

DE JURE AND DE FACTO DISCRIMINATION

Source: de Silva de Alwis, R. 2018. *When Law is Complicit in Gender Bias: Ending De Jure Discrimination Against Women as an Important Target of Sustainable Development Goal 5.* Faculty Scholarship at Penn Law. https://scholarship.law.upenn.edu/faculty_scholarship/2233

The South African government's commitment to gender equality is demonstrated by its being a signatory to various international conventions, protocols and frameworks, such as:

1. the Convention on the Elimination of All Forms of Discrimination against Women;
2. the Beijing Platform for Action and
3. the Sustainable Development Goals.

(D)e Silva de Alwis (2018) maintains that "the impact of a convention can be measured by its domestication: the ways in which it [is] integrated and mainstreamed into national laws, policies, programming and used as a tool of change". The barometer of a convention's success is the way in which it is used as an interpretative aid in lawmaking and as a tool to fill in gaps in legislation.

The author demonstrates that de jure discriminatory laws are pervasive, universally, and that the situation is exacerbated by the co-existence of plural systems of laws and customary laws. In many legal traditions, de jure discrimination legalises second class status for women and girls with regard to their public and private lives. Despite the fact that constitutional provisions prohibit discrimination, including in customary law and practice, in South Africa some laws are yet to be compliant with constitutional provisions.

(D)e Silva de Alwis (2018) adds that customary law has the most impact in the area of personal law regarding matters such as marriage, inheritance and traditional authority.

Our Constitution states that customary law must be consistent with the Bill of Rights, however Section 17 of the Children's Act states that a Minister, or any office in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister, or the said officer, considers such marriage desirable and in the interests of the parties in questions. Moreover, Section 12(5) of our Children's Act disallows virginity testing of children under the age of 16. The assumption is that virginity testing is allowed for women and girls over the age of 16.

Family law is a locus of gender discrimination and magnifies the unequal status of women in the economic sphere. Many of the practices defended in the name of culture, violate against women's rights and these include: child marriage, patriarchal marital arrangements which deny women agency and restrict women to the roles of housewives and mothers.

Polygamous marriages (which are permissible under both the Islamic faith and African traditional culture in South Africa) discriminate against women and girls and place them at greater risk of contracting HIV/AIDS.

The author states that polygamy risks excluding additional wives from asserting their marital and inheritance rights and maintains that if laws are to be gender equal, then they must prohibit polygamous marriages under both formal legal and customary systems without exception since subtle but insidious discrimination against women takes place in the name of religion and culture.

GENDER RESPONSIVE BUDGETING AND ECONOMIC OPPORTUNITY

Gender-responsive budgeting (GRB) is different from, but a critical component of, gender mainstreaming. It recognises that traditional budgeting systems are fundamentally patriarchal and fail to recognise the contribution of women to the national fiscus by entrenching the feminisation of poverty through unpaid work in the home, including, but not limited to, caring for small children as well as the elderly and the sick.

A [2018 Mail and Guardian opinion piece on GRB](#) indicates that it is not a new concept in South Africa but that it has gradually lost momentum, especially at national level, where commitments to introduce such budgets were made about 20 years ago. At subnational levels, the practice of gender-sensitive budgeting is low or non-existent. It is held that gender budget initiatives are needed most at municipal level, where gender disparities in basic rights are the most glaring.

A Women's Roundtable, held in Parliament in 2015, focused on the importance of engendering the National Development Plan and how women's empowerment and development can be accelerated through GRB. The paragraphs that follow, italicised, are from the parliamentary report on the 2015 women's roundtable.

South Africa's National Development Plan (NDP) is a blueprint or plan that aims to guide State action to eliminate poverty and reduce inequality by 2030. As the plan driving Government's strategic actions, the NDP is an important instrument for advancing the rights of women and ensuring greater gender equality. The appropriate legislative frameworks and implementation plans must be in place for this to happen. It is however important to note that this alone will not necessarily eradicate gender inequality, as the implementation of the strategies and plans that emanate from legislation will determine its ultimate outcome.

While the NDP makes reference to women and the importance of gender equality, it does not articulate in concrete terms the actions necessary for facilitating gender equity within all spheres of society. This explicit articulation is necessary because this implores all implementing agencies to deliberately outline plans in line with the principles of gender equality, and to attach resources to these plans.

If addressing gender imbalances is a priority, then its importance should be reflected in resource allocation and inclusion in the design of policies and strategies aimed at improving equality for women. A budget is the most comprehensive statement of a government's social and economic plans and priorities.

Gender-responsive budgeting is not about creating separate budgets for women, or solely increasing spending on women's programmes. Rather gender-responsive budgeting seeks to ensure that the collection and allocation of public resources is carried out in ways that are effective and contribute to advancing gender equality and women's empowerment.

Gender-responsive budget analysis, along with legislation, and other practical policy measures can address gender bias and discrimination.

The principles of gender equity must be institutionalised within departments by linking the gender equality aspirations of the NDP with departmental strategic and performance plans and budget. Gender responsive budgets can contribute to women's development in various ways, including by:

- Recognising and valuing contributions made by women to the economy as well as the private sphere (reproductive and domestic arena);*
- Ensuring women's leadership in politics, the economy and other institutions;*
- Transforming the State to focus on the poorest in society and those that most need government intervention;*
- Advancing the focus on macroeconomic issues and increasing advocacy capacity among women's organisations.*

The importance of gender responsive (GRB) budgets lies in their usefulness in assisting to bridge inequalities between men and women and facilitate development by integrating gender issues into macroeconomic policy and budgets. In general, GRB initiatives have not been successfully applied to mainstream budgets, which comprise over 90% of government expenditure. Instead, they have tended to concentrate on allocations targeting women and girls, which comprise a very small proportion of national budgets. The following are principles of good budgeting:

- **Comprehensive**: The budget must cover all the fiscal operations of government, encompassing all public expenditure and revenues, to enable full and informed debate of the trade-offs between different policy options.*
- **Predictability**: Spending agencies should have certainty about their allocations in the medium-term to enable them to plan ahead. Stable funding flows support departmental planning and efficient and effective delivery.*
- **Contestability**: No item in the budget should have an automatic claim to funding. All policy and attached funding should be regularly reviewed and evaluated in order to ensure prioritisation and optimal performance of spending agencies.*
- **Transparency**: All relevant information required for sound budgetary decision-making should be available in an accessible format, and in a timely and systematic fashion. Budget information needs to be accurate, reliable and comprehensive.*
- **Periodicity**: The budget should cover a fixed period of time, typically one year, and the process of compiling the budget should follow a clear and reliable schedule that is agreed upon and published in advance.*

Gender budget analysis is usually divided into three categories. The first category considers whether government departments had clearly targeted gender-based expenditures (such as special education initiatives for girls). The second category focused on whether there is equal employment opportunity expenditure on government employees (such as the provision of crèche facilities), while the third category judged mainstream budget expenditure on its impact on both male and female adults and children. A gendered analysis describes the situation of these groups and assesses whether policies could address their situations. Thirdly it ascertains whether a budget had been allocated to implement gender-sensitive

policies and, if so, whether it had been spent as planned. Lastly, it examines whether the policy and expenditure promotes gender equity.

Not only does this create more legitimacy for gendered budgets, it also means that this process becomes imbedded in the mainstream budget process and information on what departments spend on becomes more available.

A gender budget combines technical knowledge for equitable policymaking, with advocacy and engagement with powerful interests and institutions.

THE IMPACT OF COVID-19 ON WOMEN

In August 2020, the Daily Maverick reported that of the three million job losses in South Africa as a result of COVID-19, two million were held by women. Even before the COVID-19 pandemic, however, young women shouldered additional burdens from childcare and other household responsibilities. They had less time and money to look for work and faced a greater threat of harassment even if they could get a job interview. Young women are also less likely to have some of the tangible attributes that significantly boost the chances of finding work, such as a matric certificate or a driver's licence.

A March 2021 report by Accenture on economic opportunity and the macro-level impact of COVID-19 on women, indicates that women are more likely to work in harder hit and higher risk sectors – such as healthcare, social and domestic work. The decline in women's economic empowerment as a result of COVID-19 will have significant long-term impact. Experience of pandemics like Ebola and Zika suggest that women take longer than men to recover from the impact of a financial crisis. Women are less likely to have significant savings or have put money away for retirement, leaving them at higher risk following periods of unemployment or restricted income.

The World Economic Forum's (WEF) 15th Global Gender Gap Report of 2021, found the global gender gap has increased by a generation, from 99.5 years in 2020 to 135.6 years. The increase is largely attributed to the global COVID-19 pandemic, which has seen women take the lead as essential workers, yet losing jobs in other key sectors.

VIOLENCE AGAINST WOMEN

South Africa has one of the highest rates of rape of any country in the world. Nationwide protests erupted in September 2019 after a high-profile incident. In Cape Town, protesters marched on Parliament and the convention centre that was hosting the World Economic Forum on Africa summit, and in Johannesburg they marched on the Johannesburg Stock Exchange. These efforts then drew worldwide support through social media hashtags like #aminext and #enoughisenough. The protest drew an immediate response from South Africa's president who convened an emergency session of parliament and pledged \$75 million to tackle gender-based violence.

There is low enforcement of laws and low accountability among institutions set up to address violence against women. Nigeria, South Africa, and Tunisia have laws that protect women subject to violence, but rates of violence against them remain high because of the lack of enforcement. In South Africa, for instance, despite the presence of laws against rape, only 8 percent of reported cases in 2012 ended in convictions.

In September 2019, the country experienced an increase in attacks against women, causing the president to call an emergency sitting of parliament where he described the country as one of the most unsafe places in the world to be a woman.

POLITICAL REPRESENTATION

South Africa has quotas to ensure the representation of women in political positions at the provincial and national level. Women's occupation of seats in Parliament is not only important in its own right, but for the effect it can have on the quality and perspective of decision-making. In enacting policy, Legislatures should take into account the gendered implications of its parliamentary oversight and legislative mandate. Having few women decision makers entrenches bias that shows up in the way women are compensated, rewarded, spoken to, and treated in the workplace.