, as those who make frequent use of social media might say, "Women are doing all of the things". And we are doing these things despite facing direct discrimination and violence at staggering and unacceptable levels.

Gender-based violence is a scourge on our society, which simply has not been adequately addressed. As the Constitutional Court has repeatedly acknowledged "sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."³¹ Many women live in constant fear. Violence and the threat of violence remain widespread in South Africa, from childhood sexual abuse to marital abuse to sexual harassment in the workplace and rape.

The persistence of violence against women reflects the persistence of continued cultural and social power imbalances in South Africa caused by the many variants of patriarchy that are prevalent. It amounts to violation of women's socio-economic rights on an epidemic level and produces conditions for further violations of socio-economic rights. Furthermore, women's ability to access socio-economic rights is also shaped by the gendered nature of legal, cultural, religious and customary social structures.

Brief practical examples, informed by the work of human rights defenders and public interest lawyers (most often women) working towards the protection of women's rights may be instructive. In an attempt to prioritize the voices of women public interest lawyers fighting for the protection of women's socio-economic rights I deliberately use such women's own words instead of academic commentaries about this work.

Healthcare

Perhaps the most obvious gendered socio-economic right is the right to healthcare. The Constitution specifically protects the right to "reproductive health care"³² and the rights to "make decisions concerning reproduction" and "security in and control over their body",³³ which are of vital importance to all women in the context of the patriarchal cultures that predominate surrounding sex and reproduction.

Despite the progressive legislative framework and judicial decisions regarding women's reproductive autonomy, including abortion, too many women and girls still struggle to access safe abortion services.

³⁰ <https://www.timeslive.co.za/politics/2019-05-08-analysis-how-women-vote-could-make-all-the-difference/>.

³¹ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001), per Ackerman J and Goldstone J at para 62.

³² Constitution, s 27(1)(a).

³³ *Id*, s 12(2)(a)-(b).

Of the over 4000 healthcare facilities in South Africa, a 2017 report of Amnesty International indicates that less than 300 provided access to termination of pregnancy services.³⁴ The inequalities in the public health system more generally mean that poor, rural, black women are most affected. The government's failure to adequately regulate conscientious objection of healthcare professionals relating to administering such services exacerbates the problem of limited access. Sasha Stevenson, SECTION27's Head of Health comments: "while a balance must be struck between religious and reproductive rights, the reproductive rights of women cannot continue to be trumped".³⁵

The difficulty of accessing termination facilities exists in the context of increased numbers of reports of stock outs of contraceptives in public healthcare facilities around South Africa.³⁶ Even when they are available, Thuthukile Mbatha, researcher at SECTION27, explains: "the range of contraceptives provided is not adequate to allow women to sufficiently ensure that they can make informed decisions to protect their reproductive health".³⁷

Moreover, despite the Constitution specifically stipulating, "no one may be refused emergency medical treatment", particularly in rural areas access to emergency medical treatment remains uneven and is sometimes non-existent. A 2015 report of the Human Rights Commission, for example, noted during a hearing held by the Commission in the Eastern Cape "several village elders spoke of the fact that they had never seen an ambulance in their lives".³⁸ This too has a disproportionate impact on women. Community healthcare workers, themselves predominantly women, reported "in anguish" instances of "women dying in childbirth" without any hope of an ambulance arriving to assist them.

The burgeoning private health care sector, which international and domestic law requires the state to regulate in order to protect the right to healthcare, also creates a range of gendered access problems. One example is that 74% of children born to women who are Discovery Health Scheme (South Africa's largest private health insurance scheme) are delivered through C-Sections. This is more than three times the average in the public health sector of 26% and much higher than the average internationally. Medical experts suggest that this comes with serious risks to health of women and their children.³⁹

Housing and Basic Services

It is well established that women are disproportionately affected by the lack of access to basic services, housing and livelihood opportunities in South Africa. Women are directly and disproportionately affected by evictions, which tear the families that women often hold together apart. They are also tasked with the health, education and general care of families and children, and with primary roles related to water, sanitation and hygiene in the home environment.

Homelessness and/or threats of homelessness also increase risks of gender-based violence against women in particular. Frequent failure to provide basic services to occupiers of informal settlements results in women, all too frequently, facing violence and sexual assault in attempts to access

³⁴ Amnesty International "Barriers to Safe and Legal Abortion in South Africa" (2017) available at: https://amnesty.org.za/wp-content/uploads/2018/06/Womens-rights-Briefing-Barriers-to-Safe-and-Legal-Abortion-in-South-Africa-2017_Web.pdf

³⁵ Comment made to ICJ in preparation of this presentation.

³⁶ <https://bhekisisa.org/article/2019-03-01-00-birth-control-injection-south-africa-unplanned-pregnancy-tender-delay-bayer/>.

³⁷ Comment made to ICJ in preparation of this presentation.

³⁸ <https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf> at p 10.

³⁹ <https://www.businessinsider.co.za/discovery-c-sections-natural-births-2019-4>.

inadequately secure sanitation services. Cultural practices of registering primary residences and shared family homes in men's names persist in rural and urban settings despite the Constitutional Court's clear statements about women's rights to inherit, own and control property in cases such as *Bhe* and more recently *Rahube*.⁴⁰

According to SERI's head of research Alana Potter "The courts understand that women are disproportionately affected by socio-economic rights violations but this is not sufficiently reflected in judgments and decisions".⁴¹ Zeenat Sujee, an attorney who litigated gendered basic services cases at the Centre For Applied Legal Studies for many years notes with regret that "gendered dimensions in housing cases are often lost both during the litigation strategy and in the adjudication of the cases."⁴² She identifies a lack of understanding and knowledge amongst attorneys, advocates and judges as one of the primary causes.

Education

With respect to the right to education, barriers to education are frequently specifically gendered. Though the lack of access to good quality education has a devastating impact on children across the country, girls in particular remain vulnerable to various forms of violence in schools, compounded by the lack of private, safe and adequate sanitation facilities, and transport to and from schools. Recent reports indicate that as much as 18% of girl learners fear travelling to and from school, and just over 13% of girl learners fear certain areas within their school grounds.⁴³ Some girls miss school on a regularly monthly basis because adequate menstrual hygiene services and products, as well as safe, hygienic toilet facilities are not available at many schools.

Civil society organisations like the Equal Education Law Centre have noted with concern the number of cases they receive, which highlight the vulnerabilities girl learners encounter in their daily school experience. Despite progressive judgments, gendered forms of discrimination in schools continue, including discrimination against pregnant learners. Statistics reveal that over 97 000 teenage births were registered in 2017. Even more alarmingly, over 1000 births were registered to mothers between the ages of 10-14.⁴⁴ Nurina Ally, Executive Director at the Equal Education Law Centre notes: "pregnant learners are sometimes stigmatised and asked to leave the school once their pregnancy status is made known."⁴⁵

These few examples demonstrate the crucial importance of access to sexual and reproductive health services for girl learners in schools. Our schools should be places of empowerment for the young women of our future, not places of fear, exclusion and discrimination.

Engendering socio-economic rights

⁴⁰ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004); *Rahube v Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).

⁴¹ Comment made to ICJ in preparation of this presentation.

⁴² Comment made to ICJ in preparation of this presentation.

⁴³ Mail and Guardian, 2 August 2019: <https://www.pressreader.com/south-africa/mail-guardian/20190802/page/14>.

⁴⁴ <https://www.iol.co.za/dailynews/news/97-143-teenage-mothers-gave-birth-last-year-says-stats-sa-16813377>.

⁴⁵ Comment made to ICJ in preparation of this presentation.

The gendered nature of socio-economic rights violations has led experts, such as Professor Sandra Fredman, to call for such rights to be "engendered".⁴⁶ The process of engendering rights involves scrupulously undertaking interpretations of rights through a gendered lens. It involves taking into account existing power structures, acknowledging that equal outcomes for women will sometimes require differential treatment. It moves rights protections "beyond the male norm".⁴⁷ In constitutional language this approach requires interpreting socio-economic rights through the lens of the value of the achievement of gender equality and the right to gender equality.

A gendered lens to socio-economic rights is relevant across the board. It should be adopted by all branches of government in development and implementation of law and policy and in the adjudication of disputes about the application and interpretation of socio-economic rights. The process of engendering rights is about ensuring that socio-economic rights reflect the specific needs of women and girls and ensuring that such rights are defined and enforced in manner that ensures they are capable of addressing disadvantage to woman, and most particularly poor black women in South Africa.

Our courts have made progress in cases such as *Welkom* (with regard to pregnant girls in school),⁴⁸ *Klaase* (with regard to the tenure rights of women farmworkers)⁴⁹ and *Rahube* (with regard to women's property rights).⁵⁰ However, simply extending socio-economic rights to women in the same manner as men is not sufficient to address the serious problems facing women in accessing their socio-economic rights. Professor Cathi Albertyn has observed that a simple extension of rights to women, absent an appropriate engendering of them, reduces the transformative potential of socio-economic rights litigation for women.⁵¹

Indeed, it is telling that the process of engendering rights in South African jurisprudence is still at such an early stage of development despite the abundance of female litigants in landmark socio-economic rights cases. As examples: *Grootboom* (Mrs. Irene Grootboom), *Dladla* (Mrs. Nomsa Dladla), *Klaase* (Ms Elsie Klaase), *Daniels* (Mrs. Yolanda Daniels) and *Mazibuko* (Mrs. Lindiwe Mazibuko). Even the now world-famous Treatment Action Campaign case pertained specifically to women's reproductive health rights with the founding affidavit being attested to by Ms Siphokazi Mthathi with a range of supporting affidavits from other young, black, pregnant, HIV positive women.⁵²

⁴⁶ S Fredman 'Engendering Socio-Economic Rights' (2009) 25 South African Journal on Human Rights 410.

⁴⁷ Id, p 419.

⁴⁸ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013).

⁴⁹ *Klaase and Another v van der Merwe N.O. and Others* (CCT 23/15) [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC) (14 July 2016). For sharp criticism of this judgment see: M Hunter & TF Hodgson "Ms. Elsie Klaase and the Constitutional Court's Missing Women" available at: <https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/10-Ms.-Elsie-Klaase-CCR-VIII-2016.pdf>

⁵⁰ *Rahube v Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).

⁵¹ Cathi Albertyn "Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court" (2011) 22 *Stellenbosch Law Review* 591.

⁵² For a criticism of the legal strategy which led to the case not being argued with a focus on gendered healthcare and reproductive rights see: Cathi Albertyn & Shamim Meer "Citizens or Mothers? The Marginalization of Women's Reproductive Rights in the Struggle for Access to Health Care for HIV-Positive Pregnant Women in South Africa" in M Mukhopadhyay & S Meer (eds) *Gender, Rights and Development: A Global Sourcebook* (2008), 27 available at https://www.kit.nl/wp-content/uploads/2018/08/1456_GenderRightsDev-web.pdf.

To address the gendered nature of social institutions, it is not enough to treat women in the same way as men. Instead, a much more substantive approach to equality and "engendering of rights" consistent with section 9 of the Constitution, is required. Women's voices and the gendered nature of their claims must be actively sought out, seriously considered and adequately taken into account in the substantive reasoning of judicial decisions. In this regard it is regrettable that in some instances courts have failed to adequately consider and incorporate in their judgments gendered arguments directly raised by either parties to litigation – most often women litigants – or *amicus curiae*.⁵³

What Is to Be Done?

This brings us back to Toni Morrison's call. There is a book that South African women want to read that has not yet been written. It is the story of the engendering of South African socio-economic rights jurisprudence towards the full and equal enjoyment of socio-economic rights for women and girls in South Africa. It is the story in which the narrative weaves through the shaping and moulding of South African constitutional jurisprudence in a manner that contributes to the elimination of the "feminization of poverty" and the eradication of patriarchy-produced gender inequalities.

As lawyers and human rights defenders, we need to continue to place women's stories before the courts. While the courts have at times failed to acknowledge and/or address the specific context and circumstances of the women we must not stop helping them to their own stories. We must continue ensure women's stories – our stories – are told and insist on courts taking them into consideration. What is at stake is nothing less than the wellbeing and livelihoods of the Irene Grootbooms, Nomsa Dladlas, Elsie Klaases, Yolanda Daniels's and Lindiwe Mazibuko's throughout South Africa.

The Commission for Gender Equality and civil society groups must continue to hold the state accountable to giving effect to section 9(2) and 174(2) of the Constitution by appointing more women judges. Though there has been progress over the years in the appointment of women, we are yet to achieve a judiciary that is reflective of gender composition of the country.

However, mere representation is not enough. To ensure that the judicial officers – of all sexes and genders – are equipped to understand and respond effectively to gender-related arguments, the South African Judicial Education Institute must be supported to expand its existing workshops for judicial officers on socio-economic rights to incorporate a gendered lens. Indeed, gender-discrimination and gender-inequality should be weaved throughout all judicial education efforts.

Finally, both the executive and the legislature must be held accountable in fulfilling their duties in terms of international conventions such as CEDAW and ICESCR. The government must consider and action the recommendations made to South Africa by the Committee on Economic, Social and Cultural Rights in October 2018.⁵⁴ In keeping with such duties, as well as South Africa's constitutional promises, decisive measures must be taken to ensure holistic rights-based awareness campaigns on gender in order to

⁵³ An excellent illustration is the Centre For Applied Legal Studies' amicus intervention in *Dladla*. See https://www.seri-sa.org/images/13_01_2017_Dladla_CC_-_Second_Amicus_Curiae_Heads_of_Argument_CCL.pdf. The submissions appear to not have been taken into consideration by the Court in its judgment. See <https://www.thedailyvox.co.za/constitutional-court-encourages-change-attitude-towards-joburgs-urban-poor-tim-fish-hodgson/>.

⁵⁴ The Committee's Concluding Observations to South Africa are available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en.

eliminate gender-inequality throughout South African society.⁵⁵

This conversation is being held in Women's Month in South Africa and is aimed at highlighting socio-economic violence against women. Women's Month should not be viewed as an opportunity for symbolic and ultimately empty events. It should be taken as an opportunity to reflect on the work done in past, celebrate the strides we have made as women, condemn the problems we currently face and regroup to plan for the long struggle ahead.

In closing, and to thank them for helping write our story, we should also use this time to remember those women who have struggled, often against the odds to bring us to this point. They include:

- The women who risked their lives fighting apartheid and colonialism;
- The women who marched to the Union Buildings in 1956, demanding that the apartheid government withdraw pass laws;
- The women who fought for the introduction of a Women's Charter.
- The women of the broad-based Women's National Coalition who fought to ensure that the Constitution recognised and adequately protected women's rights;
- The women who campaign tirelessly for the women's reproductive rights and against gender-based violence;
- The women public interest lawyers who bring women's socio-economic rights cases to our courts;
- The women in grassroots social movements around the country who continue to claim their constitutional rights and insist that they are written into the story of our constitutional rights jurisprudence;
- The women in homes around the country giving their love and labour on a daily basis to ensure that care work that is so crucial to our families and communities is undertaken;
- The women in townships, urban centres and rural areas around the country who work as domestic workers, community health workers, informal traders and farmworkers and many other precarious jobs. Who sacrifice spending time with their own families in order to provide them with the basic necessities of life in the absence of sufficient support from the state.

To all of these women and all other women throughout South Africa, I join Toni Morrison in saying: keep writing, we have a story to tell.

⁵⁵ UN Convention on the Elimination of All Forms of Discrimination Against Women, Article 5 reads:

"States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."