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# Feminist Africa 15

## Legal Voice: Special issue

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# Editorial: Legal Voice: Challenges and Prospects in the Documentation of African legal feminism

Sylvia Tamale, Makerere University and Jane Bennett,  
African Gender Institute, University of Cape Town

"While one should always be sceptical about the law's pretensions, one should never be cynical about the law's possibilities."

Albie Sachs<sup>1</sup>

## Introduction

Feminist struggles in Africa are fought from various fronts, with the law representing but one of them. While law and judicial reforms are not a panacea for gender inequalities, the legal front is a central plank in this struggle as both shield and sword—a shield to protect women against discrimination and the violation of their fundamental rights, and a sword to challenge and overturn unjust sexist practices and to effect fundamental change to the status quo. While by no means a magic bullet the law can indeed be a critical game changer in the gender political landscape.

Not only are legal feminists on the continent actively lobbying for women-friendly laws but they are also filing test cases designed to achieve social change. Legal advocacy for women-friendly legislation goes back several decades in post-independent Africa while the use of strategic action litigation (SAL) is relatively new and only gained serious attention in the late 1990s. SAL is a process in public interest law whereby members of a marginalized group deliberately and proactively take a test case to court for the purpose of establishing a positive legal precedent whose effect goes beyond the immediate litigants. Such litigation has the broader goal of achieving social change. More recently, African legal activism has turned serious attention to issues of gender and sexuality, and a number of cases have been filed in order to shift the frontiers of sexual liberation.

Despite these tremendous strides, a major weakness that continues to affect much feminist activism on the continent is the lack of high quality

documentation. We generally do not give documentation the attention it deserves. And yet, documentation is an important and necessary element in the overall struggle of any social movement; it captures the complexity of historical process and social change and it is from this that people and movements can reflect and learn. So whether victory is won through the enactment and enforcement of new women-friendly laws or via strategic action litigation, it is extremely important to carefully document these processes. The documentation referred to here encompasses much more than simply an archival project. The documentation itself may take the form of paper or electronic (digital) files, microfilms, booklets, newsletters, photographs, audio or video recordings, art, blogs, music or any other media. It is also important that documentation goes beyond academic papers to include more popular and accessible forms. But an equally important and integral element of documentation is communication. This requires a comprehensive feminist dissemination strategy for maximum reach and impact.

Documenting and archiving *both* the processes and the outcomes of the activist work for any social movement serves several purposes, including the following:

- i. Forming a reference record that can be used by future change agents in building the movement and in the forging of potential coalitions; they will know what worked and what did not within a given context. Hence, documentation provides retrospective wisdom, allowing for the “institutionalisation of memory” and saving future activists from “reinventing the wheel.”
- ii. Creating an opportunity for marginalised groups to reflect upon their position and stimulates their collective introspection, discussion and action (what Paulo Freire termed *praxis*). Documentation provides the tools for such groups to visualise and interact with their social problems through various media, spurring them into further action.<sup>2</sup>
- iii. Providing a counter-hegemonic discourse on the position of men and women in society that challenges the ideal gender/power relations. In other words, feminist documentation offers an alternative discourse to the dominant sexist, heteronormative, classist, and racist one. It is one way of feminist conscientising.
- iv. Legitimizing the process of change by demonstrating to the world the detailed and wide range of individuals, groups, activities and resources that was involved in achieving the end product. In this way, documentation may also be used as a future advocacy tool.

- v. Acting as an ideological and organisational bridge between periods of abeyance in social movement activism.
- vi. Highlighting unsung heroines and heroes. Documentation serves to memorialise and celebrate the legacy of ordinary people that did extraordinary things in the struggle for gender equality.
- vii. Forming an invaluable data base for research and analysis in deepening and advancing theory and practice.

The starting point for legal feminist documentation is women's lived experiences with the law. How do women engage with justice/law? What legal discourse have they constructed for themselves while engaging with the various justice systems? What language should be used and what etiquette followed when writing about sexuality? Whose story gets documented and whose is left out? Is the lawyer's narrative similar to that of the litigant? Such documentation allows us to be feminists historically through the narrative analysis of time, space and identity. Documentation is a *process* that involves observation, reflection, interpretation, reviewing, analysis and recording. In other words, it is a political process that has historically involved gendered "gatekeeping" powers and systems.

### **A brief overview of feminist legal activism in African contexts**

Legal feminist activism on the continent came of age during the late 1980s when women lawyers who doubled as gender activists organized to pursue gender equality. Prominent among such national and regional organizations/networks were the various country chapters of FIDA (*Federecion Internacional De Abogadas* or International Federation of Women Lawyers)<sup>3</sup>, Associations of Women Jurists (Francophone Africa), Women and the Law in Southern Africa (WLSA), Women and the Law in Eastern African (WLEA), Women and the Law in West Africa (WLWA), Women Living Under Muslim Laws (WLUML) and Women in Law, Development for Africa (WiLDAF). In 1998 the African Women Lawyers Association (AWLA)—the umbrella body of African women lawyers—was launched to strengthen networking between women lawyers in the region in their common goal to promote gender equality. It must be noted, however, that the brand of legal activism that arose at that time generally skirted around issues of gender and sexuality with the exception of sexual violence. Some of the landmark cases at the time included *Sara Longwe v. Intercontinental Hotels*<sup>4</sup> [Zambia]; *International*

*Criminal Tribunal for Rwanda, The Prosecutor v. Jean-Paul Akayesu*<sup>5</sup>; and the series of post-1994 constitutional court cases from South Africa that recognized various rights of homosexuals, including the recognition of same-sex marriage unions.

At the turn of the twenty-first century, the largely uncharted territory of gender and sexuality began to be more deeply explored by African feminists, led in the main by social scientists. Anxious to deepen our own understanding of the link between women's sexualities and their subordinate status in society, in 2003 the African Gender Institute (AGI) at the University of Cape Town in collaboration with the Institute of African Studies (IAS) at the University of Ghana organized a pan-African workshop on "Mapping African Sexualities". This initiative spurred off several case studies undertaken by a network of African intellectuals, including lawyers. The African Feminist Forum (AFF) that was launched in 2006 in Accra, Ghana provided fresh impetus to efforts to engage in complex analyses of gender and sexuality to legal feminists. A multi-disciplinary model of engaging with the law was extremely important, involving activists that were not professional lawyers.

In Uganda, for example, a series of test cases were filed to challenge state control of women's sexuality: *Uganda Association of Women Lawyers & Others v. A-G* [Const Petition No.2 of 2003] that declared the sexist grounds for divorce discriminatory and unconstitutional; three years later in the case of *Law & Advocacy for Women in Uganda v. A-G* [Const. Petition Nos 13/05 & 05/06], the constitutional court struck down the double standards which existed for men and women in the law on criminal adultery; in the same year, a landmark judicial decision recognized the rights of lesbians to privacy, personal liberty and protection from torture, cruel, inhuman and degrading treatment in the case of *Victor Mukasa and Yvonne Oyo v. Attorney General* [Misc. Cause No. 247/06]. These judicial victories were a remarkable feat that shook the very fibre of Uganda's patriarchal-heterosexist society.

While legal feminists across Africa have succeeded in stirring a significant 'change of wind' to effect women-friendly legislation in the area of land law, domestic violence and sexual violence, little has been done to shift the laws that maintain a stranglehold on women's sexual autonomy and reproductive capacities.<sup>6</sup> So for example, little has changed in the post-independence laws relating to abortion, prostitution and homosexuality. African jurisprudence on homosexuality seemed to have been decided by a series of cases—the Zimbabwean case in which former president Canaan Banana was charged

with homosexuality (1997), the Namibian case of Elizabeth Frank (1999) involving lesbian's rights and the Botswana case in which Utjijwa Kanani (2001) challenged the constitutionality of sodomy laws.<sup>7</sup> Ironically, while Africa is holding onto these archaic colonial laws, countries from which they were imported have largely scrapped them from their statute books. In some African countries, the limit of legal feminists' activism has been tested by the patriarchal state actually tightening sex laws in a bid to deepen its stranglehold on women's sexuality. The recent anti-homosexuality bills in Nigeria, Uganda, Rwanda and Burundi are cases in point. Cultural sexual practices that degrade women such as female genital mutilation, virginity-testing and widow cleansing are still widely practiced around the continent. Indeed, the challenges facing legal feminist activism and documentation are still enormous. Below we outline some of them before discussing future prospects for developing better documentation.

## Challenges

There are several challenges involved in legal activism and documentation by African feminists in the area of gender and sexuality. In addition to what I have discussed above, the following pose additional hurdles to this agenda:

- i. The stigma that is attached to the label "feminism" acts as a serious impediment to the documentation agenda. Society stereotypically believes that feminists are militant men-haters. These perceptions alienate many African female lawyers from activism as they would rather be perceived as moderate "professionals." It is well known that society is neither benevolent nor rational when addressing issues of gender and sexuality.
- ii. Despite the fact that the law is a formidable tool in regulating and controlling human sexuality (particularly when it concerns women) relatively little research has been conducted in this area by African legal feminists. Indeed, legal and gendered analyses of the various sex laws and customs are only beginning to take root on the continent. Capacities thus need to be strengthened in order to achieve the required goals.
- iii. Even the little research conducted by African legal feminists on gender and sexuality does not receive sufficiently wide dissemination. There is a wide gap between legal feminist theory (jurisprudence) and praxis. Legal feminists in the African academy and the activist

practitioners on the ground tend to operate in separate cocoons. Yet theory leads to informed activism. Theory is about understanding the ‘what?’ the ‘why?’ and the ‘how?’ questions about women’s oppression, and about power. When jurisprudence does not speak to activism and when the latter does not inform the former, the unfortunate result is a half-baked and truncated feminism.

- iv. Strategic action litigation in the area of gender and sexuality is also in its infancy. Apart from the fact that SAL is extremely resource consuming, its process is brutal and controversial. Most women’s rights NGOs that engage this strategy take their cases to mainstream lawyers due to limited capacity and the fact that most female lawyers shy away from overly aggressive lawyering. This means that lawyers who argue such cases in court lack the requisite empathy with feminist issues and methods.<sup>8</sup> With the support of organisations such as Interights, this strategy could be pursued with more vigour coupled by a coherent agenda across the continent.
- v. Even where successes have been recorded in SAL, the impact seems to resonate more at the international level than on the ground. Hence while landmark cases like Sara Longwe and Unity Dow<sup>9</sup> have become part of international jurisprudence, they have had little knock-on effect locally and are hardly ever referred to in their home countries where women continue to suffer the discriminations that they sought to strike down. Such disconnect needs to be addressed by the legal feminists on the ground.
- vi. Strategic action litigation is more likely to have an impact in countries with common law jurisdictions (former British colonies) than those with civil law jurisdictions (former colonies of continental European countries). This is because, in making court decisions, judges in the latter system rely more heavily on written codes than those in the common law system which also takes into account former court decisions (precedent).
- vii. Reducing the information that resides in the memories of NGO executive directors and other activists to print/digital record requires investment in time and finances. Recently, when Lillian Mwaura—a founder member of FIDA (Kenya)—wrote a proposal to write a book about the organisational history, potential donors were sceptical about the process, arguing that it was not part of FIDA’s core activities.

- viii. The institutional and language barriers that have perennially afflicted Anglophone, Francophone, Lusophone and Arabophone countries in Africa also impede successful pan-African activism.
- ix. Compared to the rest of the world, the Internet is still a marginal medium on the African continent. Challenges range from the cost of computer hardware and software, to the lack of electricity or the intermittent power supply, to limited bandwidth and its high costs. In addition, many legal feminists are technologically challenged and few can utilize the computer beyond word processing and e-mail. All these have implications on efficient documentation and archiving strategies.

## Future Prospects

Global advances in technology and communication have opened up numerous opportunities and avenues for easy and convenient documentation. The internet in particular erases borders, obviates geography and unlocks many restrictions on sharing information, laws, policies, judgments and other documents.

There are several donor-funded projects on the continent that are part of the global, “Free Access to Law” movement in common law countries. For example, the Southern African Legal Information Institute (SAFLII) collects and publishes legal materials from southern and eastern Africa for free online access [[www.saflii.org](http://www.saflii.org)]. Their collection of laws, superior court judgments and other legal material covers 15 countries in the sub-region. Some of the spin-offs from SAFLII include the Uganda Legal Information Institute (ULII), which publishes online country-specific public legal information [[www.ulii.org](http://www.ulii.org)]. Another Uganda-based online law reporting service is JurisAfrica [[www.jurisafrica.org](http://www.jurisafrica.org)]. Its database includes significant human rights cases (particularly on customary law), laws and other legal materials from Uganda and the rest of Africa.

The Kenyan National Council for Law Reporting maintains online publications of superior court decisions as well as other relevant legal materials [[www.kenyaLaw.org](http://www.kenyaLaw.org)]. The International Centre for the Legal Protection of Human Rights (Interights) maintains a rich online database of significant human rights decisions from both domestic commonwealth courts and from tribunals applying international human rights law such as the African Commission on Human and People’s Rights [[www.interights.org](http://www.interights.org)].

Other useful databases outside Africa that publish important legal materials on Africa include the University of Minnesota human rights library [[www1.umn.edu/humanrts](http://www1.umn.edu/humanrts)] and the University of Toronto law library [[www.law-lib.utoronto.ca](http://www.law-lib.utoronto.ca)]

Although most of these online databases carry general legal materials, they provide an invaluable primary source from which legal feminists can sift relevant documentation materials. But there are a few collections which specifically index cases of gender equality. For example, under their “Jurisprudence of Equality Program,” the International Association of Women Judges (IAWJ) document summaries of select judicial decisions on gender equality, including those from Africa [[www.iawj.org/jep/jep.asp](http://www.iawj.org/jep/jep.asp)], conference papers and useful links to various human rights resources.

Apart from online resources, there are some local digital or printed collections found in small resource centres of legal feminist organisations and offices. Many of these scattered, ephemeral materials fall in the category of “grey literature” and include annual reports, newsletters, proceedings, policy documents, conference papers, bulletins, dissertations and NGO study reports. While a few of these may be available on the organisational websites, access to such grey literature is generally limited and its management leaves a lot to be desired.

While it will take a while before African legal feminists develop electronic databases on the scale of legal databases such as Lexis-Nexis or Westlaw, it is not unrealistic to radically transform legal activism and documentation in the area of gender and sexuality. Some of the first creative steps we could take towards this journey include launching an African Legal Feminist Journal; introducing a legal feminist caucus at the African Feminist Forum (AFF); initiating an African Legal Feminist online Documentation Centre with national chapters that would be linked to the main central website; undertaking nuanced research of legal feminist activism including life stories/narratives, constitutional reform processes, cases settled out of court, abortion, sex work and LGBTI (lesbians, gays, bisexuals, transgendered and intersexed) and enhance cyber activism through building or posting web sites, creating blogs, creating legal alerts on twitter, sharing e-files, podcasts and making linkages among multiple databases.

By publishing material which documents something of the nitty-gritty of legal feminist work, this special issue of *Feminist Africa* aims to contribute to work done by Women in Law in Southern Africa, different national chapters

of FIDA, and the reports of hundreds of legally-oriented NGO's with a whole, or partial, focus on questions of gender and sexuality (such as Ditswanelo, in Botswana), or the Law, Race and Gender project at the University of Cape Town. While we recognize that this collection of pieces offers a very small glimpse of the range of feminist legal work throughout the continent, it is also critical that the arduous, and often poorly understood, battles of strategic litigation, legal reform, and/or legally-oriented advocacy remain within the debates of how, and why, certain questions of inequality remain obdurate. At the same time as countries such as Cameroon, Uganda, Malawi, Nigeria and Uganda face newly intense attempts to re-criminalize homosexual relationships, many of the familiar zones of discrimination against women continue to engage the time and effort of legal activism: access to property, independent control of reproductive health, protection from violence. It is vital that we continually move towards a "deep accounting" of all that has been done, and – of course – all we still have to do.

### **Introduction to Special Issue: *Feminist Africa 15: Legal Voice***

In an article published in the *Stanford Law Review*, in 1990, Angela Harris explores the question of "legal voice" in relation to the potential of strategic litigation to change the realities of racism within the USA legal system<sup>10</sup>. She introduces her argument by noting that "legal voice" is commonly understood to be the "voice" of "We, the People," an authoritative abstraction which gestures at a (long-lost) political moment but reifies this at a point far beyond the notion of an individual (Harris, 1990:585). She calls this version of locution "the first voice", and adds that, of course, within legal processes "legal voice" constitutes a self-referential conversation, where the challenge is to apply – through interpretation – governed by a rigid set of rules – the language of the law to the dilemmas of everyday life. Her article goes on to worry at the essentialism of the category of "women," drawn on by the late twentieth century Northern legal feminists such as the renowned Catherine McKinnon. Harris names these feminists' approach to a homogenized "woman" an effort to create a "second voice" (Harris, 1990: 586). Her own article demands the possibility of a "third voice," capable of representing the experiences of women differentiated through class, race, sexuality, and context, and battles with the history of "the first voice" which is, by very definition, intolerant of the unique and inhospitable to the notion of differentiated relationships to justice.

Difficult as it is, the dilemma with which Harris works is simpler than those with which African legal feminists wrestle. The question of “finding a voice” within legal terrain is complicated not only by the construction of identity (through gender, race, ethnicity or nationality), but simultaneously through plurilegalism, multilingualism, vast contextual differences of literacy and education, and through the fact that many post-independence states have equated legal reform with the meaning of political liberation. Taking opportunities offered by broad legal reform, instituting legally-oriented advice clinics and NGOs, making connection to international women’s rights movements, and fighting particular legal battles have nonetheless constituted a rich layer of African feminist engagement in the past three decades, one that has seen some extraordinary achievements. For example, fifty years ago (and still, in some contexts), a woman raped by a man, whether a stranger or someone known to her, would not have been approached as a legal “entity” in her own right; whatever system of law was in operation, what had happened to her would have centrally involved the men in her family; her assault would have been read and understood as an attack on their dignity and status, and processes of adjudication and resolution would have focused primarily on the repair of that attack. Although the idea of raping a woman as a route to attacking something else (a nation, a community, a family) is far from dead, and although the raped woman legally constitutes a witness in State prosecution (in most contexts), her identity is nonetheless recognized in ways that would once largely have been unthinkable. The shift here is almost entirely due to the unremitting advocacy and legal reform work of feminists, operating at multiple levels: survivors, NGOs, movements, parliamentarians, professional lawyers, judges.

To argue that African legal feminists have achieved a powerful body of work in the past decades is not to deny the realities of ongoing, and sometimes mind-numbing, discrimination. In addition, feminists without legal training sometimes struggle with the law: its language is arcane and dense, its institutions seemingly impenetrable, and its practitioners operating in a class of their own. To gain “legal voice” seems to require either endless translation or transition to a professional space reliant on specialist education and enormous resources. From the notion that “the law” is quintessential patriarchal, and steeped in colonial legacy, to the idea that legal activism is the province only of the elite, legal feminism may find herself relegated to the margins of discussion about contemporary activism or locked into the “constitutional/traditional” dichotomies in ways which refuse nuance.

The articles in this special issue of *Feminist Africa* assume however that African legal feminism involves conversations central to what can be understood by theorising the processes of change. While it is true that these conversations demand patience with details of law, and an interest in the formalities of legal processes, they suggest that the work of pushing the boundaries of what is possible for women's lives and happiness (in their relationships, their work, their motherhood, their properties and goods, their bodies) is occurs across and within myriad places within each of which a courageous, intelligent, and often very feisty, battle for "voice" is on-going. "Legal voice" for African legal feminism is a dynamic, hard-to-track, and intricate mesh of liaisons wrought at a daily level within and between courts, legal advice offices, lawyers' rooms, NGO training centres, village-based negotiations, and within writing itself. This notion of "voice" suggests that legal activism demands a complex grasp of institutions, political interests, "ordinary" experiences, and of the slow and dehumanized violence of being legally insignificant. It simultaneously raises, as Sylvia Tamale notes above, the need to document what it takes to create feminist "legal voice" with sufficient resonance to be audible (especially to other feminists).

In 2010, the African Gender Institute, based at the University of Cape Town, ran a project, supported by the IDRC in Canada, which addressed aspects of the task of exploring the need to document processes of feminist legal reform in African contexts. The thinking was not that no such documentation exists, but that it is – in general – the outcomes of legal advocacy and reform processes which make it into the record, rather than the details of the very complex, and context-specific, dynamics of the process itself. There is research which seeks to capture this complexity (the writing of Julie Stewart and Amy Tsanga is especially valuable here), and the project sought to build on this. The project was linked to two other concerns: one, the importance of offering support to those working in the field of legal reform as feminists, through cross-national dialogue and capacity-building, and two, the need to build the capacity of young professionals, working in the legal and policy-making arenas, with an interest in the integration of gender and sexuality frameworks into their writing skills.

Given that the African Gender Institute's primary expertise lies in the social sciences, rather than the law, a small team of legal advocacy activists, lawyers working in NGO's focused on feminist issues, and lawyers working within multi-national organizations on the continent (such as FIDA and

WLSA) worked to develop case-studies on specific instances of legal reform in African contexts with which they had been involved. The team discussion was very lively, and rigorous feedback was given to the presentations made. There was overwhelming consensus among the group that the project had touched on an area critical to understanding the past few decades of legal reform work around issues of gender justice in African contexts. The small number of participants allowed for frank and challenging discussion and a number of serious questions arose during discussions:

- Although cases such as *Longwe v Intercontinental Hotel* (presented in this issue by Sara Longwe, from an autobiographical position) did set legal precedents for gender equality in Zambia, we do not know (a) how often this precedent is drawn upon (b) how often it is in fact held up in similar cases of public harassment. This question applies to all the ‘landmark’ achievements of legal feminism in the past 20 years, and we need to know much more than we do about the trajectory of so-called “land-marks” for gender justice in the law.
- The commonalities of the legal systems under discussion (arising of course from the Roman-Dutch/British systems) were marked, but what was important to note was that despite this, our countries are unevenly placed in terms of the fundamentals of gender justice. The differences between a context in which the king retains strong political influence (including influence over legal discussion and possibilities for reform) and one in which new constitutional principles are being fought through, in a politically tense environment, are immense – what can be achieved in the name of “feminist legal activism” in one context may not be easily understood in another. This is despite the reality that we fight very similar legal battles for both positive and negative rights.
- The question of women’s movement alliances with feminist legal work deserves much more research. The stories of both Sara Longwe and Doo Aphane (again, both in this issue) suggest that they were very isolated, particularly in the early phases of their activism, and that building movement support for a particular legal battle is not critical to the success of the battle, but is vital in terms of the resilience of the women bringing cases to court as ‘test cases’, and also to the resilience of a favourable court decision in terms of advocacy around a new possibility.

- The issue of teaching and training weighed heavily on participants' minds; despite the rich history of feminist legal reform work, there is little recognition of this in most law school syllabi, and it was recognized that capacity building of young lawyers around the realities and processes of taking up gender justice work is essential.
- The use of gender/sexuality issues as political touchstones, often engaged with through the law, also held our attention. The recent focus on the recriminalization of homosexuality has been driven through legal channels (the Bahati bill in Uganda; the Chimbalanga/Monjezi case in Malawi; the Anti-Homosexuality and Same-Sex Marriage Bill in Nigeria). With the exception of a handful of feminist activists, lawyers who have been willing to engage with gender justice arguments are unwilling to be seen to support homosexuality. The need to draw on feminist experiences of tackling widely unpopular issues (such as the criminalization of marital rape ) to develop a platform of research-backed arguments to withstand the vitriol and violence of legal/political homophobia is pressing.
- We recognized that even as those centrally involved in legal activism of different types, we are woefully thin in terms of deep knowledges of one another's legal contexts, and that we need a strategic review of what has been achieved, how, and with what consequences. We recognize that there are already organizations (such as FIDA, and WLSA, and the prolific work of the Women's Law Centre of the University of Zimbabwe, and of the Law, Race and Gender Unit at UCT) with long 'memories' and much wisdom to share, and that we would like to think through ways of building a research project to create such a review.

Many of the pieces created through this project are now presented here in a special issue of *Feminist Africa*. The pieces from the workshop process collated in the issue are in some cases edited versions of longer studies (which can be accessed on request from the African Gender Institute), and as editors, we have tried to profile a range of studies: those tracking particular legal battles, from legally-focussed organizational locations, those written in the autobiographical voices of women who have undertaken to drive strategic litigation processes in their own name, those describing activist intervention. The articles are often written in a "case-study" style, less conventionally

academic than is usual for *Feminist Africa* but seeking to retain the rigour demanded by profiling the trajectory of legal processes. The decision to do this came from our sense that the material warranted dissemination beyond a feminist circle primarily interested in questions of law. We are interested in feedback on the questions raised by the different pieces on what it means to sustain “legal voice” in contexts where the fight for the recognition of rights as diverse as equal access to land tenure and recognition of the right to live as lesbian occupies our minds, work, and hearts.

## Endnotes

1. Sachs, A. 2009. *The Strange Alchemy of Life and Law* Oxford: Oxford University Press at p. 50
2. Singhal, A., L. Harter, K. Chitnis and D. Sharma. 2007. Participatory Photography as Theory, Method and Praxis: Analysing an Entertainment-Education Project in India, *Critical Arts: A Journal of South-North Cultural Studies* Vol. 21(1): 212-227. Available at: <http://utminers.utep.edu/asinghal/Articles%20and%20Chapters/Singhal-harter-chitnis-sharma-2007-critical-arts-participatory-photography.pdf> (last accessed on September 08, 2010).
3. Most of the FIDA chapters found on the continent are in east and west Anglophone Africa. In southern Africa the common practice is to have a human rights or women’s rights committee within the national legal professional Law Society offices.
4. [1993] 4 Law Reports of the Commonwealth 221. In this 1984 case, Sara Longwe successfully challenged a discriminatory policy held by the Intercontinental hotel that prohibited unaccompanied women from entering the hotel premises.
5. ICCTR-96-4-T (Sept. 2, 1998).
6. The exception is South Africa, which has seen a radical transformation in its legal landscape. The South African Constitution explicitly prohibits discrimination on grounds of sexual orientation.
7. See Horn, N. 2008. Religion and Human Rights in Namibia, *African Human Rights Law Journal* 8(2)
8. This, for example, happened in the recent Ugandan case of *Mifumi (U) Ltd. & 12 Others v. Attorney General & Another* (Const. Petition No. 12 of 2010) where the women’s rights NGO, Mifumi unsuccessfully challenged the traditional practice of bridewealth, associating it with domestic violence. Instead of directly challenging the deeply entrenched practice per se, perhaps it may have been more strategic to focus on and argue against its oppressive aspect that requires a wife to “reimburse” bride price in full in order to gain divorce from her abusive husband.
9. In 1991 Unity Dow successfully challenged the government of Botswana for denying her the right to pass on her citizenship to her children borne of a foreign husband. See *The Attorney-General v. Unity Dow* (Civil Appeal 4/91).

10. Harris, A. P. 1990. Race and Essentialism in Feminist Legal Theory. *Stanford Law Review*, 42, 3, February 1990



# Seeking the protection of LGBTI<sup>1</sup> rights at the African Commission on Human and Peoples' Rights

Sibongile Ndashe<sup>2</sup>

## Introduction

Over the past four years there has been a steadily growing movement of organising for the protection of lesbian, gay, bisexual, transgender and intersex (LGBTI) rights at the African Commission on Human and Peoples' Rights ('ACmHPR').<sup>3</sup> The ACmHPR is seen as the ideal venue for the protection of rights of sexual minorities because of its mandate to protect human rights. The organising has focused on identifying activists who are interested in working in the regional human rights mechanism, expanding the circles of activism by reaching out to mainstream human rights organisations and finding ways of getting the ACmHPR to understand and respond to the violations of human rights of LGBTI people.

## The 39<sup>th</sup> and 40<sup>th</sup> Session of the African Commission on Human and Peoples' Rights: The foundational meetings

Before May 2006 mention of LGBTI rights at the ACmHPR had only been in passing<sup>4</sup> and not part of an organised civil society strategy.<sup>5</sup> Co-ordinated work for LGBTI rights at the ACmHPR began in May 2006 when the International Gay and Lesbian Human Rights Commission ('IGLHRC')<sup>6</sup> in conjunction with the Coalition of African Lesbians ('CAL')<sup>7</sup>, Behind the Mask ('BTM')<sup>8</sup> and All-Africa Rights Initiative ('AARI')<sup>9</sup> sought to investigate the opportunities for advancing activism using the regional human rights mechanism for the protection of LGBTI people<sup>10</sup>. A conscious decision was initially made not to formally engage with the ACmHPR but to establish whether the space to engage with the ACmHPR existed. The meeting focused on providing information about African regional human rights mechanisms and the opportunities and challenges these presented and on looking at the manner in which international human rights has worked to protect LGBTI and

sexual rights. Participants also discussed their national contexts in so far as they relate to LGBTI people.

The meeting was organised to coincide with the 39th Ordinary Session of the ACmHPR in Banjul, the Gambia. Upon hearing that the Cameroon was due to submit its country report for review, the participants had a committee draft a statement that provided details about the situation of LGBTI people in Cameroon, the contents of which was shared with members of the ACmHPR in order to work as a shadow report. At the conclusion of the meeting the participants attended the public session of the ACmHPR. Sybil Ngo Nyeck, a Cameroonian activist, read out the statement, using the observer status<sup>11</sup> of the human rights NGO, Legal Defence and Assistance Project ('LEDAP').<sup>12</sup> During the discussion of the Cameroonian country report three commissioners<sup>13</sup> asked question on issues addressing the violations of human rights of LGBTI people. In particular, Commissioner Tlakula mentioned discrimination against LGBTI people. She also stated that the penal code's criminalisation of consensual same sex practice was not compatible with Article 2 of the African Charter on Human and Peoples' Rights ('ACHPR') and asked whether it was compatible with the Cameroonian Constitution. Commissioner Malila questioned the Cameroonian delegation on the length of the detention period of the Cameroonian 11<sup>14</sup> and whether this was not inconsistent with Article 7 of the ACHPR. He wanted to know about the availability of compensation, among other things. Commissioner Gansou requested further information on the law criminalising sodomy.

IGLHRC held another meeting at the 40th session of the ACmHPR Banjul, the Gambia, in November 2006. Participants at the meeting included a delegation from the Coalition of African Lesbians ('CAL'), Sexual Minorities of Uganda ('SMUG'),<sup>15</sup> Gays and Lesbians of Kenya ('GALCK')<sup>16</sup> and the International Commission of Jurists ('ICJ').<sup>17</sup> IGLHRC and SMUG submitted a shadow report on Uganda. The report provided information on the situation of LGBTI people in Uganda. In particular, it referred to arbitrary arrests, short term detentions, discriminatory laws and policies, and a lack of access to health care services, particularly HIV prevention, treatment and care services.<sup>18</sup> During the ACmHPR's session Uganda presented its country report. Commissioner Mumba Malila asked questions emanating from the shadow report to the Ugandan representative. Among the questions asked by the Commissioner was the status of the continued existence of the penal code which criminalises consensual same-sex conduct and the nature of the violations of Victor Juliet

Mukasa's human rights by the Ugandan authorities.<sup>19</sup> The case dealt with the human rights violations of two individuals who were identified as lesbians and had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court subsequently found that the police had violated a number of human rights instruments.

## Developments at the NGO forum

At the NGO forum of the 40<sup>th</sup> session, Christian Mukosa from Amnesty International presented a report on central Africa.<sup>20</sup> The report included the arrests of the Cameroon 11.<sup>21</sup> In 2005 Cameroonian authorities raided a bar and arrested 11 men. The men were detained without a trial for a period exceeding a year. Some participants objected to the mention of the Cameroon 11 on the basis that homosexuality was un-African.<sup>22</sup>

At the 41<sup>st</sup> session in Accra, Ghana in May 2007 the NGO forum adopted its first resolution<sup>23</sup> explicitly referencing sexual orientation and gender identity. IGLHRC, the Metropolitan Community Church and ICJ worked on a statement that set out the violations of human rights LGBTI people face in Nigeria. In particular the statement focused on the draft same-sex marriage bill. The resolution on human rights defenders adopted at the NGO forum referenced the anti-same sex marriage bill in Nigeria as having the potential to impede on the work of human rights defenders. The ACmHPR did not adopt the resolution with the proposed language.

The 42<sup>nd</sup> session was held in Brazzaville, in the Republic of Congo. Few organisations were in attendance. There were no statements made by LGBTI groups. The women's rights special interest group proposed a resolution on the situation of women's rights in the Southern Africa Development Community ('SADC'). The draft resolution made reference to lesbian and bisexual women. This resolution was adopted by the NGO forum. The ACmHPR amended the resolution before adopting it and removed the reference to lesbian and bisexual women.

At the 43<sup>rd</sup> session in Ezulwini, Swaziland in May 2008, there was a large contingent of LGBTI activists. About a third of civil society who participated at the forum were LGBTI rights activists.<sup>24</sup> CAL submitted its application for observer status. A resolution condemning violence against LGBTI people was adopted by the NGO forum. The women's rights special interest group had a draft resolution on impunity on violence against women. The resolution made reference to lesbian and bi-sexual women. The resolution was however

not adopted by the ACmHPR. People Opposing Women Abuse ('POWA')<sup>25</sup> launched the Raising Feminist Voices Project with the idea that the LGBTI organisations would be a part of that project. CAL and the Forum for the Empowerment of Women ('FEW') were part of it in preparation for the session. The NGO forum established a caucus group on sexuality, gender and human rights. The thematic caucuses often consist of people who are act as focal points for sub-regions. Joel Nana, who was working for IGLHRC and Fikile Vikalazi from CAL were appointed as focal points for Central and West Africa and East and Southern Africa, respectively.

At the 44<sup>th</sup> session in Abuja, Nigeria in November 2008, a further draft resolution was proposed at the NGO forum condemning violence and the culture of impunity of violations of human rights of LGBTI people. A representative of Advocates International,<sup>26</sup> challenged the resolution on the basis that there was no consensus on the issue. A discussion on whether resolutions of the NGO forum should be adopted by consensus or by majority ensued. There were differing views on this. Members of the steering committee proposed to hold the resolution in abeyance until the next session and undertook to make time available at the next session to discuss LGBTI rights in the African human rights mechanism and its relevance to civil society in order to create consensus. In discussions between the activists present, although there was disappointment that the resolution was not adopted, there was appreciation of the idea that the discussion needed to begin in earnest. After the previous resolution it was felt that it was not enough that civil society adopts the resolution without engaging with the content and more importantly how it relates to other thematic areas that are discussed at the session. The opportunity to provide a panel to discuss the issues at the next session was viewed as a way of broadening the support base on the issue.

At the 45<sup>th</sup> session in Banjul, the Gambia in May 2009, the NGO forum provided space for two panels to discuss LGBTI rights. The participation of LGBTI rights activists was made possible by funding from the United Nations Development Programme (UNDP) through Shivaji Bhattacharya. The panels were organised by IGLHRC, INTERIGHTS,<sup>27</sup> POWA, CAL, Centre for Human Rights – University of Pretoria and Global Rights. Hassan Shire, a member of the steering committee, introduced the panels. In doing so, he provided the context of human rights violations against LGBTI people and the importance of civil society to view the issue as fundamentally being about human rights. The first panel, moderated by Joel Nana, from IGLHRC, provided the

context of the human rights violations faced by LGBTI people throughout the continent. Samuel Matsikure from Gays and Lesbians of Zimbabwe ('GALZ') talked about the impact of human rights violations and the criminalization of consensual same-sex practices on the causation of HIV infection, Charles Gueboguo, an academic from the University of Cameroon, gave an overview of same-sex sexual practices in African cultures. Poulina Kimani from GALCK provided an overview on the specific challenges that are faced by lesbians. The second panel provided information on the various identities of the groups covered under the LGBTI initialism and the manner in which various laws impact on LGBTI people. Ralph Monye, a human rights lawyer from Nigeria, provided information on the adverse impact that representing LGBTI people sometimes has on the personal and professional lives of the lawyers. Wendy Isaack talked about the various identities: L G B T and I. In contextualising violence and the other human rights violations that LGBTI people are subjected to, the expectation was not to get civil society to "repent" but to seek a shift from referring to LGBTI rights as moral issues to viewing them as human rights issues. In an informal briefing after the sessions one activist related a discussion with a participant on the NGO forum who still did not "agree with" homosexuality but agreed that the violence had to stop. That was viewed as a success and a start that was hoped for. POWA also launched a book entitled *State Accountability for Homophobic Violence*. The book has contributions from feminist lawyers and activists and is focused on reports of hate crimes against black lesbians and transgender women in South Africa. It was launched by Commissioner Maiga, the special Rapporteur on women's rights.

At the 46<sup>th</sup> session in Banjul, the Gambia in November 2009, no formal event was held. The Eastern Horn Human Rights Defenders presented a statement on the proposed anti-homosexuality bill in Uganda. An informal meeting was held at the Kairaba Hotel. The purpose of the meeting was to assess the strategies of engaging with the NGO forum as well as the ACmHPR and to think about ways of getting the ACmHPR to adopt a decision on the CAL application for observer status. There was a concern that if the ACmHPR was pushed to make a decision before an assessment of the consequences of the change to the ACmHPR's composition the movement may get a decision that it did not like. Two commissioners who were receptive to the protection of human rights of LGBTI people had left. Sanji Monageng, who had been the chair of the ACmHPR, had joined the International Criminal Court and Angela Melo,

who had been the deputy chair, had left to join UNESCO. Two commissioners from Tunisia and Egypt had joined the ACmHPR and their position on LGBTI rights was relatively unknown. There was a discussion at the informal meeting about getting more information about the new commissioners but also about ascertaining the position of the old commissioners in order to make an informed decision on what needed to be done. One of the suggestions was to identify the ones we thought were green and continue the conversations, the ones we thought were amber, to see if they could be made to see how this was a human rights issue and to simply ignore the ones who were red and hostile to the idea until such time that a strategy has been devised.

The resolution of the NGO forum adopted on at the 46<sup>th</sup> session was the most elaborate and expansive on LGBTI rights and called on the ACmHPR to adopt a number of measures. The resolution called on the ACmHPR to do the following:

1. Acknowledge the continuing and increasing incidence of human rights violations, including murder, rape, assault, persecution and imprisonment based on perceived or actual sexual orientation and gender identity on the continent as a problem requiring urgent action;
2. Condemn these acts of human rights violations;
3. Condemn discrimination and exclusion of individuals and communities from the enjoyment of rights and the full realization of their potential because of their sexual orientation and gender identity;
4. Specifically condemn the situation of hatred and systematic attacks by state and non-state actors against lesbian, gay, bisexual, transgender and intersex individuals and, more in general, against any human rights defenders who is operating for the protection of LGBTI human rights in Malawi, Kenya and Uganda, with a particular attention for the draconian legislation under consideration by the Ugandan Parliament;
5. Mandate the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Women and the Special Rapporteur on the Freedom of Expression to coordinate a Special Committee to investigate, document and report on these violations in order to develop appropriate responses and interventions;
6. Create a mechanism to address human rights violations based on sexual orientation and gender identity;

7. Ensure that states put in place mechanisms for access to HIV prevention treatment and care services for everyone regardless of their sexual orientation and gender identity.
8. Strongly urge states to:
  - 8.1 Comply with the African Charter on Human and Peoples' Rights, and other binding international treaties, by repealing laws which criminalise non-heteronormative sexualities and gender identities, such as laws criminalizing sexual conducts between consenting adults of the same sex, or laws banning cross-dressing, and by amending other laws that are implemented with the purpose of persecuting individuals and communities based on their sexual orientation and gender identity, such as laws against indecency, impersonation, and debauchery, among others.
  - 8.2 End impunity for acts of violation and abuse, whether committed by state or non-state actors, by enacting appropriate laws, ensuring proper investigation, arrests and punishment of the perpetrators, and establishing judicial procedures favorable to the victims.
  - 8.3 Protect the right of all people, regardless of their sexual orientation and gender identity, to freedom of association and assembly, freedom of expression, and freedom to participate in civil society and key decision-making organs of government.

The NGO forum also adopted a recommendation which 'strongly urged' the ACmHPR to grant observer status to the CAL.

At the 47<sup>th</sup> session in Banjul, the Gambia in May 2010, LGBTI rights activists attended the first two days of the NGO forum and then held a two day meeting focusing on LGBTI rights. The purpose of the meeting was two-fold, firstly to assess the work that has been done at the ACmHPR since 2006 and secondly to begin a conversation on decriminalisation, which was taking place in various countries with varying degrees of seriousness. The meeting attracted a total of 52 participants. The participants were drawn from mainstream human rights NGOs, women's rights NGOS and HIV/AIDS NGOs.

On the first day, the meeting focused on decriminalisation by looking look at structural features of decriminalisation challenges to try to analyse elements of success and failure. Allison Jernow from the ICJ provided an overview of

the cases where decriminalisation has been successful and where it had not been. Monica Tabengwa provided an analysis of the Botswana situation where decriminalisation has been attempted before but was unsuccessful and the new efforts to launch a new legal challenge. There were presenters who brought in a comparative perspective from the lessons learnt in India during the Naz Foundation case and the ongoing work in the Caribbean to address the criminal laws that criminalise consensual same sex. Arvind Narrain from India and Maurice Tomlinson from Jamaica addressed provided the contextual analysis of their domestic contexts respectively.

The second day was an assessment of the work that had been done at the ACmHPR and to identify new strategies and activities to continue with the work. Wendy Isaack started out by introducing the ACmHPR and provided an overview of how the system works. Joel Nana, who at the time had moved from IGLHRC to become the director of African Men Sexual Health and Rights ('AMShE<sup>R</sup>')<sup>28</sup> provided a historical account of the development of LGBTI activism at the ACmHPR. Stefano Fabeni of Global Rights and Maurice Tomlinson provided a comparative perspective on the activism at the Organisation of American States ('OAS'). The work at the OAS involved lobbying member states to take progressive positions on LGBTI, and with more recent success in getting the resolution on sexual orientation passed at the OAS it encouraged the movement to start thinking about finding ways to engage with the African Union ('AU'), the OAS' regional counterpart. There were lessons about organising activists who were active in domestic advocacy programs to make linkages with their work and to get them interested in regional advocacy. One of the objectives for the meeting was to identify activists who had an interest in working in the regional mechanism and to request them to be part of an ongoing core group that works at the ACmHPR and to provide training and ongoing support. In that session Frans Viljoen, Director of the Centre for Human Rights at the University of Pretoria, talked about the development of the discussion document<sup>29</sup> which civil society formations had worked on in conjunction with the ACmHPR. Steve Letsike from CAL provided the application for CAL's observer status, which had become an issue that the activists can coalesce around.

Although there were many participants present, it was not possible to have all of them in the room in one time. Funding had not been made available to fund all participants who had wanted to come to the meeting. The organisers worked with other mainstream human rights organisations who were attending

the session to get their participants to attend some of the sessions of the meeting in an attempt to build critical mass and to get many people to understand the work that has been taking place at the ACmHPR. Some activists were in Banjul to attend sessions organised by Human Rights Development Initiative, Amnesty International and The Eastern and Horn Africa Human Rights Defenders. UNDP still made funding available to fund nine participants. Whilst the meeting was able to achieve the critical mass, the absence of participants in order to attend to the other work that they were in Banjul for had a disruptive impact on the meeting. The meeting tried to identify activities that activists could work on at a country level that would be supportive of the work at the ACmHPR. A computer was placed in a central point with a page listing various activities. Participants were required to insert their organisations' names on the page with a view to establishing which services including legal aid, community organising, working with politicians, lawyers, mainstream human rights organisations, were available in various countries.

### **The discussion papers on sexual orientation in Africa**

Informal conversation between some of the activists who were working in the regional human rights mechanisms and some of the commissioners who were sensitive to the violations of human rights based on sexual orientation led to the idea of development of a discussion document.<sup>30</sup>

A legal officer of the ACmHPR was requested to draft of the discussion document. Various organisations including the Centre for Human Rights, University of Pretoria, IGLHRC, CAL and others contributed towards its development. The discussion document was intended to be an internal paper for information and discussion by the commissioners. The discussion document highlights the relevance of sexual orientation to the ACmHPR, while recognising the controversial nature of the subject, and suggests ways in which the ACmHPR can proceed.

The discussion document addressed five issues. In the first part focusing on the relevance of the issue to the ACmHPR, it provides an overview of the situation of individuals whose rights are violated based on their sexual orientation, the existence of criminal laws criminalising consensual same sex sexual conduct, the vulnerability of human rights defenders working to protect sexual minorities, the failure of mainstream civil society organisations to speak out against abuses of sexual minorities and the vilification of gay and lesbian people by political and religious leaders.

The second part locates the right to equality on the basis of sexual orientation within the ACHPR. It highlights the idea that the universal application of rights provided for under the ACHPR by looking at the various formulations, 'every individual', 'every human being' 'every citizen' and 'no one' may be restricted. It asserts that the prohibited grounds of discrimination listed under Article 2<sup>31</sup> are not exhaustive and therefore should be expanded to include sexual orientation. In addition it claims that the ground of 'sex' already provided for in the list, should be understood to include sexual orientation.

The third part pre-empts arguments around limitations of rights on the basis of sexual orientation. It identifies factors listed in Article 27<sup>32</sup> that requires 'due regard to the rights of others, collective security, morality and common interest' as something that could be invoked as a basis for limiting the rights of gay and lesbian people. It continues to make the argument that a limitation cannot erode such that the right becomes illusory and that the limitation must be proportionate and necessary to the interest that states seek to protect.

The section further identifies three potential arguments that can be used to challenge the argument that Article 27 is inconsistent with the protection of gay and lesbian people. The argument that the rights of lesbian and gay people are inimical to the African value system and African family values is weighed up against tolerance for diversity and minorities. The argument that the morality that member states seek to uphold is consistent with the views of the majority, majority morality, is distinguished from political morality and constitutional morality. In the absence of domestic protection, 'Charter morality' requires the ACmHPR to extend its protective shield to include sexual minorities. The last argument deals with the prevention of HIV and denies the contention that criminalising same-sex conduct creates a buffer against the spread of HIV and it points out that HIV transmission occurs overwhelmingly through heterosexual conduct. It proceeds to discuss how the existence of these criminal laws impedes access to information and health services for men who have sex with men who face an increased biological vulnerability.

The discussion document concludes by pointing out the variety of tools and mechanisms that are available to the ACmHPR. The adoption of resolutions, the establishment of working groups and holding of seminars were some of the activities suggested.

In May 2010 during a discussion between some of the activists and the

staff at the ACmHPR it appeared that there were two discussion documents, the first one being the one that civil society formations had developed and the second one being the one that the secretariat staff had worked on which was exclusively prepared by the ACmHPR. The latter discussion document was not made available to the public and was only intended for the private discussion of the ACmHPR, and its distribution was therefore restricted. The agenda of the private sessions of the ACmHPR had an agenda item 8f, draft paper on sexual orientation. Although this paper was not publicly released, it can be noted that it arrived to the same conclusions as the other discussion document, namely that the ACHPR provides a sufficient basis for the protection of people who face human rights violations on the basis of their sexual orientation, whether perceived or real.

### **CAL's application for observer status**

CAL is one of the organisations that applied for observer status at the ACmHPR at its 44<sup>th</sup> Ordinary Session held in Ezulwini, Swaziland, May 2008. Although there was no formal correspondence, from the time the application was lodged until the decision was communicated, the CAL application became a rallying point for LGBTI rights activists.

In November 2008 at the 44<sup>th</sup> Ordinary Session, the ACmHPR deferred the CAL application to the 45<sup>th</sup> Ordinary Session in May 2009 stating that they needed more information on sexual orientation and gender identity in order to inform their decision and that they must still discuss the matter during the private session. In May 2009, the ACmHPR deferred the application to the 46<sup>th</sup> Ordinary Session in November 2009.

During the 46<sup>th</sup> session agenda item dealing with the granting of observer status, Commissioner Pansy Tlakula introduced the CAL application. She stated that she did not see any impediment to the granting of observer status as the application met the criteria for eligibility and therefore recommended that CAL be granted observer status before the ACmHPR. There was a discussion after her recommendation. The Ugandan state delegates rejected the recommendation and threatened to leave the ACmHPR if observer status was ever granted to CAL. One of the Ugandan delegates further undertook to refer South Africa to the African Court for passing laws which were inconsistent the ACHPR. Other commissioners also opposed the recommendation and argued that sexual orientation and gender identity are not guaranteed rights in the ACHPR. The application was again deferred to a private session in May 2010

at the 47<sup>th</sup> Ordinary Session.

At the beginning of the 47<sup>th</sup> session, during one of the breaks, an invitation was extended to the LGBTI lobby attending the ACmHPR to attend a private session with the commissioners in order to have a discussion on LGBTI rights. It was not clear what the purpose of the meeting was. There were two discussion documents which set out the basis of the protection of gay and lesbian people under the ACHPR. Most of the lawyers and activists present were of the view that this would be an appropriate conversation to have. The invitation alluded to the CAL application, which at this stage had been postponed again. The view was that it would be inappropriate to merge the two processes as granting CAL observer status depended on whether they met the criteria for eligibility and was not linked to the discussion document.

The delegation for the private session consisted of the author, Steave Nemande from Alternatives-Cameroun, Joel Nana from AMSHeR and Monica Tabengwa from Lesbians, Gays and Bisexuals of Botswana ('LEGABIBO').<sup>33</sup>

In going to the meeting the delegation was unclear about the purpose and format of the discussion. The process was unprecedented and the nature of the information required was also unclear. Commissioner Pansy Tlakula explained the purpose of the meeting as a discussion that will provide information to members of the ACmHPR on issues relating to sexual orientation. The presentation by the delegation started by pointing out that despite how the issue has been framed in the various forums, the ACmHPR were not being asked to confer a new set of rights. However, what was being asked was for the ACmHPR to fulfil its mandate to protect rights guaranteed under the ACHPR. Although the term "LGBTI rights" is often mentioned, it was noted that this was done in order to highlight that the rights of the LGBTI persons are human rights and that members of the LGBTI community are entitled to be protected under the ACHPR in the same way that one talks about women's rights. The ACmHPR has been consistent on its mandate to protect the rights guaranteed under the ACHPR. The ACHPR has out of its own accord sought to protect the rights of LGBTI persons. It was then argued that intellectually, the ACmHPR has recognised and accepts its mandate to protect the rights of LGBTI persons. The presentation provided an overview of how various provisions of the ACHPR are consistent with the idea that LGBTI persons are protected under the ACHPR.

It was put to the ACmHPR that if this matter were to be a discussion, for the delegation to be able to respond to the concerns of the ACmHPR in

so far as the protection of LGBTI people were concerned, the rationale for the conversation needed to be clarified. If there was an acceptance that the ACHPR itself did not impose a blanket prohibition on the protection of the LGBTI people then the ACHPR needed to be able to answer two fundamental questions if there were further doubts about using the ACmHPR to protect LGBTI people: firstly, which rights under the ACHPR should not be applicable to the LGBTI community? For example, does violence inflicted on a lesbian woman cease to be a violation of the ACHPR if the sexual orientation of the victim is revealed? Secondly, if the ACmHPR were to take a view that the rights of LGBTI people needed to be curtailed, what is the rationale for this and the extent of the curtailment of those rights?

The delegation pre-empted what some of the possible concerns for the ACmHPR may be. CAL's application for observer status was highlighted as one of the issues that the ACmHPR seemed to have been struggling to make a decision on. The delegation went on to mention that CAL is an organisation that works to protect the rights of LBT women. It complied with the criteria for eligibility. To the extent that 'homosexuality' was a concern to the ACmHPR, an emphasis was placed on the fact that CAL seeks to advocate for the rights of a group whose existence does not violate any laws of the member states to the ACHPR. Being a lesbian is an identity that is not inconsistent with any law. It was pointed out that during the past session of the ACmHPR there had been statements made on the discrimination suffered by LGBTI people and it is now common knowledge that there are numerous human rights violations that lesbians are subjected to for no other reason other than their being lesbians. These violations include rape, forced marriages and murder. Various special rapporteurs including the special Rapporteur on the rights of women at the recent NGO forum continue to urge civil society formations to submit shadow reports and to let the ACmHPR know of violations when they occur in order to enable the ACmHPR to carry out its protective mandate. CAL has been set up to do, among other things, document the violations that attempt to "disappear" lesbians. It is an organisation that seeks to gain observer status as an effort to bring issues that affect lesbians to the ACmHPR and make statements about the violations.

The concerns that the ACmHPR could have about majority morality were also pre-empted. As a starting point, it was argued that the ACmHPR needed to accept that as African people, morality was as diverse and varied as the continent itself. This did not mean that anything and everything becomes

acceptable but there was a need for the ACmHPR to give content to those values and norms that the continent should aspire to. The morality and our values cannot be determined by what the majority thinks but rather on what the ACHPR espouses as values. Although the views of the majority were not entirely irrelevant, the ACmHPR itself has made it clear that the ACHPR's interpretation cannot be conclusively defined with reference to the views of the majority, even as they are reflected by Parliament, acting on their behalf. In *Legal Resources Foundation v Zambia*, the ACmHPR held that justification of limitations cannot be derived solely from popular will: 'Justification ... cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.'<sup>34</sup>

Reference was also made to Article 28<sup>35</sup> of the ACHPR which imposes a duty on every individual to respect and consider his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. That has to mean an obligation to respect difference and promote diversity. The presentation by the delegation was a plea to the ACmHPR to understand that it was not being asked to invent something new but that the protection of LGBTI people falls squarely within the ACmHPR mandate. The delegation concluded and then requested that the ACmHPR share their concerns.

After the presentation the chairperson of the ACmHPR asked members of the ACmHPR to ask questions. There were nine commissioners<sup>36</sup> who were present during the discussion. Commissioner Bitaye was the first to comment and he was very clear that the ACHPR did not protect LGB persons. His intervention focused on the social aspects of what he considered to be the adverse impact of same-sex relationships. He questioned the value of same-sex relationships to society, arguing particularly that they did not allow for procreation. In response to his interventions it was pointed out that what the CAL application was asking for was only observer status.

Commissioner Atoki was concerned about the framing of LGBTI rights as she could not find a provision that applied to LGBTI people in the ACHPR. She explained that the concept of LGBTI rights would have the consequence that any other group could come to the ACmHPR and ask that they be protected, including thin people organising to have an organisation of their own. She pointed out that the "founding fathers" of the ACHPR did not envisage protection for "this group". She read from the preamble of the ACHPR "taking into consideration the virtues of their historical tradition and the values of

African civilization which should inspire and characterize their reflection on the concept of human rights". Commissioner Tlakula asked the delegation to explain the identities in the LGBTI initialism. Commissioner Atoki wanted to know whether CAL worked to protect lesbians or to promote homosexuality. Commissioner Malila referred to Article 28 of the Charter and said that there was another possible argument under Article 27(2) which referred to the duty of the individual to have due regard to the rights of others, collective security, morality and common interest. He wanted a comment from the delegation. Commissioner Yeun posed a similar question somewhat differently; he accepted the developments at the United Nations including *Toonen v Australia*<sup>37</sup> but wanted to know what the delegation thought about how the African human rights systems needed to give content to this issue given the emphasis on the protection of human and peoples' rights. The discussion took a little over two hours.

The letter communicating the decision to deny CAL's observer status is dated 20 May 2010. The decision was taken four days after the meeting. This letter was faxed to CAL on 25 October 2010. The letter does not provide reasons for the refusal. Reasons were however provided by the ACmHPR in its activity report to the AU where it was noted that CAL does not work to protect rights guaranteed under the ACHPR. Upon receiving the letter CAL sent out a call to action to civil society asking them for support by sending letters of protest to the chair and vice chair of the ACmHPR.

At the 48th Ordinary Session in Banjul, the Gambia in November 2010, CAL and its partners requested other civil society formations that had observer status with the ACmHPR to use their observer status to make statements during the public session denouncing the decision of the ACmHPR. Some organisations made full statements setting out why the decision of the ACmHPR was objectionable. Others included paragraphs on their statements dealing with the CAL observer status. No fewer than eighteen organisations<sup>38</sup> denounced the decisions. The statements, letters of support and articles from organisations and individuals were later published in *Pambazuka* as a special issue.<sup>39</sup>

## Conclusion

For some, the relevance of the ACmHPR work remains unclear. There are questions of the utility of the mechanism: who takes them seriously? There are questions on the relevance of the work for the activists who are involved

in activism at country level. I would argue however that the importance of the ACmHPR to the development of this area of work the continent can never be overemphasised. The ACmHPR is the bearer of standards on for the continent on human rights. The African Charter entrusted the promotion and the protection of human rights to the ACmHPR. If there is any space worth investing in, on the regional sphere, it has to be the ACmHPR. Any advocacy with the political bodies on LGBTI rights that ignores or fails to recognise the importance of engaging with the ACmHPR is doomed to fail. The ACmHPR can provide advisory opinions and make recommendations to governments<sup>40</sup>. The ACmHPR will have to make decisions that are unpopular with member states. Their obligation is to set the standards and then proceed to hold the states accountable. If the AU seeks an opinion on the justiciability of LGBTI rights under the African Human Rights systems, they will have to go to the ACmHPR. The ACmHPR provided an advisory opinion on indigenous peoples' rights to the AU<sup>41</sup>. This opinion was made necessary because of the adoption of the UN declaration on indigenous peoples' rights. In the same way, the discussion that are taking place at the UN have implications for the work of the ACmHPR, Resolutions and guidelines adopted by the ACmHPR, on other issues, have also been used by civil society groups for advocacy purposes at domestic level.

The doubts on the usefulness of the ACmHPR have been partly responsible for the lack of funding for the ACmHPR. This has had an impact on the progress of the work. Many participants get to the ACmHPR not to attend the LGBTI session but through other programmes. At present there is no organisation that has assumed co-ordination of the work or ensuring that there is work done inter-session. The co-ordination largely depends on the organisation that is leading a particular session or is able to provide funding for hiring the room and paying for some external participants.. Travel grants have been made available by UNDP for the past three sessions. The absence of a co-ordinator has meant that some of the strategies and activities that have been identified have not been pursued because none of the partners have capacity to add this extra work on their existing programmes.

Most of the activists get to the session to work on other thematic areas that they are funded for, largely the human rights defenders networks and the women's rights work. Whilst this is largely a positive development in terms of mainstreaming the work, activists who specifically funded to attend other parallel meetings are sometimes not available to meet and spend most of their

time doing the work that they have been funded to do.

With the support of mainstream human rights organisations growing, it is hoped that many Africa based NGOs will be strong allies of the movement. In the past, North based NGOs have provided support for the nascent movement. These included a mixture of LGBTI specific and mainstream human rights NGO. An increasing number of both LGBTI specific and mainstream human rights groups based on the continent have embraced the LGBTI rights movement at the ACmHPR and this was evidenced by the number of NGOs that readily supported CAL in denouncing the decision of the ACmHPR not to grant it observer status.

The best successes over the past five years have been in creating visibility and increasing awareness. It is not unheard of for activists to encounter “confessions” from people who have never met a gay person before. Similarly, whilst the presence of transgender activists was initially a subject of intense curiosity the ability and willingness of activists to work on issues other than LGBTI rights has helped to entrench the movement in civil society. This was an objective of the organising, that activism required a “give and take”. It is not only about the activists seeking ways in which other groups could be supportive of LGBTI issues but how activist can support other causes and create allies with groups which are not traditional partners of the LGBTI movement.

The support of the NGO forum and particularly the leadership of the steering committee helped to set the tone for the rest of the forum that LGBTI rights were human rights and therefore not negotiable. At the 47<sup>th</sup> session one participant suggested that he would charter a boat to take all gay and lesbian people to back Europe where they come from. The NGO forum took this as such a serious issue that they mandated a development of a code of conduct for the participants of the forum.

An LGBTI specific organisation has been granted observer status by the ACmHPR<sup>42</sup> and there are other mainstream human rights organisations that work on LGBTI issues in ways which are very explicit whose observer status is not threatened by the decision not to grant such a status CAL. Despite the major setback presented by the refusal to grant CAL observer status, the movement for LGBTI rights can only go forward as retreating is no longer an option for the groups working there. The ACmHPR remains one of the few viable spaces for advancing human rights of LGBTI people.

## Endnotes

- 1 LGBTI is used as a catch all for the issues and interests that the informal coalition would like to work on. Other organisation use sexual orientation and gender identity and others work only on lgbt issues. The essence of the work has however focused on sexual orientation. There have been discussions on how the collective can bring all the issues impacting on the various groups but there has not been a lot of work done.
- 2 Sibongile Ndashe is a lawyer at Interights. She writes in her personal capacity. Wendy Isaack and Joel Nana provided information and helpful comments. Dennis Wamala from Ice-breakers, Uganda also provided information.
- 3 The African Commission on Human and Peoples' Rights is a body made up of 11 independent human rights experts. It is a body established under Article. 30 of the African Charter on Human and People's Rights. It is tasked with the twin mandate of protection and promotion of human rights in Africa. The Commission sits twice every year for a period of two weeks per session in May and November. The Secretariat of the Commission is in Banjul, Gambia. The sessions of the Commission are preceded by a three day gathering of civil society formations organised as the NGO forum of the African Commission on Human and Peoples' Rights. Other civil society organisations use this opportunity to organise parallel meetings during the sessions in order to draw from the diverse expertise and people who are often in attendance.
- 4 At the 18<sup>th</sup> session in Praia, Cape Verde in October 1995 an exchange between the then chair, from Gabon, in a discussion about expansion of prohibited grounds for discrimination listed under the African Charter on Human and Peoples' Rights commented that discrimination on the basis of sexual orientation was not protected under the Charter. Chidi Odinkalu, then a legal officer with INTERIGHTS countered that the chair was only expressing a personal opinion.
- 5 In 1994, William Courson instituted proceedings at the ACmHPR against Zimbabwe for criminalising consensual same sex between consenting adults. The communication was withdrawn and the ACmHPR decided not to pursue the matter.
- 6 The International Gay and Lesbian Human Rights Commission (IGLHRC) is a leading international organization dedicated to human rights advocacy on behalf of people who experience discrimination or abuse on the basis of their actual or perceived sexual orientation, gender identity or expression. See <<http://www.iglhrc.org>>.
- 7 The Coalition of African Lesbians is a network of organisations committed to African lesbian equality and visibility. See <<http://www.cal.org>>.
- 8 *Behind the Mask* is a communication initiative around LGBTI rights and affairs in Africa. It publishes a website magazine that gives voice to African LGBTI communities and provides a platform for exchange and debate for LGBTI groups, activists, individuals and allies. See <http://www.mask.org.za>.
- 9 All-Africa Rights Initiative is a network of LGBTI organisations across the continent.

- 10 IGLHRC 2006 Annual Report <<http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/25-1.pdf>>.
- 11 The ACmHPR allow non-governmental organisation who have been granted observer status by the ACmHPR to make statements on a host of human rights issues during the public sessions.
- 12 The Legal Defence and Assistance Project (LEDAP) is a non-governmental organization of lawyers and Law professional, engaged in the promotion and protection of human rights, the rule of law and good governance in Nigeria. See <<http://www.ledapnigeria.org/>>.
- 13 Mumba Malila, Special Rapporteur on Prisons and Conditions of detention in Africa, Reine Alapini Gansou, Special Rapporteur on Human Rights Defenders and Pansy Tlakula, Special Rapporteur on Freedom of Information in Africa.
- 14 See page 3 and footnote 20.
- 15 SMUG is a network of lesbian, gay, bisexual, transgender and intersex people's organizations based in Uganda. See <<http://www.sexualminoritiesuganda.org/>>.
- 16 GALCK is an umbrella organisation that consists of six member lesbian, gay, bi-sexual, transgender and intersex organizations; Minority Women in Action (MWA), Ishtar MSM, Gay Kenya Trust (GKT), Transgender Education and Advocacy - TEA, Persons Marginalized and Aggrieved (PEMA Kenya in Mombasa) and Artists For Recognition and Acceptance (AFRA-Kenya). See <<http://galck.org/>>.
- 17 The International Commission of Jurists is an organisation that is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. See <<http://www.icj.org>>.
- 18 *Outspoken*, IGLHRC, Winter/Spring 2007 edition.
- 19 *Mukasa and Oyo v Attorney General in Victor Juliet Mukasa and Yvonne Oyo v Attorney General* (Misc. Cause No.247 of 2006).
- 20 The NGO forum has a session where updates of the human rights situation from the various regions of the continent are presented.
- 21 On 11 October 2006, the United Nations Working Group on Arbitrary Detention declared that the detention of 11 men in Cameroon on the basis of their presumed sexual orientation constituted an arbitrary deprivation of liberty and a violation of the principle of equal protection of the law.
- 22 See <[http://cal.org.za/index.php?option=com\\_content&task=view&id=46&Itemid=76](http://cal.org.za/index.php?option=com_content&task=view&id=46&Itemid=76)>.
- 23 The resolution of the NGO forum are draft resolutions that are submitted by the civil society for the consideration of the ACmHPR. They then become resolutions of the ACmHPR once adopted.
- 24 'If not, why not?', J Nana, *Pambazuka News 506: Special Issue: African Commission blocks LBGTI human rights*. See <<http://www.pambazuka.org/en/category/features/68956>>.
- 25 POWA is an NGO that works to end violence against women in South Africa. See <<http://www.powa.co.za>>.

- 26 Advocates International is the largest international network of legal professionals networked for the purposes of protecting and promoting religious freedom, family, human rights, the sanctity of life, justice for the poor or governing integrity under the rule of law. See <<http://www.advocatesinternational.org>>.
- 27 INTERIGHTS, the International Centre for the Legal Protection of Human Rights, works to promote respect for human rights through the use of law. Interights works by providing legal expertise to lawyers, judges, human rights defenders and other partners concerning international and comparative human rights law. See <<http://www.interights.org>>.
- 28 The African Men for Sexual Health and Rights (AMShER) is the regional coalition of MSM/LGBT led organizations and other organizations that work to address the vulnerability of gay and bisexual men, Male-to-female transgender women and other MSM, to HIV. See <<http://www.amsher.net/>>.
- 29 See section. '*The discussion papers on sexual orientation in Africa*' below.
- 30 Discussion document was for internal circulation only
- 31 Article 2 provides: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.'
- 32 Article 27 provides: '1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'
- 33 LeGaBiBo (Lesbians, Gays and Bisexuals of Botswana) is the first LGBTI organization in Botswana. See <<http://www.legabibo.org.bw/>>.
- 34 (2001) AHRLR 84 (ACHPR 2001).
- 35 Article 28 provides: 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'
- 36 The Chairperson, Reine Alapine Gansou; Vice Chairperson, Mumba Malila; Musa Bitaye, Chairperson of the working group on indigenous populations; Pansy Tlakula; Catherine Atoki, Special Rapporteur on Prisons and Conditions of Detention in Africa; Soyata Maiga, Special Rapporteur on the Rights of Women; Yeung Yeun, Chairperson working group on the rights of older persons in Africa; Mohamed Kalfallah, Special Rapporteur on Human Rights Defenders and Mohamed Fayek, Special Rapporteur on Refugees, Asylum seekers, IDPs and Migrants in Africa.
- 37 The United Nations Human Rights Committee found that laws that criminalise consensual same sex between adults violated the rights to privacy and equality.
- 38 These included the Human Rights Development Initiative, Alternative Cameroon, POWA, INTERIGHTS, Kenya Human Rights Commission, East and Horn of Africa

Human Rights Defenders, Human Rights Institute of Southern Africa, Centro Nacional de Aconselhamento The Coalition for an effective Court on Human and Peoples' Rights, Centre for Human Rights, Amnesty International, Human Rights Monitoring Group, International Human Rights Law Group, International service for Human Rights, Legal Resources Centre, Associação Justiça, Paz e Democracia and Liga Moçambicana dos Direitos Humanos.

- 39 *Pambazuka New 506; Special Issue: African Commission blocks LGBTI human rights*, see <http://www.pambazuka.org/en/issue/506>>.
- 40 Under Article 45(3) of the ACHPR
- 41 *Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declarations on the Rights of Indigenous Peoples* see <[http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf)>
- 42 Alternative Cameroons are a LGBTI specific organisation and were granted observer status by the ACmHPR in 2009.



# South African Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages

Hoodah Abrahams-Fayker, Women's Legal Centre

## Introduction

While the South African Constitution serves as the legitimate legal instrument on the enshrinement of the rights of individuals to be freely who they are, without fear or prejudice from others, it does little to ensure that these rights are enacted and protected across the landscape of social engagement. This is especially prevalent where a particular grouping is in a minority, and where the isolation of an apartheid way of life ensured that little was known or debated about within the community. As just one minority group within South Africa, the Muslim community has the right to freely practise its religious and traditional practices. As a social grouping, therefore, it would be fair to say that Muslims are able to comfortably enjoy a certain freedom of expression, which is not always found by other minority groups elsewhere in the world. But beneath the social surface of this community, more and more questions are emerging regarding the legal rights of the Muslim woman – not within her role as a South African citizen, but within her legal role as a wife – how this is constituted, exercised, and in the event of divorce or death of her spouse, what this means to her in terms of access to resources.

This case study article examines the South African context, introduces the Women's Legal Centre (WLC) in Cape Town, South Africa as a feminist organisation, and explores the strategies of the WLC in relation to litigation attempts at legislation recognising Muslim marriages, case studies that have developed Muslim Personal Law (MPL) in South Africa and the international approach to MPL.

## The South African context

A situational analysis of South Africa shows that South Africa has one of the widest disparities in income between rich and poor in the world, which has steadily increased since 2000.<sup>1</sup> Poverty and inequality in South Africa are organized by class, race and gender, with a per capita income of black households 13% of that of whites, and female headed households 46.2% of that of male headed households.<sup>2</sup> According to the South African government 2007 report on Millennium Development Goal 3, the majority of the poor are disproportionately women.<sup>3</sup> The poorest households in South Africa are female headed (Bonthuys and Albertyn, 2007: 205).

The WLC takes note of the subordination and discrimination suffered by South African women by specifically acknowledging that black South African women are further disempowered by a lack of access to resources as a direct consequence of the apartheid regime that differentiated among women. Considering that the focus of this paper is on Muslim women, when one looks at the position of Muslims as blacks in South Africa, one is obliged to look at their role in the anti-apartheid struggle as a minority group. South Africa's transition to democracy had an enormous impact on all social, religious and ethnic groups in the country, defining or rather redefining their political role within a changing order (Bonthuys and Albertyn, 2007). In the early 1980's the resistance to the apartheid regime grew rapidly and embraced almost all social groups which were oppressed. This development led to an increasing political mobilization and involvement of Muslims who until then had shown little interest in political participation as long as they could exercise their religious duties freely (Niehaus, 2006).

In line with the many resistance movements at the time, there was a part of the Muslim community that protested under the guise of forums such as the Call of Islam (1960), Muslim Youth Movement (1957) and Qibla (1980). Even though it was a small group of Muslims that became active in the struggle, the apartheid regime saw Muslims as militant and suppressed their religious rights with the aim to curb their political activism in the struggle. It must be noted that the Islamic clergy took a political and principled stand not to register as marriage officers as prescribed by South African legislation. Their position was bending to the legislation implied an acceptance of the apartheid regime and after the new dispensation it was felt that Muslims contributed and should be entitled to practice their religion freely; and the country's laws on marriage did not make provision for polygamous marriages which is permissible in MPL,

and in customary law. The battle for the recognition of customary law in its relationship to polygamy was won in South Africa in 1998, but the meaning of marriage in MPL was still under contestation in 2010. In order to explore the Women's Legal Centre's approach to the issues raised by MPL for South African Muslim women, the next section briefly introduces the Centre itself and its broadly feminist platform towards strategic litigation.

### **WLC strategy: strategic litigation**

"To be a feminist today, I think it is fair to say, is to believe that we belong to a society, or even civilization and have been subordinated by men and women, and that life would be better certainly for women possibly for everybody, if that were not the case, feminism is then the range of committed enquiry and activity dedicated first, to describing women's subordination – exploring its nature, extent, dedicated second, to asking both how and through what mechanisms and why for what complex and interwoven reasons – women continue to occupy that position and dedicated third, to change." (Dalton, 1987:1)

Whilst the WLC identifies as a feminist organisation, it must be noted that there is no single definitive or correct feminism or feminist theory. Instead, feminist insights, methods and theories are applied to challenge mainstream analyses across a multitude of disciplines including history, sociology, philosophy, psychology and anthropology. In some contexts, feminism sought to unite women in the face of oppression under patriarchy, but in the past three decades - and in diverse contexts - feminists understand the intersection of race and class, alongside other forms of social categorization, with gendered experience (Lewis, 1993). By acknowledging that feminism must be examined in terms of race and class, it becomes always necessary to put feminism into context and the WLC argues that a contextual and intersectional approach forms part of any definition of feminism in South Africa which aims to use of litigation to achieve women's equality.

It is important to examine how the WLC uses the law to bring about change through strategic litigation. Strategic litigation is defined as a method used by attorneys, usually non profit organisations (NPO), to advance human rights. It is also known as impact litigation. The court is used to create broad social change to create long term positive effects.

The most common method of achieving the objectives of strategic litigation is through the establishment of effective and enforceable law (i.e.

creating precedents). In successful litigation, this may arise through: the interpretation of existing laws, constitutions and international law instruments to substantiate or redefine rights, or to enforce or apply favourable rules that are underused or ignored i.e. implementation problems, challenging existing laws detrimental to social justice or individual rights (e.g. based on conflict with internal law or constitutional law) and where existing law prohibits the human rights violations complained of but the local judicial and executive systems fail to provide a remedy for the wrong.

Organisations use strategic litigation because it can contribute to the stabilisation and clarification of the legal system or its laws (procedural and substantive) providing the basis for government reform and the legal parameters within which this must occur, it raises the level of legal and human rights literacy by educating the judiciary and legal profession, it exposes institutionalised injustice, promotes government accountability and changes social attitudes and empowers vulnerable groups

Strategic litigation has several advantages over other strategies (Kitchling, 2003):

- A single case can have extensive legal and social effects and impact.
- It uses judicial power to defend and promote the rights of minority, deprived or marginalized groups. In a system where there is an independent judiciary and credible legal system, but where the executive and legislature reflect only the view of the majority or the political and economic elite (e.g. South Africa under Apartheid), this may be the only way to get redress for wrongs suffered.
- It establishes precedent that benefits future claimants. This is particularly relevant in common law jurisdictions where stare decisis (i.e. legal precedent) is the rule.
- It raises issues publicly.
- In the case of international tribunals or courts, it may create political pressure from abroad – will have an international impact.
- In many cases (particularly for group claims through class/group action) it raises an issue or has a genuine political effect than other means.
- It broadens access to justice.
- It 'tests' and clarifies the content of existing laws, thus furthering government accountability by establishing the parameters within which government must operate.

There are also disadvantages to strategic litigation:

- By its very nature, the outcome of any litigation can rarely be assured. Hence, a 'trial and error' approach has been used. This means that several cases can be taken to court before obtaining the desired judgment.
- A related consideration is that because of the need for a decision of precedential value, there may be no judgment below that of the highest available court that is fully satisfactory. Given that in most legal systems it is only very few disputes that reach trial (because of settlement, lack of knowledge about rights, etc.), and fewer still appeal, Settlement out of court is not an option – settlement does not bring about change. Attorneys need to act on instructions.
- Litigation does not necessarily reflect public opinion and may achieve a result that does not have public support. The objective of strategic litigation may be more properly achieved through debate in the political system rather than judicial decision.
- Impact litigation is dependent on finding the 'right' client. Ideal clients are not easily found in the real world. Many client problems, such as fear, lack of resources, inability to understand the process and inconsistencies in testimony, may need to be addressed through client management rather than case selection.
- Where legal protections and enforcements are weak, strategic litigation may not achieve the desired impact. Implementation is fundamental.
- Where there is no independent judiciary, attempting to use the judicial power for policy ends may be redundant.
- Often the process of strategic litigation is difficult to control, particularly in class action procedures where the claimant class is not fixed.
- Strategic litigation may not actually benefit the affected community. As a strategy, it has been criticised for being lawyer-centred and lawyer-defined and having the effect of disempowering affected communities, relegating them to victim status and producing wins that do not improve the well-being of the community. This is because policy-oriented strategies do not focus on the client as an individual but rather as the means to further a social reform strategy.
- Litigating may be a costly method of raising issues. Publicity or political lobbying may be cheaper.

In the South African context public interest litigation has played and is playing an increasingly important role in addressing inequality and realising the achievement of constitutional rights. While it has its challenges and risks, one cannot underestimate the role of public interest litigation in making the constitution a living document that can be used to make a real difference in the lives of our most vulnerable citizens. With constitutional supremacy in South Africa there has been a deliberate intention to ensure that the law is not used as means to oppress as was done by the apartheid. On that premise, the chosen strategy of the WLC to use impact litigation has had far reaching implications for women by obtaining a number of successful judgments to advance women's rights.

In the next sections, the focus will be on relationship rights in respect of the vulnerability of Muslim women who cannot turn to the courts for protection on the dissolution of their marriages because they are married by religious rites only as such marriages are not recognised as legal marriages and therefore do not have legal consequences. Many women are currently deprived of access to resources (including their homes) by the failure of the State to recognize religious marriages.

Muslims make up two percent of the South African population. The failure to recognise these marriages means that all women married by Muslim law do not enjoy the protections offered by civil marriages.

Islamic feminist discourse and activism has grown, historically, in response to the Muslim conservatism present in the process for the development of MPL legislation for South Africa. There is an assumption (often ungrounded) that women in Islam are oppressed and while there may be much to debate here, it remains true that the South African Muslim society often deploys a conservative and often patriarchal approach to the Quran where Islamic religious leaders consist of only men and are seen as authorities for the South African community. This has served as an obstacle to ensuring that Muslim women's rights are protected in the adjudication of MPL by the Islamic authority, highlighting the necessity for legislation to govern MPL so that Muslim women's rights are adequately protected.

The main strategy used by the WLC to further the cause of Muslim women has been through strategic litigation. The WLC argues that women who are married by religious rites are discriminated against and marginalised by the fact that their marriages are not legally recognised. Hence they do not have a right to fair access to resources on the dissolution of marriages through death or

divorce, whereas women who are married civilly or in terms of African Customary Law are protected by a legislative framework. The status quo currently is that religious marriages are not legally recognised. What that in effect means is that a woman's marriage in accordance with her religion (Islam, for example) is not actually considered as a marriage in the eyes of civil and constitutional law.

### *Attempts at enacting legislation*

The South African Constitution advocates the Bill of Rights as the “cornerstone” of democracy in South Africa, enshrining the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>4</sup> This includes the right to freedom of religious belief and opinion in terms of Section 15 of the constitution. Section 15 expressly allows for legislation to be passed recognizing such rights subject to the Constitution.

The political transformation in the country was the catalyst for renewed attempts at the legal recognition and enforcement of aspects of MPL. Considering the active role that Muslims played in the apartheid struggle, some assumed that this would be acknowledged by not only having the right to freedom of religion, but by an approach which would offer religious law a new status. Under the new dispensation, there were various endeavours on the part of the Muslim community to seek legal recognition of aspects of MPL. With the electoral promise made in 1994 that legislation will be passed relating to MPL, the Muslim Personal Law Board was established in 1994 with the general brief to legally recognise the MPL law system. Due to ideological differences relating to the compatibility of Shariah (MPL) with the Constitution, the Board disbanded in the same year.

A Project Committee of the South African Commission Law Reform Commission was established to investigate Islamic Marriages and related matters. The project committee was tasked to investigate Islamic marriages and related matters with effect from 1 March 1999 for the duration of the investigation having a more specific brief than to examine the MPL system overall by only looking at the recognition of Muslim marriages.

In the context of a secular state in which Muslims constitute a minority community, the non-recognition by the State of the system of MPL or aspects thereof has caused serious hardships and produced grossly unjust consequences. The issues have been identified as *inter alia* being:

- the status of a spouse or spouses in an Islamic marriage or marriages,
- the status of children born of an Islamic marriage,
- the regulation on the termination of an Islamic marriage,
- the difficulties in enforcing maintenance obligations arising from an Islamic marriage,
- the difficulties in enforcing custody of and access to minor children,
- the proprietary consequences arising automatically from an Islamic marriage are not recognised in law and therefore not enforceable.<sup>5</sup>

The draft of the Discussion Paper culminated in the draft Muslim Marriage Bill in 2003 after extensive public comment. As a consequence of receiving numerous concerns relating to the SALRC Bill, which revolved around both constitutionality issues generally and the women's right to equality in particular, the parliamentary office of the South African Commission for Gender Equality drafted an alternative bill in October 2005 called the Recognition of Religious Marriages Bill. This Bill was of general application and provided for the recognition of all religious marriages.<sup>6</sup>

The importance of passing legislation was highlighted by Manjoo when she argued that "Bringing personal status laws into conformity with international and constitutional equal rights provisions is an imperative for the protection of women's human rights. Multicultural secular democracies face a challenge in effectively and meaningfully guaranteeing the right to equality and the right to religion and culture" (Manjoo, 2007; 4).

It is our understanding that the Gender Commission Bill was not taken any further in the executive structures. The draft Bill by the SALRC seems to be the only Bill that is being given due consideration. The Bill is obviously subject to amendments and modification by the Minister of Justice and Constitutional Development. The Department of Justice and Constitutional Development has informed the public that the Bill is on the legislative timetable for the year 2010, and to be introduced to Cabinet. There is presently an embargo on the amended Bill, pending Cabinet approval. From enquiries made to the Parliamentary Monitoring Group in September 2010 as to the progress of the passing of the Bill, it seems that the Bill is still with the Department of Justice and Constitutional Development and has not been taken to Cabinet for approval yet. While it is commendable that the State acknowledged that MPL should be given legal recognition to be consistent with the Constitution, a decade and a half later, the status quo remains the same in that Muslim

marriages are still not recognised and the serious hardships suffered by Muslims are more apparent, the question about the lack of legislative framework has become ground for intensive feminist work within the WLC.

A contextual reality is that idea of legislation has received mixed reactions from the Muslim community. There are those that vehemently oppose the Bill saying that enacting legislation will make it subject to constitutional supremacy which is unacceptable as the Quran is the supreme law according to the tenets of Islam. Then there are those that favour legislation only if there are independent Shariah courts to ensure that adjudication is strictly according to Islam, thereby favouring religious pluralism. Then there is a significant sector of the Muslim community that feel strongly that the advantages of legislation far outweigh the disadvantages in that the community will benefit from having a legislative framework and that MPL, which is based on the premise of fairness and justice, can be compatible with the Constitution. During colonial and apartheid South Africa, marriages contracted under Islamic Law were considered null and void. Against this background, clergy regulated Muslim family life through the practice of MPL as an unofficial community code parallel to secular law (Abdullah S., 2006; 3)

However, the effectiveness of the Islamic clergy regulation has been problematic in that: as a community organisation, its funding is limited resulting in them not having the resources to provide Muslim women with the urgent assistance required and there is no consistency amongst the “judgments” of the Islamic clergy where some of the conservative Ulama do not interpret MPL in line with the changing situation in modern society.

The majority of the clients who utilise the MJC’s services are women between the ages of 18 and 50 who seek assistance for marital problems in abusive marriages who are mainly homemakers or otherwise unemployed and automatically rely on their spouses.<sup>7</sup> The Islamic clergy have been criticised for serious shortcomings when addressing the plight of women in that their decisions are skewed in favour of men. Many women coming to the WLC reported struggling to get divorced.

Women are often torn between their religious affiliations (advocated to them by their religious leaders) and the hardship they endure. They find it difficult to reconcile that their religious beliefs condone pain and suffering where the clergy do not grant them redress based on religious doctrine according to them. The secular courts have seen more and more women turn to them for help, having little faith that the Islamic clergy which consists only

of males, will take due consideration of their plight. Muslim women have no legal redress, and so the WLC has felt obligated to intervene to challenge the discrimination suffered by Muslim women.

### *Muslim Personal Law Through the Courts*

Prior to the Constitution, the courts viewed Muslim marriages as potentially polygynous and therefore contrary to public policy. Not too long ago, in 1983, in *Ismail vs Ismail 1983* (1)SA1006(A) where the appellant sought the proprietary consequences flowing from the termination of a marriage solemnised according to Islamic rites, the court refused to grant rights to polygynous unions on the grounds of public policy saying that “the union was contrary to the accepted norms that are morally binding on our society”.

After the democracy in South Africa was achieved, when the court had to consider the consequences of a Muslim marriage in *Rylands vs Edros 1997*(2) SA 690(C), where a woman married by Muslim rites in a *de facto* monogamous union which had subsequently been terminated by her husband in accordance with Islamic law, asked the Court to enforce ‘*the contractual agreement*’ constituted by the marriage according to Muslim rites between the parties. The Court was not asked to recognize the marriage by Muslim rights as a valid marriage, but rather to enforce certain terms of a contract made between the two parties. The Court considered whether the spirit, purport and objects of Chapter 3 of the interim Constitution were in conflict with the views of public policy expressed and applied in the *Ismail case*. Recognizing the values of equality and tolerance of diversity underlie the interim Constitution, the court found there was nothing offensive to public policy or good morals in the contract which the defendant was seeking to enforce. As such, the Cape High Court recognized a *de facto* marriage by Islamic rites as a valid contract under the Constitution and demonstrated that the Court could be called upon to ensure that parties to a monogamous Muslim marriage comply with the terms of the contractual engagement. Here, the court decided to enforce a contract to protect the vulnerable spouse. This case is known as the case that gave legal recognition to the consequences of an Islamic marriage. Even though it did not recognize the union as a marriage, it was hailed as a breakthrough because it removed the uncertainty of spouses married according to Islamic rites from having to prove their contributions to the marital estate. By looking at it the consequences of a Muslim marriage contractually, the court avoided having to interpret what the religion dictated.

In *Amod v Multilateral Motor Vehicle Accidents Fund* 1999(4) SA1319 (SCA1) a woman brought an action against the insurer of a driver who had negligently killed her husband. She and her husband had been married according to Muslim rites in a *de facto* monogamous marriage, which had not been registered in terms of the Marriage Act 25 of 1961. The Supreme Court of Appeal found that since the marriage had been a *de facto* monogamous marriage and undertaken according to the customs of a major religion through a very public ceremony, the appellant's marriage, in the spirit of plurality, equality, and freedom of the new Constitution, could not continue to be found to be offensive to the *bonos mores* of society. The court focused on the legal duty of support, rather than committing to examine the status of the relationship that gave rise to the legal duty.

The WLC has been approached for legal help by many Muslim women and the first case that the WLC took on to challenge the discrimination faced by Muslim women by not having their marriages recognized was the groundbreaking case of Daniels which allowed for Muslim women to inherit from their deceased husband to whom they were married to Muslim rites only.

### *Daniels v Campbell N.O. and Others* 2004(5) SA 33C

Zuleigha Daniels married Mogamat Amien Daniels in 1977 according to Muslim rites. In 1994 Mr Daniels died without leaving a will. The only real asset in Mr Daniels' estate was a house in Hanover Park. The house was first occupied by Mrs Daniels as a rental from the City of Cape Town in 1969. When Mr and Mrs Daniels married, the housing policy dictated that the tenancy be transferred to Mr Daniels as he was deemed to be the principal breadwinner. Consequently when he died, the property formed part of his estate. The legislation relating to persons dying without a will, namely the Intestate Succession Act 81 Of 1987, stipulated that the surviving spouse would inherit the estate. The surviving spouse was considered to be where the parties were married legally. Further, the Maintenance of Surviving Spouses Act 20 of 1990 stipulated that a spouse may claim maintenance from the deceased estate, spouse being considered where the parties were married civilly.

The primary legal issue was whether Mrs Daniels could be deemed to be the surviving spouse of the deceased of estate of her husband where their marriage was solemnised according to Muslim rites only, so that she could claim a benefit as an heir and receive maintenance?

In terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 20 of 1990, the surviving spouse of the deceased has a right to inherit and be maintained. However, the Master of the High Court (who administers deceased estates) failed to acknowledge Mrs Daniels as a spouse because her marriage was not solemnised by a marriage officer appointed in terms of the Marriage Act 25 of 1961.

Mrs Daniels approached the WLC for help to prevent her from losing her home which she lived in for more than two decades and to which she had financially contributed to and maintained. The WLC made an application to the Cape High Court in 1999 to have her rights asserted as her late husband's surviving spouse in terms of her constitutional right to freedom of religion, equality and dignity. When considering the matter, Judge Van Heerden said:

"Marriages by Muslim rites have not been recognized by South African Courts as valid marriages, firstly because such marriages are potentially polygamous and hence contrary to public policy and secondly because such marriages are not solemnized by authorized marriage officers in accordance with the Marriage Act 25 of 1961...An appropriate remedy must mean an effective remedy for breach, for without an effective remedy for breach,, the values underlying the rights entrenched in the constitution cannot be properly upheld or advanced. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal". The High Court declared Mrs Daniels to be a spouse so that she could be deemed to be an heir to her deceased's husband's estate and claim maintenance from the estate.

The Constitutional Court confirmed that Mrs Daniels must be considered as a beneficiary of her deceased husband's estate. The Constitutional Court held that:

"the word "spouse" as used in the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Muslim Marriage and the word survivor as used in the Maintenance of Surviving Spouse Act 27 of 1990 includes the surviving partner to a monogamous Muslim marriage."

Despite this landmark victory, Mrs Daniels was not in a financial position to register the property in her name which she inherited because of the legal costs involved and the arrears owing on the property in respect of rates and taxes. The Women's Legal Centre managed for the transfer of the property at no cost. The Women's Legal Centre raised funds to pay for the arrear rates

and taxes to effect the transfer of the property in her name. Mrs Daniels is now the proud registered owner of the property!

The WLC's concluding analysis of this case starts with the premise that the Constitution dictates that the courts have an obligation to give due consideration to the Bill of Rights entrenched in our constitution and this court decision illustrated constitutional supremacy by recognizing the importance of the Bill of Rights, albeit that the marriage was not given legal recognition by the Legislature. The Constitutional Court agreed with the High Court that relevant legislation be declared inconsistent with the Constitution whereby in terms of Section 1(4) of the Intestate Succession Act 81 of 1987 ("ISA"), the definition of spouse shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous marriage and Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 ("MSSA") survivor shall be deemed to include the surviving husband or wife of a de facto monogamous union in accordance with Muslim rites.

*Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) (15 July 2009)*

The WLC then intervened as an amicus curiae (friend of the court) in the watershed case which gave recognition to polygamy in Muslim marriages for the purpose of inheritance, where the husband died intestate, having more than one wife to whom he was married according to Muslim rites:

Mrs Fatima Gabie Hassam made an application to court concerning the estate of the late Ebrahim Hassam as one of two current wives of the deceased, to whom they were both married to according to Muslim Rites, asking the court had to provide clarity on the validity of the marriage/s.

Fatima Gabie Hassam married Ebrahim Hassam in accordance with Muslim rites on 3 December 1972. On 10 February 1990 Ebrahim Hassam acquired property in Cape Town that served as their matrimonial home for them and their children. In June 1998 Fatima obtained a "fasakh" to terminate their marriage. Their marriage was not considered terminated because they reconciled within three months and they continued to live together as husband and wife until his death on 22 August 2001. Mr Hassam was also married to Miriam Hassam in or about 2000 and there were three children born of the marriage. Mr Hassam died without leaving a will. When his estate was reported to the Master's office, the Master refused to acknowledge Fatima Gabie Hassam as a spouse because Miriam Hassam was also a spouse. Fatima

Gabie Hassam sought to challenge her rights as a spouse. She applied to the Cape High Court asking that she be declared the spouse of the deceased because she was first married to the deceased.

The WLC as *amicus curiae* sought to make submissions to the court arguing that a polygynous Islamic marriage should be dealt by advocating that the relief that should be accorded to all parties in polygynous Islamic marriages should be in accordance with a constitutional reading of the ISA and MSSA.

The legal issue was whether or not upon the death of their husband, the surviving spouses of a polygynous marriage contracted in accordance with Muslim private law are entitled to the benefits created by the Intestate Succession Act 81 of 1987.

In terms of the legislation relating to intestate succession and maintenance of surviving spouses, there is no provision for the polygynous Muslim marriages allowing more than one wife to inherit intestate and be maintained. The purpose of the Acts in question was to provide relief to a vulnerable section of our society, namely widows who face dependence and potential homelessness and women who are parties to Muslim polygynous marriages fall into this category. Excluding surviving spouses from polygynous Muslim marriages would be inconsistent with the purpose of the constitution to provide human dignity, equality and freedom. In *Daniels v Campbell NO and Others* 2004(5) SA 331 (CC), the provisions of the legislation in question were interpreted so that the concepts of “spouse” and “survivor” are sufficiently wide to encompass surviving spouses of marriages contracted according to Muslim private law. To do otherwise would result in a violation of such widows’ rights to equality as regards marital status, religion and culture and would compromise their right to dignity. This should apply with equal force to polygynous Muslim marriages. Muslim men are permitted under the Qur’an to marry more than one woman. Not extending the concept of “spouse” and “survivor” to polygynous Muslim marriages discriminates against these widows solely because of an aspect of their faith, violating their rights to equality based on marital status, religious, and culture as well as violating their right to dignity. That discrimination is unfair in terms of section 9(5) of the Constitution. Legislative and judicial policy is shifting to reflect the recognition of polygynous marriages.

The provisions of the Intestate Succession Act 81 of 1987, save section 1(4)(f), are easily capable of being applied to spouses in polygynous marriages

in that each spouse would be entitled to a child's portion of the estate, if there are descendants and an equal share if there are none. The concept of "survivor" in the Maintenance of Surviving Spouses Act 27 of 1990 uses the article "the", insinuating a singular application. However, section 6 of the Interpretation Act 33 of 1957 provides in every law, unless contrary to intention appears, that words in the singular can include the plural; and in sections 2(3)(b) and 3 of the Maintenance of Surviving Spouses Act 81 of 1987 "survivor" could be applied in terms of multiple surviving spouses without straining the language of the act.

The order was made declaring the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, to include a surviving partner to a polygynous Muslim marriage. Fatima Gabie Hassam was, for the purpose of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor" of the late Ebrahim Hassam, as was Miriam Hassam. The word "spouse" as used in the Intestate Succession Act 81 of 1987, included a surviving partner to a polygynous Muslim marriage. Fatima Gabie Hassam was, for the purpose of the Intestate Succession Act 81 of 1987, a "spouse" of the late Ebrahim Hassam, as was Miriam Hassam. Section 1(4)(f) of the Intestate Succession Act 81 of 1987 was declared inconsistent with the Constitution, to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband. The section was substituted with a statement that if more than one spouse survived a deceased person, the estate would be divided by dividing the value of the estate by the number of children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased. Each surviving spouse would inherit a child's share of the intestate estate or the amount fixed from time to time by the Minister for Justice and Constitutional Development; whichever was greater. The orders of the new section were referred to the Constitutional Court for confirmation.

The Constitutional Court confirmed the order by the High Court and went further to order that it had retrospective effect.

This case has been described as a "watershed" case in the media because of the recognition of a Muslim polygamous marriage. For the WLC, The judgment was obviously welcome, giving recognition to polygamous Islamic marriages was a major step towards entrenching constitutional rights.

In the legal community, the Hassam judgment has been welcomed and

rightly so, in developing MPL in South Africa, but for Ms Hassam who now will only receive a portion of her home the legal gains achieved is of little consequence to her personally.

By unlocking the door in recognizing polygamy also opened the door to further implications arising out of polygamy with regard to the position of wives in dual system marriages i.e. where the one wife is married legally having purported a civil ceremony before a registered marriage officer and the other wife married according to religious rites only. This begs the question of whether both wives will be treated the same. The current legislation relating to customary law, the Reform of Customary Law of Succession Act of 2009, failed to use the opportunity to make provision for women in dual system marriages with the result that women whose customary marriages are not valid or who are involved in unregistered polygamous marriages or dual system marriages cannot inherit from their spouses.

The Hassam judgment reflects the success of impact litigation to be able to change the interpretation of the law in the interests of women in the broader community where there is no legislative framework to afford the necessary protection.

### *Muslim women spouses' right to maintenance*

The area of maintenance has also seen favourable adjudication being made for Muslim women who have claimed maintenance from their ex-husbands to whom they were married according to Muslim rites. In *Khan v Khan 2005 (2) SA 272 (T)* the Court considered whether there was a legal duty on the appellant, in terms of the Maintenance Act of 1998, to maintain the respondent, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygynous one. The Court held that the preamble to the Maintenance Act emphasized the establishment of a fair system of maintenance premised on the fundamental rights in the Constitution; that the common law duty of support was flexible and had expanded over time to include many types of relationships; that the purpose of family law was to protect vulnerable family members and ensure fairness in disputes arising from the termination of relationships; that polygamous marriages were a family structure and thus be protected by family law; and held that partners to Muslim marriages – whether monogamous or not – were entitled to maintenance. This case laid the foundation for the maintenance courts to have jurisdiction to hear maintenance matters.

Maintenance claims were further developed when Muslim women made interim maintenance claims where they turned to the secular courts to grant them a divorce. Rule 43 of the Uniform Rules of Court allows for whenever a spouse seeks relief from the court in matrimonial matters the court made provision for *pendent lite* maintenance, a contribution towards costs of a pending matrimonial action, interim custody of a child or interim access to any child.

In *Mahomed v Mahomed 2008 ECP* an interim application for maintenance in terms of Rule 43, Judge Revelas recognized that an increased tendency had developed in our courts to enforce maintenance and other rights to spouses married in terms of Islamic law, even though the legislature did not legally recognize an Islamic marriage as a marriage in terms of the Marriage Act. Accordingly, on that premise the Rule 43 Application was granted in terms of which the Respondent was ordered to pay maintenance for the applicant and his minor child and had to pay a contribution towards costs.

In *Hoosain v Dangor 2009 CPD* in an application in terms of Rule 43 of the uniform rules of court Ms Hoosain sought interim maintenance for herself and her minor daughter and a contribution towards costs in the main divorce action. The court found that interim maintenance arose from the general duty of a husband to support his wife and children and is not precluded from doing so because she is married by Muslim rites.

The WLC has also taken matters to court on behalf of women seeking legal redress in terms of the proprietary consequences of the marriages which was terminated Islamically. For the past seven years, the WLC has continued to use strategic litigation very successfully to create increasingly widening recognition of the legal discrimination faced by Muslim women married under MPL, and to address this through concrete issues, each of which interrupts an individual woman's life and stability in specific and contextualized ways. This chapter could outline the facts and outcomes of many more cases taken on by the WLC, and reports and discussion papers on these are readily available from the WLC.

The one with which I would like to end this section of the chapter brings us back to the meaning of MPL itself in South Africa:

*The Women's Legal Centre Trust vs The President Of The Republic Of South Africa & Four Others (Constitutional Court Case CCT13/09 [2009] ZACC20*

As much as the piecemeal development of the law by the courts is making inroads towards recognising Muslim marriages, legislation is necessary to help the broader Muslim community by having provisions to ensure that women's rights are protected. This led to the WLC launching a class action.

Because of the continued vulnerability being faced by Muslim women having no legal recourse, the WLC felt that as a strong advocate of women's rights it had a duty to advocate for the passage of legislation where there has been a draft bill since 2003 which had not been actioned.

The WLC felt that it was imperative for the protection of Muslim women in South Africa that legislation be passed to put them on par with other South African women who can seek legal redress and can have access to the courts.

The Women's Legal Centre brought an application at the beginning of 2009 directly to the Constitutional Court in terms of Section 167 of the Constitution asking the court to compel the President and Parliament to pass legislation recognizing Muslim Marriages and regulating the consequences of such marriages thereof within eighteen (18) months.

The response to our application was overwhelming.

Formally many Muslim organizations vied to enter the court arena by either wanting to be a party to the proceedings to oppose the application or applying to be a friend of the court and make submissions in support of our application. Notably, the United Ulama Council of South Africa, which is the umbrella body of Muslim religious bodies of South Africa, voted in favour of supporting the implementation of Muslim Personal Law in South Africa, with one constituent body dissenting. The majority of the Muslim religious bodies realize that a legislative framework would be necessary to protect the Muslims' interest, rather than relying on the courts advocating constitutionality on an ad hoc basis, which could be more threatening to the sanctity of the religion by the courts getting involved in religious doctrinal issues.

Informally we received a flurry of "objection mail" nationally from a vociferous Muslim minority, basically all in the same vein vigorously objecting to the WLC interfering in religious affairs of Muslims, asking for "an unwarranted and unwanted intrusion on Islamic law" when the "WLC does not represent the Muslims" and the application is a "misguided effort which aims to be a threat to the Holy Quran".

The court asked the WLC to address the preliminary issue relating to the jurisdictional issue of whether the Constitutional Court can hear the matter. The constitutional Court has concurrent jurisdiction with the High Courts and SCA to enquire into the constitutionality of legislation and has exclusive jurisdiction in certain instances inter alia in terms of Section 167(4)(c) where it may decide that Parliament and the President has failed to fulfill a constitutional obligation or in terms of Section 176(6) one may approach the Constitutional Court directly in extraordinary circumstances where the matter is of sufficient public importance or urgency that direct access will be in the interests of justice.

The Women's Legal Centre brought its application in terms of Section 167 applying for an order declaring that the President in his capacity as the head of the National Executive has failed to fulfill the obligation imposed on him by Section 7(2) of the Constitution to protect, promote and fulfill the rights of the Constitution and by preparing and initiating diligently without delay a Bill to provide for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition.

We submitted that the adjudication of the dispute involved important questions that relate to the sensitive areas of separation of powers and would require a decision on critical political question and precisely fall within the ambit of Section 167(4)(e) of the Constitution.

In the alternative, we made application in terms of Section 167(6)(a) that the failure of the President (in his capacity as head of National Executive and head of State) and Parliament to pass legislation was not in the interests of justice.

When considering the application in terms of this provision, the court highlighted that it contained a significant "agent-specific" focus in that the provision refers to "Parliament" only. The court held that the obligations we sought were obligations imposed by the Constitution on the "State". The court advocated that the provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament alone. The Courts must allow a person, when it is in the interests of justice and without leave of the Constitutional Court to bring a matter directly to the Constitutional Court.

The decisions of the Constitutional Court on application for direct access make it clear that there must be compelling reasons to use this exceptional procedure to persuade the Constitutional Court that it should exercise its

discretion to grant access. It was our considered opinion that the consequences of having no legislative framework for Muslims married according to the tenets of their faith constituted compelling reasons for direct access.

However, the Constitutional Court found that this was a matter that would have benefit from other courts and that a multistage litigation process would have the advantage of isolating and clarifying issues and may require the resolution of conflicting expert and other evidence which the Constitutional Court as court of first and last instance.

Legislation not recognizing Muslim marriages and the consequences therefore was inconsistent with fundamental rights, equality, human dignity, freedom of religion, belief and opinion, rights of children, language, cultural, cultural religious and linguistic communities, access to courts, diligent performance of constitutional obligations.

Section 167(6)(a) of the Constitutional provides “National legislation or the rules of Constitutional Court must allow a person to bring a matter directly to the Constitutional Court when it is in the interests of justice.

It was the considered opinion of the Women’s Legal Centre that the delay in passing the bill relating to Muslim marriages was deemed to be extraordinary circumstances in the interests of justice. There has been a limited application of this provision and we were obviously disappointed that that the delay in passing the bill relating to Muslim Marriages was not deemed to be extraordinary circumstances. There has been limited application of this provision and we were obviously disappointed that the Constitutional Court did not use this opportunity to develop the law. Had we applied to the High Court we would have risked the same jurisdictional challenge and could maybe have been referred to the Constitutional Court.

We obviously have been set back by having to re-launch our application but do not consider that we had “lost” our application in the Constitutional Court because it caused the office of the Minister of Justice to prioritize the Muslim Marriage Bill whereby the Department of Justice publicly announced that the Bill is on the legislative timetable for 2010. However, 2010 is at an end and there is no indication that the Bill will be introduced

## **Global Context**

Globally the challenge of having legislation which engages religious norms is a very difficult one. The recognition of Muslim Personal law throughout the world is dependent on the religious status of Islam within the given

country. The situation varies from non-recognition in secular countries at one end of the scale, to the application of Islamic law in all areas of the legal system in Islamic states. Of those countries in the middle ground, efforts have been made to accommodate diverse religious beliefs, through measures such as codification of family law and the existence of customary courts within certain countries. Global trends include the increased recognition in Western countries of the need for some form of acknowledgment of the range of religious beliefs within their country, and in countries with a large Muslim population, there are moves towards codification of family laws and other measures to ensure less arbitrariness in judicial decisions and greater protection of women's rights.

Countries with minority Muslim populations, for the most part, do not recognise MPL within their legal systems. Western countries are the main countries in this category, with stringently secular France demonstrating this point. There are nonetheless moves within some of these countries to recognise the existence of different belief systems within the state. An example of this is current dialogue in Britain about whether the Human Rights Act of 1998 necessitates the protection and recognition of the rights of Muslims to live under their own religious laws. However, the predominant belief in many of these countries is that Islamic laws propound the idea of inequality of the sexes. This can at times be a simplified notion of Islam.

There are however exceptions to this general rule that countries with a minority Muslim population do not recognise MPL. A number of African countries come under this category. Ethiopia and Ghana both have minority Muslim populations, and both have provided for some form of recognition of MPL. Article 34 of Ethiopia's constitution allows for 'adjudication of disputes relating to personal and family laws in accordance with religious or customary laws', and Ghana has legislation providing for registration of Muslim marriages. India has the Muslim Personal Law (Sharia) Application Act, which applies MPL to any legal matters involving personal law for Muslims.

Those with majority Muslim populations, even if secular states, generally have legislation in place which recognises the religious diversity within their borders. At the far end of the scale there are of course the Islamic States such as Iran, where the law goes beyond recognition of MPL, and Sharia law is implemented in all spheres of life. Then there are legal systems which seek to accommodate a number of different religions, such as Tanzania. Tanzania has a Muslim population of 65%, but the Constitution of the State does not lay

down an official state religion. Tanzania has a uniform Marriage Act, which integrates existing marriage laws while preserving certain rights such as the right to religious solemnisation.

The group 'Women living under Muslim Laws' (WLMUL) have noted the major trend recently towards codification of family law. They note the views of the Women's Petition Committee in Bahrain, which hopes that codification will introduce the rule of law in family matters and end the arbitrariness of current judicial decisions. WLMUL observes that getting divorced women an equal or more equitable share of assets acquired during the marriage is one of the most hotly contested areas in recent family law reform in the systems covered here. When considering the reactions of different countries towards this issue, they note that a common first step in this area to improve the situation of women's rights, is the entry into force of new provisions which enable a couple to choose their matrimonial property regime.

Taking further heed that the Muslim population of South Africa has nearly doubled from 1991 to 2004, with the presence of a growing number of Muslims from the rest of the continent with an estimated 75,000 African Muslims being in South Africa, indicating a 600% increase, we argue the onus is even more on the Legislature to ensure that their rights are protected. Where foreigners turn to the South African Courts for assistance when they have been married in their country of birth which recognizes Muslim Personal Law, will the courts apply the law or will the courts deem it contrary to our law and apply what they would seem to be fair and just in their discretion?

Most discussions about the recognition of MPL globally, and the clash this creates with principles of equality and the rhetoric of women's rights, can be linked to the issue of interpretation of Islamic law. Many would argue that Islamic law does not in fact dictate certain current applications of MPL, in integral areas such as property rights and guardianship issues, and that the Quran can be interpreted in a non-patriarchal way so as to ensure equality for women and men.

## Conclusion

Although the courts have made significant inroads towards the development of the recognition of MPL in South Africa, one cannot rely on the courts to provide relief to the majority of Muslim women who do not have the financial resources, education and/or time to turn to the courts for relief. Piecemeal legislation is costly and time consuming, which the Muslim woman on the

street who has no access to resources does not have.

The question has been asked “Why is there this need for MPL to be legislated?” The problem can be easily addressed by registering the marriage whereby women can then access the courts. Quite frankly that is what Muslims are doing at the moment because legislation is taking so long to be implemented. However, it does not solve the problem in that civil marriages do not make allowance for polygynous marriages; and furthermore, as South Africans many Muslims feel that their contribution to the liberation struggle gives them some entitlement to practice their religion freely in terms of the Constitution which represents what the struggle was all about.

Legislation is imperative to protect the Muslim woman in her being able to turn to the courts for protection. Furthermore the process of implementation of legislation is through a consulting process with those that the legislation affects, which can ensure that the religious principles will be respected.

Obviously, the Bill is not without flaws and remains contested. Its codification of MPL opens a Pandora’s Box of constitutional quagmires that threatens to swallow whole the social justice mission which embodies the right to gender equality (Naylor, 2008). According to Waheeda Amien of the Law, Race and Gender Project at the University of Cape Town, even though the problems remain challenging, with the new legislative process South Africa stands at the forefront of countries with minority Muslim populations in moving to entrench religious rights within the framework of civil law ([www.capeargus.co.za/index.php?fArticleID=5341355](http://www.capeargus.co.za/index.php?fArticleID=5341355)).

Advocating for the rights of women, the WLC acknowledges that the Bill will be examined in terms of its gender sensitivity and we will be making submissions accordingly. In the absence of legislation, the WLC will continue with its litigation strategy in order to ensure that women have some relief.

## Endnotes

1. RRIN Humanitarian News and Analysis, UN Office for HR Co-ordination of Humanitarian Affairs 7 November 2007 (IRIN) Statistics SA Places the GINI Co-Efficient at 0.72 on a scale of 0 to 1, with 1 being total inequality
2. 2007 Transformation Audit, Institute for Justice and Reconciliation, Cape Town [www.ijc.org.za](http://www.ijc.org.za)
3. South African Government Millennium Development Goals Mid Term Report 2007, p 22, available at [www.gov.za](http://www.gov.za)
4. The Constitution of the Republic of South Africa, Act 108 of 1996 Section 7.
5. SALRC Discussion Paper 101. 2000

6. SALRC Discussion Paper 101, 2000 para 1.3
7. SALRC Discussion Paper 101, 2000 para 1.6.

## References

- Abdullah, S. 2002. Multicultural Social Intervention and Nation-Building in South Africa, the role of Islamic Counselling and Psychotherapy (unpublished PhD Dissertation, University of Cape Town)
- Abdullah, S. 2006. "The Shariah and the Secular Shifting Paradigms in Muslim Personal Law" in *Post Apartheid South Africa and Prospects for Democratic Change*
- Bonthuys, E. and Albertyn, C. 2007. *Gender, Law and Justice* Cape Town: Juta and Co. Publishing Company
- Currie, I. and de Waal, J. 2005. *The Bill of Rights handbook 5th Edition* Cape Town: Juta and Co. Publishing Company
- Dalton, C. 1987. *Where we stand observations on the situation of feminist legal thought* *Berkeley Women's Law Journal*, Vol 1
- Hough, M. and Du Plessis, A. 1994. *Selected documents and commentaries on negotiations and constitutional development in the RSA 1989-1984*, Pretoria: Institute for Strategic Studies, University of Pretoria
- Jeena, N. 2006. "The National Liberation Struggle and Islamic feminisms in South Africa", *Women's Studies International Forum*, Vol. 29
- Kitching, K. 2003. "Strategic Litigation and Case selection", Research Paper, Interights (the International Centre for the Protection of Human Rights)
- Lewis, D. 1993. "Feminism in South Africa", *Women's Studies International Forum* Vol.16.No.5
- Manjoo, R. 2007. "The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights" Human Rights Program at Harvard Law School Working Paper, July 2007
- Murray, C. and O'Sullivan, M. 2005. *Advancing Women's Rights, The First Decade of Democracy* Cape Town: Juta and Co Publishing Company,
- Naylor, N. 2005. Discussion Paper: Rules of Standing in Litigating Public Interest Cases on Behalf of Women on the Continent, Workshop on Strategic Litigation For Women's Property Rights, African Human Rights Access to Justice Women's Rights Programme (AHRAJ)
- Niehaus, I. 2006. "South Africa's Muslims between participation and exclusion- the political role of a religious minority during the transition of democracy". Paper presented at the conference "Islamic Civilisation in Southern Africa" University of Johannesburg 2006
- Thornton, M. 2004. "Neoliberal Melancholia: The Case of Feminist Legal Scholarship" *Australian Feminist Law Journal* 7, 14.

# The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights

Grace Maingi

## Introduction

Constitutional reform processes are always highly political, and driven by multiple interests. Despite contemporary debates on the gaps between constitutional positions on women's access to rights and the day-to-day experiences of women in contexts of poverty and patriarchal norms, there is broad consensus that constitution-building offers an invaluable opportunity to translate ideals of gender equity and equality into law. This article tracks the process through which FIDA Kenya, the Federation of Women Lawyers in Kenya, worked (with allies) during 2010 to demand that the Kenyan constitutional reform process recognized the importance of women's rights to equality at the highest level of legal authority. The case study is organized into chronologically-based categories of work based on the different phases of the reform process. It suggests that making the demand for women's rights within high-level processes of legal reform entails a huge range of tasks and skills, which include experience in legal analysis and the drafting of law, media strategy, political networking, community education, and intensive planning in often unpredictable situations. While none of this would surprise legal activists, and organizations already committed to securing women's rights within the law, the level and demands of the work suggest that we cannot ignore the need to continue to document the nature of women's right work in the legal terrain. Without such documentation, the intricacy and sophistication of the work, as well as the lessons we learn from undertaking it, may well become obscured. It is relatively simple to acknowledge that an organization such as FIDA Kenya was one of many who played a key role in Kenya's constitutional reform process of 2010; it is more difficult to remember the details of that role and the layers of the work involved because as time passes these become regulated to the archival files within NGOs and the memories

of the individuals primarily involved. This case study aims to describe some of the details of FIDA Kenya's engagement with the constitutional reform both as a contribution to legal feminist history with the continent, and as a way of honouring a year of difficult and exciting work within FIDA Kenya.

## Background

Kenya has had a very interesting constitutional history. Kenya's independence talks were carried out in constitutional conferences held at Lancaster House, London and Nairobi in 1963. It was at these talks that the Independence Constitution was prepared. In May of the same year elections were held on the principle of one person one vote in leading to victory for the Kenya African National Union (KANU). Internal self-government was attained on 1 June and full independence on 12 December, 1963. In 1964 Kenya did away with the Queen as the Head of State by becoming a republic with an Executive President. Mzee Jomo Kenyatta who had been the Prime Minister became the first President of Kenya. The opposition Kenya African Democratic Union (KADU) merged with KANU, thus making Kenya a *de facto* one party state.<sup>1</sup>

The 1963 Constitution of Kenya has been amended several times since independence. The most far-reaching amendments are those which dismantled the multiparty democracy and ushered in a one party state and later the reversal of that system and the reintroduction of a multiparty political system in the 1990s. Constitutional rule in Kenya has been rocked over the decades since independence by several unexplained assassinations of prominent political figures. These include those of Pio Gama Pinto, Tom J. Mboya, Josiah Mwangi (JM) Kariuki, and Robert Ouko. These assassinations had serious repercussions on the Kenyan body politic.<sup>2</sup>

In 1966, the first Vice President of Kenya Jaramogi Oginga Odinga resigned from the ruling party and government to form the Kenya Peoples' Union (KPU). He was joined by other prominent politicians who were dissatisfied with the way the country was moving politically. These included Bildad Kaggia and Achieng Oneko. Three years later in 1969 KPU was banned, thereby confirming the one-party status of the country. In August, 1978 the first president of Kenya Mzee Jomo Kenyatta died and was succeeded by Daniel Arap Moi.<sup>3</sup>

The period immediately following the death of the founding President was characterised by continued economic progress. Kenya was widely regarded as a good example of an African country that appeared to be truly on course

to becoming a newly industrialised country. Economic growth consistently stayed above the 7% gross domestic product.<sup>4</sup>

In 1982 two events of constitutional importance for Kenya took place. First, there was an attempt to remove the government from power by unconstitutional means – i.e. by use of military force by some sections of the Kenyan army and Airforce. This was unsuccessful. Secondly, Kenya which had only been a *de facto* one party state was officially declared a *de jure* one party state. This was done through the adoption of Section 2A of the Constitution by Parliament, followed by protracted struggles by Kenyans demanding for the resumption of multiparty activity in the country. These struggles took various forms including seminars, workshops and at times demonstrations which were sometimes crushed with excessive force by the members of the police force. The most prominent of the demonstrations were those referred to as the “*Saba Saba*” uprisings of 1990.<sup>5</sup>

After the failed military coup of 1982 the ruling regime embarked on a process of purging elements in the military, government and academia viewed as being dissidents intent on undermining the government. Detention without trial and crackdown of ‘revolutionary movements’ and the free media became commonplace. For all intents and purposes, Kenya was a one party dictatorship between 1982 and 1991. The next phase of reforms, which took place over the period 1989 and 1992, was triggered by the fall of the former Soviet Union and subsequently the Berlin wall, events that marked the collapse of global communism and the genesis of a wind of change in favour of Western style democracy and the end of the cold war.<sup>6</sup>

As all this was going on, pressure for economic reforms fronted by the two Bretton Woods institutions namely, the International Monetary Fund (IMF) and the World Bank was intensifying. Governments in the developing world urged to adopt structural adjustment programmes (SAPS) in order to become eligible for loans from the IMF and the World Bank. SAPS required imposition of user charges for public services, including essential ones such as health and education, many of which were previously provided free by governments. The result was reduced access to these services by the majority poor citizens majority of whom are women. Levels of poverty and deaths from preventable diseases escalated to unprecedented proportions.<sup>7</sup>

The authoritarian nature of the government of Kenya resulted in a state of affairs where appointments to public office were based on loyalty to the President and the ruling party rather than experience and capacity of the

holders of those offices. The result was poor economic management and intermittent breaking of relations with the country's major bilateral donors. Levels of corruption escalated at the same rate at which the standards of living of citizens plummeted. Budgetary indiscipline, compounded into a crippling domestic debt problem. The government's operations and maintenance budget dropped from 46% in 1980 to 25% in 1996 even with increasing donor assistance.<sup>8</sup> A year later in 1991 Section 2A was repealed and political pluralism was allowed once again in Kenya.

The long awaited constitutional review process came in 1997 when the Constitution of Kenya Review Commission Act was passed to provide a framework for constitutional change. Following extensive negotiations between the government and civil society, changes were effected in that law through the Constitution of Kenya Review Commission (Amendment) Act, 1998. The new changes managed to incorporate a people driven constitution-making process the insistence by those in government and the ruling party that it is only parliament that could review the constitution stalled the process again. It is at this point that the Ufungamano Initiative; a citizen's lobby group on constitutional change led by the religious sector came into life. The mandate of this group was to facilitate the making of a constitution for Kenyans by themselves. Following the intervention by Prof. Yash Pal Ghai, the Chairman of the Constitutional Review Commission, the two initiatives – i.e. the parliamentary group and the Ufungamano group, merged to form one Commission.<sup>9</sup>

The Constitution of Kenya Review Commission (CKRC) was formed through the enactment of the Constitution of Kenya Review Commission (Amendment) Act of 2001, however after consultation that lasted less than a year the march towards a new constitution was stopped when Parliament was dissolved in October 2002 to prepare for the general elections at the end of that year.

The CKRC continued with its original work of collecting views from Kenyans after the National Alliance Rainbow Coalition (NARC) won the December 2002 general elections. The outcome of that process was a Draft Constitution (Ghai Draft) which was presented to and adopted by a National Constitutional Conference, of which FIDA Kenya participated in, as the Bomas Draft. This draft was however contested and after the Bomas process collapsed, the Attorney General prepared the Proposed New Constitution of Kenya (2005) or the so called Wako Draft that was subjected to a referendum on the 21<sup>st</sup> of November 2005 and was rejected.

The rejection of the Proposed Constitution in 2005 engendered a tense political environment that contributed to the disputed Presidential elections of 2007 and the resultant post election crisis. The crisis was resolved through the National Accord and Reconciliation Agreement mediated by the African union appointed Panel of Eminent Persons led by H.E. Kofi Anan, the former UN Secretary General. The Agreement was underpinned by the National Accord and Reconciliation Act (2008) (NARA). NARA established the coalition government, a framework and institutions to initiate a constitutional review process that would lead to a new constitution for Kenya. Notable among the key concerns was the Agenda Four of the National Accord that called for the resolution of long standing constitutional, legal and institutional reforms, including the passage of a new Constitution.

Parliament enacted the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008 to serve as the legal framework for achieving a new constitution.<sup>10</sup> The Constitution of Kenya Review Act, 2008 provided for the following:

1. The establishment or recognition of four organs to be involved in facilitating the review process and drafting the new constitution.
2. The procedure and the modalities of the work of these organs especially as regards the achievement of consensus on the so called contentious issues.
3. The provision for the holding of a referendum in which all eligible voters will decide on the new constitution.

The four organs established or recognized by Parliament to help achieve a new constitution were-

- The Committee of Experts
- The National Assembly
- The Parliamentary Select Committee
- The Referendum - People of Kenya

These organs were established and expected to operate independently and not accept instructions from any person. The Committee of Experts and the other organs were required by the law to take into account the following as guidelines in their work.

- (a) ensure that the national interest prevails over regional or sectoral interests;

- (b) be accountable to the people of Kenya;
- (c) ensure that the review process accommodated the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
- (d) ensure that the review process–
  - (i) provided the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
  - (ii) was guided by the principle of stewardship and responsible management;
  - (iii) was conducted in an open manner; and
  - (iv) was guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;
- (e) Ensured that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

## **The Committee of Experts**

The Committee of Experts was the main technical organ in the process. It comprised nine experts who were nominated by the National Assembly and appointed by the President as per the requirement of the Act. In nominating persons for appointment as members of the Committee of Experts, the nominating bodies (the National Assembly and the Panel of African Union Eminent Persons) were required by law to have regard to the experience and academic qualifications of the applicants, the principle of gender equality and Kenya's national character and diversity.

Six of the members of the Committee were Kenyans and three members were non-Kenyans. The Committee of Experts was required by law to–

- (a) identify the issues already agreed upon in the existing draft constitutions;
- (b) identify the issues which were contentious or not agreed upon in the existing draft constitutions;
- (c) solicit and receive from the public written memorandum and presentations on the contentious issues;
- (d) undertake thematic consultations with caucuses, interest groups and other experts;
- (e) carry out such studies, researches and evaluations concerning the

- Constitution and other constitutions and constitutional systems;
- (f) articulate the respective merits and demerits of proposed options for resolving the contentious issues;
  - (g) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in a manner that will be for the greater good of the people of Kenya;
  - (h) prepare a harmonized draft Constitution for presentation to the National Assembly;
  - (i) facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
  - (j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution.

The Committee of Experts prepared its report and the harmonized draft Constitution and published the draft Constitution for a period of thirty days; and after that ensured that the report and the draft Constitution were made available to the public. After receiving the views of Kenyans the Committee of Experts reviewed the draft Constitution and incorporated the views of the public and then presented the draft Constitution and the report to the Parliamentary Select Committee for deliberation and consensus building on the contentious issues. In debating the contentious issues the Parliamentary Select Committee was required to take into account the recommendations of the Committee of Experts.

FIDA Kenya was able to participate in the various public forums held by the COE and specifically presented a memorandum to the COE on the women's agenda for the Constitutional review process. The memorandum and presentations at the public forums borrowed heavily from the past work FIDA Kenya had undertaken at Bomas, the draft constitution prepared by FIDA Kenya, IED, the League of Kenya Women Voters and the Kenya Human Rights Commission.

During this period, FIDA Kenya was also able to undertake civic education on the harmonized draft constitution in thirty three constituencies countrywide. This initiative was geared towards drawing public attention to the process and content of the Harmonized draft. Various challenges were faced during this civic education process which included fear and suspicion of the Constitution due to the post election violence, poor distribution of the harmonized draft constitution, the illiteracy still prevalent within Kenya's

poorest communities, and popular ideas rooted within Kenya about the legitimacy of women as full citizens when it came to questions of inheriting property and reproductive control.

Even more difficult challenges for FIDA Kenya arose however once the Parliamentary Select Committee, which was responsible for tabling the report and draft Constitution received from the Committee of Experts before the National Assembly, began its work. Analysis of the PSC draft revealed to us that a lot of gains made in the Harmonized Draft Constitution prepared by the COE were taken away in the PSC Draft. In summary, these can be named as:

- Significant losses for the protection of the rights of children, women, people with disabilities, and minority groups, among others.
- The PSC Draft represented a significant setback in the government's commitment to protecting and fulfilling economic and social rights, specifically the rights to social security, health, education, housing, food and water.
- The PSC Draft undermined transparency and civil society participation by removing key language protecting the right to information and freedom of association.
- The PSC Draft eliminated language outlining the activities which the government must take to meet its human rights obligations.
- The PSC Draft eliminated the Constitutional Court and its accompanying powers.

It is important to this case study to spell out the specific way in which the PSC Draft represented significant losses for ensuring that women's rights were upheld in the Kenyan constitution.

### *Eliminating Equal Rights around Marriage*

The PSC Draft eliminated the COE Draft language affirming that "Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage." This affirmative declaration of equal rights was replaced by language that "Parliament shall enact legislation that recognizes the rights of parties to a marriage at the time of marriage, during the marriage, and at the dissolution of the marriage." The word "equal" was markedly absent in the PSC Draft.

### *Threats to Women's Reproductive Health*

The PSC Draft added language stating that “The life of a person starts at conception” and that “Abortion is not permitted unless the in the opinion of a registered medical practitioner, the life of the mother is in danger.” The PSC Draft also removed language affirming the right to reproductive health care.

### *Eliminating Language Affirming Shared Parental Responsibility for the Care of Children*

The PSC Draft removed language stating that “A child’s mother and father, whether married to each other or not, have an equal responsibility to protect and provide for the child.”

In doing so, the PSC Draft left in place a legal regime where mothers are generally held solely responsible for providing for children born outside of marriage.

In the PSC Draft, children were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 41) which specifically outlined the rights of children, including among others:

- the equality of children regardless of whether they are born within or outside of marriage,
- (as mentioned above) the right to care from both parents regardless of their marital status
- the right to “free and compulsory basic education,”
- the right to “adequate nutrition, shelter, basic health care services and social services,”
- the right “not to be subjected to violence or to be treated or punished in a cruel, inhuman or degrading manner in schools and other institutions responsible for the care of children,”
- the right to “be detained for only the shortest appropriate period” and to “be kept separate from adults in custody.”

In the PSC Draft, persons with disabilities were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 43) which specifically outlined the rights of persons living with disabilities, including among others:

- the right to “have access to education and to institutions and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons,”

- the right to have reasonable access to all places accessible to the public, to public transport and to information and communications;
- the right to “use of sign language, Braille and other appropriate means of communication,” and
- “equal rights to inherit, access, and manage property.”

The PSC Draft also represented significant losses for ensuring that the rights of ethnic and religious minorities and marginalized groups were upheld in the constitution.

### *Eliminating the Articulation of Multiple Rights for Minority and Marginalized Groups*

In the PSC Draft, minority and marginalized groups were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 44) which specifically outlined measures the government should take to ensure that minority and marginalized groups can, among other things:

- “are accorded special opportunities in the educational and economic fields,”
- “are accorded special opportunities for access to gainful employment,” and
- “are assisted to have reasonable access to water, health services and transport infrastructure.”

### *Eliminating a Minority Rights Commissioner*

The PSC Draft replaced the Human Rights and Gender Commission contained in the COE Draft with an Equality Commission. In doing so the specific designation of a “Minority Rights Commissioner, who shall have special responsibility for the rights of ethnic and religious minorities and marginalized communities” was eliminated.

### *Eliminating Language to prohibit compelling a person to indicate race or ethnicity*

Under the Equality and Freedom from discrimination provision, the PSC draft removed language stating that “A person may not be compelled to indicate or define that person’s ethnicity or race.”

In summary, then, the PSC Draft seriously weakened constitutional protections for economic and social rights. The PSC Draft consolidated

into one article the freestanding rights to social security, health, education, housing, food, and water as they were elaborated in the COE draft. It then framed these rights solely in the context of progressive realization, stating that the “State shall take legislative, policy and other measures, including the setting of standards to achieve the progressive realization of the rights of every person to” these rights. In doing so, as discussed below, it weakened the contents of these rights significantly. In addition, the PSC Draft removed the provisions which would allow oversight and accountability for ensuring whether the government was meeting its progressive realization obligations, including removing a freestanding right to information and removing the clauses which would guide accountability body in determining whether the government was complying with its obligations.

### **Fida Kenya’s initiatives after the PSC Draft**

Following the presentation of the PSC Draft FIDA Kenya undertook various initiatives to counter the negative effect of the PSC draft on both specific and general issues and both on its own and as part of various networks. FIDA Kenya specifically focused on issues around the bill of rights, specifically gender related provisions and the Judiciary.

During this period FIDA Kenya in conjunction with the Reproductive Health Rights Alliance (RHRA) worked towards highlighting the negative effects of the clause on right to life. This was done at two levels that is activities geared towards policy makers, that is the Committee of Experts and Parliamentarians and on the second level activities geared towards changing public perceptions on reproductive health rights and abortion in general.

In order to successfully mount this campaign to have the language in the PSC draft amended to ensure that the right to life clause was left to read as per the Harmonized draft, FIDA Kenya and the RHRA were able to establish a rapid response unit to counter negative messaging.

Due to the high level of negative portrayal of reproductive health rights and the clause on abortion, it was essential to ensure that any misleading information on abortion and reproductive health rights developed by the anti choice movement was countered with researched and factual information. This led to the development of clear messaging on the effects of article 25(4) of the PSC draft which in simple terms meant that women would only be able to procure an abortion if their life was in danger and that this could only be determined by a doctor. This bore several challenges that include

that in Kenya there are under one hundred registered gynecologists working in public health facilities countrywide therefore limiting women's ability to receive effective care.

Simple messaging was used to shift public opinion and perception and this included using medical practitioners and women leaders to speak out together with the same message. This also included use of media to propagate the messaging through the use of vernacular radio, use of both print and electronic media with widespread coverage and other information education and communication tools such as pamphlets and fliers.

The Judiciary is the custodian of the Constitution. It is mandated to ensure that the protection of the rights provided in the Constitution and polices the boundaries between the powers of the various state organs. In order to fulfill its inherent constitutional mandate, the Judiciary must enjoy independence from other branches/organs of government. Consequently, independence of the Judiciary is a crucial means to an end. The independence and accountability of the Judiciary is key to the realization of the rule of law, social, political and economic stability of any nation.

FIDA Kenya in conjunction with the Kenyan Section of the International Commission of Jurists (ICJ Kenya and the Kenya National Commission on Human Rights (KNCHR) reacted to the decision of the Parliamentary Select Committee regarding transitional clauses on the Judiciary in the Harmonized Draft Constitution through various methods including issuing press statements on the same. The PSC draft proposed to maintain the Judiciary unaltered, even as the country sought reforms in its institutions as part of the constitutional reform process.

This position was a departure from the initial proposal in the Harmonized Draft Constitution which had taken into account the general consensus on judicial reforms and had gained popular public support. The transitional clauses in the COE draft proposed the reform of the country's judicial system, and provided that upon the enactment of the new Constitution, the President and the Prime Minister would be required to establish an Interim Judicial Service Commission to serve for a year.

The Commission would be mandated to reform the Judiciary by subjecting all judges and judicial officers to a conduct review. Whilst the review was being conducted, all judges and other judicial officers - including current head of judiciary - would continue to serve but under an acting capacity.

There are several reasons why FIDA Kenya was opposed to maintain the

status quo in the Judiciary. First, the procedure by which judicial appointments had been made was opaque and did not lend itself to public confidence. It is not possible to argue that the composition of the current Judiciary has been arrived at on the basis of merit alone. While a number of the serving judges are competent, and enjoy the confidence of colleagues in the legal profession, a large number of others are unfit for the offices that they hold and are of great disservice to the institution and their colleagues.

Secondly, the Kenyan Judiciary has consistently been the subject of criticism and declining public confidence from the political class, media and most importantly, the general public. A number of credible independent assessments of the Judiciary have resulted in findings that there was an urgent need for an overhaul of the Judiciary. The UN Special Rapporteur Professor Philip Alston and the Commission of Inquiry into Post Election Violence (CIPEV) Report made specific recommendations on the need to urgently reform the Judiciary.

Thirdly, the PSC had proposed a strong presidential system “with checks and balances”. One of the checks and balances on a strong presidency is a strong Judiciary. As demonstrated in several situations, including its participation in the hurried swearing-in of President Mwai Kibaki for his controversial second term, which is the acknowledged trigger for the post election violence, the current Judiciary lacked civic courage and had no capacity to withstand extreme political pressure.

FIDA Kenya also participated as an active member of the Katiba Sasa<sup>11</sup> Campaign which was a civil society initiative aimed at ensuring that Kenya got a new constitution. Through the Katiba Sasa! Campaign FIDA Kenya was able to ensure that women’s issues remained key within the constitutional debate. The Katiba Sasa! Campaign maintained regular contact with the public through its regular Sunday press conferences and actively engaged Members of Parliament and the PSC on key fundamental issues. FIDA Kenya’s active involvement in the Campaign as a member of the technical committee ensured that women’s rights matters were mainstreamed.

## National Assembly Debate

When the Revised Harmonized Draft (RHD) was tabled before Parliament there were over one hundred amendments proposed by Members of Parliament to the same. This was not an ideal situation for FIDA Kenya or women in general as we were of the opinion that any tampering with clauses within

the RHD would serve to water down the key principles around human rights and equality. Various strategies were employed to counter the MPs proposed amendments.

FIDA Kenya in conjunction with other civil society groups presented a petition to Parliament to halt any amendments to the RHD. In addition to this FIDA Kenya and other key women rights organizations organized several meetings with female MPs and the then Minister of Gender to garner support for maintaining five key women gains in the constitution. FIDA Kenya was also part of a lobby to push for amendments to the RHD in favour of reproductive health rights through various strategic MPs.

FIDA Kenya also joined other civil society organization to caucusing with Members of Parliament as organized interest groups and to provide technical expertise to MPs. Various media engagements were undertaken in order to shape public opinion and this also included one on one civic education with colleagues, friends and acquaintances.

The debate on the Proposed Constitution was very spirited with the green colour symbolizing support for the proposed constitution and the colour red symbolizing rejection of the proposed constitution. At this point a certain group of civil society organizations saw it unfit to declare support for either side however due to the gains that the proposed constitution had for women FIDA Kenya however came out strongly to show its support for the proposed constitution. As a result of FIDA's work, and the work of other feminist activists, we argued that the proposed constitution – as revised – carried strong gains for women. Some of the gains for women in the PCK included:

- Women would be able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. This is as opposed to the old constitution which only allows women married to Kenyan men to acquire citizenship through marriage. Citizenship is also not lost through marriage or the dissolution of marriage- This is a gain for women as it is not expressly stated in the current Constitution. It is a symbol of protection and safety of women by the state.
- The constitution accords Right to health included the right to reproductive health to women Under Article 43 (1) (a). Article 27 (3) also provides that women and men have equal opportunity without discrimination. Health is a basic need for human existence and survival and as such, it is a right that must be respected, promoted and protected by government and society.

- Article 60 (1) (f) provides for the elimination of gender discrimination in law, customs and practices related to land and property in land. This is a great gain for women as it seeks to rectify historical injustices that have continually faced the women of Kenya. The law as it is has promoted discrimination of women in land and property rights by allowing for the application of customary laws which are discriminative in Nature. The customs and practices of many Kenyan communities promote discrimination of women in several areas, including land and property rights. This will benefit not only the women but Kenyan citizens generally.
- Article 68(1) states that “parliament shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage” This is recognition of the injustices women have historically faced in relation of matrimonial property. Women’s rights to matrimonial property have been largely compromised due to the patriarchal order of society that views men as the sole owners of matrimonial property.
- Gender equality has been maintained even in political parties with the constitution providing for it as a basic requirement for political parties as amongst others respect and promotion of gender equality. The old Constitution supports customary laws that discriminate against women in the areas of gender-based violence, leadership, early marriage, child labour, divorce, property rights, girl child illiteracy, and other matters while The Proposed Constitution recognises women’s rights above discriminatory customary laws.

There were a number of challenges faced during the pre referendum period and these included low female voter registration and poor understanding of women of their gains within the PCK. The Interim Independent Electoral Commission attempted to encourage an increase in female voter registration ahead of the referendum however this was hampered by patriarchal practices by husbands who kept the national identification cards of their wives and refused to release them to their wives whom they did not want to be in urban areas such as Nairobi during the referendum day due to the fears associated with voting and the post election violence. FIDA Kenya went ahead to mark the 3<sup>rd</sup> of May 2010 as Female Voter Registration Day and held press

conferences calling on women to come out and register to vote.

There was a distinct lack of genuine voter civic education as most of the campaigns began well in advance of the stipulated campaign period and fed into the period set aside for civic education. There was intense campaigning however even now a large percentage of the population did not benefit from quality civic education.

During the pre referendum period there were also numerous distortions made within popular and media debate. These mainly centred on the controversial topics of land, abortion, Kadhi Courts and same sex marriages. A separate study of these discourses would be very interested; some of the misinformation circulation included the idea that mortuary attendants will be able to provide abortions to women; that women would be able to have abortions anytime and anywhere and performed by any person working in a hospital even if they are not a health provider; that sharia law would be introduced in Kenya; that same sex marriages will be allowed in Kenya; and others. In order to counter the distortions FIDA Kenya participated in various radio and TV talk shows in order to address the key distortions affecting women's rights and developed a simple flier which outlined key gains for women in the PCK.

During the debate around the PCK and abortion the clergy and anti choice movement came out very strongly to oppose the PCK and resorted to applying extreme pressure to policy makers to amend the PCK. There were various calls to the President to amend the PCK and at one point there was proposed a meeting between the executive arm of government and religious leaders to broker a deal due to the sharp divide. FIDA Kenya at this juncture presented a letter to both the President and the Prime Minister on the issue. FIDA Kenya is the leading women rights organization in Kenya and was able to liaise with its international partners such as the Centre for Reproductive Rights (CRR) to quickly analyse the various drafts. FIDA Kenya was able, both on its own as part of various networks and initiatives submit memoranda to the Committee of Experts on the gains that women wanted to see in the new Constitution.

In addition to this FIDA Kenya was able to run a civic education programme that utilized community personnel in thirty three constituencies out of two hindered and ten on both the Harmonized Draft and the Proposed Constitution. FIDA Kenya also took part in ad hoc civic education forums organized by its partners through utilizing its membership. FIDA Kenya members were able to provide civic education to the National Nurses

Association of Kenya, the Reproductive Health Rights Alliance, Daughters of Mumbi, Waremba Ni Yes and other groups.

FIDA Kenya held five National Women Strategy Meetings ahead of the referendum to enable women from both the yes and no campaign sides an open space to discuss holding a peaceful referendum and thereafter the Strategy meetings were centred around developing an action plan for women around the implementation of the new Constitution. The work was intensive and demanding; however, we believe that it had powerful effects on public discourses hostile to women's equality.

Prior to the referendum a number of cases were filed in a bid to halt the constitutional review process. One such case touched on article 26(4) with regards to the Right to life and abortion. The petitioner requested the court to delete the article from the Proposed Constitution. FIDA Kenya was able to appear before the court as an intervener and contended that the court had no jurisdiction to review content of the PCK as regulation 12 of the IICDRC Rules stipulates that;

"Any person who is aggrieved by a matter relating to the constitutional review process as specified under the Act may petition the court in accordance with these rules."

Regulation 12 clearly dealt with the process of the Constitutional Review and not the content and or the substance of the draft Constitution.

By urging this Honorable court to strike out Article 26 (4) and to insert a new Article 26(4) as contained in the Bomas Draft the petitioner was asking the Court to change the content of the Constitution. FIDA Kenya pointed out that the statutory power of reviewing the Constitution of Kenya lied in the hands of the organs of review, under Section 5 of the Constitution of Kenya Review Act – Act 9 of 2008 which included the Committee of Experts, the Parliamentary Select Committee, and the National Assembly and the Referendum. The power to insert and remove Articles in the draft constitution was alive and in the hands of these organs during the review process. FIDA Kenya pointed out that the National Assembly was the organ that had the opportunity to amend the draft constitution and, although 7 amendments were proposed to Article 26(4) alone, not a single amendment was successfully passed by the elected officials in the National Assembly. All proposed amendments failed. Instead, the draft constitution was approved by the National Assembly in its current form and there this was the draft that must, according to the Constitution of Kenya Review Act, go to the final

review organ, the *referendum*, to be voted on by the people of Kenya.

FIDA Kenya's application was successful and the case was thrown out.

During the referendum itself FIDA Kenya monitored the levels of electoral violence. It was widely celebrated that the referendum process was both well managed by the Interim Independent Electoral Commission (IIEC), the referendum was peaceful and that there was high turnout. A number of initiatives were geared towards spreading the message of peace during the referendum and this became the rallying call of the women's movement.

On the 4<sup>th</sup> of August 2010 the majority of Kenyans voted in the Proposed Constitution of Kenya which was promulgated on the 27<sup>th</sup> of August 2010. The grand promulgation was everything that any Kenyan would hope for save for the presence of President Omar Bashir who has outstanding ICC arrests warrants but whom was invited to the ceremony by the Kenyan Government, this and the fact that no woman spoke throughout the entire promulgation ceremony were stake reminders that the Government viewed everything 'as business as usual'.

## Conclusion

As Kenyans focus on the arduous task of implementing the new Constitution there is a renewed energy amongst all. As FIDA Kenya the key lessons that we learnt during this process include the importance of a co-ordinated response to such mammoth tasks. This includes the need to undertake intense mapping of partners, sharing of responsibilities and synchronized, aggressive fundraising. Another key lesson for FIDA Kenya is the power of networking. Through various interest initiatives and networks FIDA Kenya was able to propagate the message of gender equality and therefore use various strategies open to a wider cross section of civil society. It is hard to deny that continuous engagement and a rapid response unit to issues did not greatly assist the process. The technical assistance from foreign partners also contributed to the successful passing of the Constitution and is a clear case study of how various efforts can contribute to a great change. In the long run, it remains to be seen how the commitments of the new Constitutions can open up new avenues of thought and practice, particularly in the controversial arenas of women's right to terminate pregnancies, to inherit property, and to have access to the same rights as Kenyan men.

## Endnotes

1. Report of a fact-finding mission of Kituo Cha Katiba (East African Centre for Constitutional Development) on the progress of the constitutional review exercise in Kenya
2. Ibid.
3. Ibid.
4. Country reform in Kenya. Case study region 7 – sub Saharan Africa. FIDA Kenya.2002.
5. Report of a fact-finding mission of the Kituo Cha Katiba on the progress of the constitutional review exercise in Kenya
6. Country reform in Kenya. Case study region 7 – sub Saharan Africa. FIDA Kenya. 2002.
7. Ibid.
8. Gatheru, G. and Shaw R. 1998. *Our problems, our solutions: an economic and public policy agenda for Kenya*, Institute of Economic Affairs Nairobi, Kenya.
9. Report of a fact-finding mission of the Kituo Cha Katiba (East African Centre for Constitutional Decevelopment) on the progress of the constitutional review exercise in Kenya.
10. COE.
11. Constitution now in Swahili.



# Case Study: Legal Action to Stop Hotels Discriminating Against Women in Zambia

Sara Hlupekile Longwe

## Introduction

This case study takes a personal look at legal action taken against a *Zambian* hotel in Lusaka during the period 1984–1992 to stop their discrimination against women in access to the hotel. The hotel in question was the Hotel Inter-Continental in Lusaka, which – like other expensive hotels in the country – had a well-known policy of preventing ‘unaccompanied women’ from entering the hotel, or otherwise from certain parts of the hotel (especially the bar).

I challenged this discriminatory practice as a *Zambian* citizen, during the period 1984 to 1992, when I finally obtained a High Court order that such practice was unlawful and in contravention of the human rights provisions of the constitution, and that such practice must be “scrapped forthwith”<sup>1</sup>

I begin by looking at my first brush with the hotel’s discriminatory practice, the subsequent raising of a complaint with the Investigator General (the *Zambian* equivalent of an ombuds), and the unsatisfactory outcome of this action. I then go on to consider a second similar incident, which caused me to petition to the High Court. This is followed by an account of the court case, the judgment and the events which followed.

The final sections look at some of the issues arising from this case, and its wider implications for legal action as a means towards women obtaining their right to equal treatment under the law.

This is a well documented case, and the titles of almost all of the documents referred to are listed; what makes this study different from others is that I write autobiographically, not in any spirit of self-congratulation, but in the acknowledgement that the work of this case was an intimate part of my own life, and my family’s life, for eight years. The realities of challenging the law, as a feminist activist, include the personal experience of coming up

against a wall of resistance and opposition. While it is possible to manage this and to strategize against the psychological and political impact of this opposition, there is need to recognize the multiplicity of roles, such as litigant, petitioner and witness, which an African feminist must assume when daring to enter into the field of legal activism.

## The First Case of Discrimination

### *The Incident*

In the late afternoon of 4 February 1984 I went, with my husband Roy Clarke, to the Inter-Continental Hotel in Lusaka, Zambia, to collect two of my children from a children's birthday party which had been held within the hotel. I got out of the car at the main hotel entrance, while my husband drove with our toddler to wait in the hotel car park while I went into the hotel to fetch our two daughters. Although aware of the 'no unaccompanied women' rule which was part of the policy of surveillance over women's access to hotel spaces in the evenings, I had not expected this rule to be operating in the afternoon, and during daylight hours.

In this I was wrong. As I tried to enter through the main entrance, the security guard addressed me, saying "Where are you going, madam?" to which I replied "I'm going into the hotel." He immediately said "You can't go in, you are unaccompanied." I was shocked and replied "Rubbish", and walked past him. The security guard then grabbed my arm from behind, pulling me back. Being a fit young woman with some training in karate, I threw him off, which caused the security guard's hat to fall to the ground, whereupon he instinctively stooped down to pick it up. I took advantage of the guard's distraction and ran into the hotel.

The security guard, who had followed me into the hotel, shouted and other hotel personnel came onto the scene. The duty manager was called, and I attempted to lay a complaint concerning the treatment I had received. However, instead of any attempt at redress from the duty manager, I was informed that I had transgressed the hotel regulation that a woman could enter the hotel only if accompanied by a man.

All this took so long that I sent my daughters to go and fetch their father, who then came to find out what had happened. Upon his appearing upon the scene, I instructed him to go at once to the nearby police station and return with the police. This is because, by then, the hotel duty manager had admitted that the security guard had transgressed hotel instructions because

he was not supposed to physically accost “unaccompanied women.” Roy duly returned with four policemen, one of whom appeared to be an inspector, and the other three appeared to be constables. I explained my experience to the police, and laid a complaint against the security guard for physical assault, and against the hotel for refusing access to the hotel without reasonable grounds. However, the police treated me as the offender. Despite my account of having been (literally) manhandled by the security guard being fully and enthusiastically corroborated by the security guard himself, the police warned me to immediately leave the hotel premises.<sup>2</sup>

When I told the police I would be lodging a complaint about their attitude, the police inspector in charge told me that I could report to anybody their refusal to accept the complaint of assault. They further warned me that if I did not immediately “shut up” and stop “making a nuisance of yourself,” they would lock me up in the cells for the night.

In the face of the police threat, I asked each of the policemen to provide their name, rank and number (their numbers were not displayed on their uniforms). One junior officer (a constable) gave his name and number grudgingly, but the others refused to do so. At this stage I chose to leave the premises of the hotel, for fear of the safety of my unborn child (I was four months pregnant at the time).

### *Letters, Appeals, Delays: Action on First Hotel Incident*

Four days later, on 8 February 1984, I sent a letter, complaining about my treatment at the hotel, to the Executive Secretary of the Women’s League of the United National Independence Party (UNIP), the ruling party of the then one-party state. No reply was ever received to this.

This same letter was also copied with covering letters to various public institutions including the Investigator General, Minister of Home Affairs, Commissioner of Police, Minister of Tourism, Hotel Board of Zambia, Hotel Inter-Continental Proprietors and Anderson Security Systems Ltd (which was the company which employed the security guards at the hotel).

### **Complaint to the Hotel Proprietors and Others**

Six days later, I wrote a letter to the President of Hotel Inter-Continental in New York, complaining of non-response from the General Manager of the Lusaka Inter-Continental Hotel to my letter of 8 February 1984 which was copied to the hotel management. There was no reply from New York either.

However, the Acting General Manager of the Lusaka Inter-Continental Hotel wrote two letters on 14 and 27 February 1984, without reference to the New York head office. In the first letter, which I received after I had already written to New York, the local hotel management promised that they “will do everything possible to investigate this unpleasant incident with the Anderson Security Systems Ltd”.<sup>3</sup> However, in the second letter the manager invited me to go to their hotel to be informed of their findings. I replied in a letter in which I refused this invitation on the following grounds:

- i. The hotel had not put their findings in writing, which should have been copied to all interested parties mentioned in her letter of 8<sup>th</sup> February 1984 for their consideration;
- ii. I continued to run the risk of being molested and humiliated again by the hotel security guards, since I had been given no assurance that this would not happen;
- iii. The manager had not apologized for what he called an “unpleasant incident” that he had investigated with the Anderson Security System Ltd;
- iv. The manager was evidently treating the “unpleasant incident” as an isolated and private matter which he considered warranted no more than a “verbal explanation.”

I concluded this letter by inviting the hotel management to reply in a satisfactory manner to the issues summarized above. They did not reply.

### **2.2.2 Complaint to Lusaka Police Commanding Officer**

On 27<sup>th</sup> April 1984 I wrote a letter of complaint to the Lusaka Central Police Commanding Officer for police failure to take action in my case of physical assault and unlawful exclusion from public premises. I pointed out the unsatisfactory aspects of the police:

- i. The police refusal to take a statement from me.
- ii. The four policemen on the incident scene constituted themselves as a kangaroo court by declaring that the hotel had no case to answer and yet the hotel manager on duty at the incident scene admitted that it was hotel policy to prevent unaccompanied women from entering the hotel.
- iii. The police had taken no action against the assailant on the ground, they said, that I had no physical signs of injury. This determination

was made even after the assailant had admitted in their presence that he had indeed physically attacked me and even boasted that he habitually assaulted unaccompanied women who tried to enter the hotel.

- iv. The police had pointed out that the security guard was wearing a uniform, and I should always obey instructions from a person wearing a uniform.
- v. The police refused to disclose names and ranks of all the police officers present.

I received no reply from the police to this letter.

### 2.2.3 Appeal to the Investigator General

When I followed up the case at the office of the Investigator General, who had also been sent a copy of my complaint of 8 February 1984, and asked to investigate, I was told in writing (1 October 1984) that the Investigator General had declined to look into the case, claiming that he had not been directly asked (but he had), and that the ruling party UNIP was already looking into the matter (it wasn't).

Undeterred, I wrote back to the Investigator General putting my views on why he should intervene in the case as part of their mandate. I specifically pointed out that:

- i. The original letter of complaint, although addressed to the UNIP Women's League, was not only copied to him, but included a covering letter addressed to the Investigator General that directly requested the Commission to investigate my complaint about the unwarranted and unlawful discrimination against unaccompanied women being practiced by the Lusaka Inter-Continental Hotel.
- ii. The Commission's assertion that the UNIP Women's League were handling the matter was false because they had not replied to my letter of 8th February 1984 and since then, through Press reports of the Zambia Daily Mail of 24 and 28 August 1984, the Chairperson of the League commended the Hotel's action of barring entry to their premises to unaccompanied women because they are 'home breakers', contradicting her Executive Secretary, who had given the opposite view to the same newspaper.
- iii. Since the UNIP Women's League clearly had conflicting views on

what constitutes women's rights, and had not responded to my complaint, it was essential that the Commission for Investigations took interest and action in this issue on women's constitutional fundamental rights.

My letter had its effect because, notwithstanding the Investigator General's earlier dissociation of himself from the case, he wrote to me on 10 June 1985 (more than a year after the complaint was originally put before him), agreeing to attend to my complaint, and inviting me to a hearing. Subsequently, at this hearing, I verbally re-put my complaint before the Investigator General and a panel of his colleagues, and answered their further questions on what exactly had happened, and why I considered this to be a case of illegal discrimination.

Despite now having finally persuaded the Investigator General to properly investigate my complaint, I did not have any feeling of optimism. It was obvious that the case had been taken on reluctantly, after excuses not to do so had been shown by me to be inadequate. Furthermore, apart from within my own family, I could find little support or enthusiasm for pursuing the case – rather there was an attitude that I was making a fuss about a minor matter, and there were more important issues in women's rights than trying to gain access to an expensive hotel.

### *The Outcome*

On 23 March 1987, more than three years after the complaint was made, the Investigator General wrote to me giving a ruling in my favour. He stated that the Ministry of Tourism had agreed with the Investigator General that it was wrong for hotels 'to discriminate against women in this wholesale manner'.

According to his letter, the Investigator General had advised the Ministry of Tourism to advise the Hotels Board to advise the hotels that they should not discriminate in this way. It may be noted that the Investigator General did not think to extend his advice to the police, that they should in future ensure that their actions on such issues should be guided by laws made in parliament rather than laws made by hotels.

I did not feel any sense of victory about this outcome. Although I was subsequently given a copy of the policy position and directions given by the Ministry of Tourism to the Hotels Board, there remained the question of whether the Board ever formulated new regulations and gave these to all hotels. And if the Hotels Board did ever make a ruling on the matter, did

the hotels ever take any notice of it? It looked rather as if the ruling by the Investigator General had no force, and no means of enforcement.

I did not attempt to celebrate or publicise the outcome, because it seemed to be little more than a piece of deliberately ineffective lip-service. And sure enough, as time went on, it became clear that hotel discrimination against women continued to follow the same pattern as previously, as is evidenced by the second similar instance of discrimination which I experienced, and which is recounted below.

## The Second Case of Discrimination

### *The Incident*

On 1 February 1992, eight years after the original incident, I had an almost identical experience at the same hotel. I had gone to the hotel in the morning for an all-day meeting to discuss strategies for promoting women's rights. I was one of the organizers of the meeting and both myself and my husband were amongst the main speakers.<sup>4</sup> The meeting was held in a conference room within the main hotel building.

After the meeting had ended, late in the afternoon, my elder sister Christine and I decided to relax and review the meeting at the hotel's Luangwa Bar (my husband Roy had already gone ahead to the bar). However, as we approached the bar, we found a security guard posted at the door who denied us entry. When I asked why, he replied that we were unaccompanied. In an apparent effort to be helpful, the security guard asked us if we knew anybody who was already in the bar. The implication of this question was that, if there was a man we knew within the bar, he could invite us in, so that technically we would be "accompanied".<sup>5</sup>

It was at this point that the incident took on the character of a test case, because my husband was already at the bar, and was watching the proceedings from a few meters away. However, neither I nor my sister said that we had come to join him, and my husband stood there and stared at us as if he had never seen us before in his life. All three of us had immediately recognized that this was an issue for all women, and that it had to be treated as such from this point on. In other words, I had just been given the basic material for a test case.

Unlike the previous incident eight years earlier, there was no violence from the security guard, nor did we make any attempt to push past him. Instead, in the company of Christine and Roy, I turned and headed for the reception desk and asked to see the duty manager.

The duty manager was quite polite, but nonetheless defended the behaviour of the security guard, who he said was merely doing his job. He was at pains to explain that it was hotel policy to exclude “unaccompanied women” from the Luangwa Bar. After some discussion of an essentially circular and unproductive nature, the duty manager invited all three of us to come with him to the privacy of his office, where we could sit comfortably and where he could explain the position in more detail.

I was aware, from several of my friends’ accounts of similar instances, that in recent times the standard hotel response to such complaints was to offer the complainant compensation in the form of a free dinner at the luxury restaurant in order to settle the matter. The standard story from the manager would be that the exclusion rule was directed at preventing women prostitutes/sex workers from entering the premises, but this was not intended to embarrass “respectable” customers, and therefore the complainant should accept the hotel’s apology and compensation for any embarrassment she had suffered.

I made it clear to the manager that I considered this discrimination was more than an insult to me as a person, but was an insult to all women in Zambia, and therefore that I was not in a position to sell the rights of all women by eating an expensive dinner on their behalf. I therefore refused to hear the duty manager’s further explanation in his office, but instead informed him that I would hear his further explanation in court.

It may be noted that, since the first incident eight years earlier, there seemed to have been some changes in the hotel’s regime of discrimination. The discrimination now operated at the cocktail bar within the hotel, and not at the main entrance. Secondly, there was no physical assault upon the hotel guest. Thirdly, the approach of the duty manager was more reasonable and conciliatory. But despite this rather different regime, the same discriminatory rule was operating, albeit by means of a less vicious form of administration.

On the other hand, some aspects of the discriminatory rule had become more blatant: the newly established casino, which was in a building separate from the main hotel building, had a large plastic notice screwed onto the wall outside the entrance announcing ‘Unaccompanied Ladies Prohibited’.

### *Follow-up Action: Petition to High Court*

In March 1992 I lodged a petition with the High Court of Zambia, demanding the following declarations against the Inter-Continental Hotel:

- i. That I had been and was likely to continue to be unfairly discriminated against on the grounds of sex.
- ii. That I and indeed any person female or male was entitled to human rights and that it was therefore unlawful for the hotel to refuse permission to public places on the grounds that a person was female or on the ground that a female was not accompanied by a male.
- iii. That the ministerial policy position and the Investigator General's ruling attached to my affidavit [in support of the Petition] be a pronouncement of the law which should be observed and enforced in all hotels, motels and other institutions, punishable by contempt if not observed.
- iv. That all public institutions be open to all people irrespective of sex or other discriminatory attributes, provided that they had not breached any written laws or regulations and that all institutions whose policies and regulations result in female harassment are against the law, against public policy interests, and against international conventions to which Zambia is party.
- v. That an injunction be issued restraining the respondent hotel whether by itself, its servants or agents, or otherwise from turning away any unaccompanied woman from its hotel or doing any other act which amounts to discrimination of people on the basis of sex or marital status.
- vi. That extraordinary and exemplary costs be awarded to the petitioner for the embarrassment and humiliation caused ; and
- vii. Costs.

I must say that this “second phase” of the same issue gave me renewed enthusiasm to tackle the hotel. In effect, I had been defeated in my previous efforts, mainly because I had had an overly optimistic view of the powers of the Investigator General. I also had optimistically thought that the Women’s League of the ruling party would be interested in furthering women’s rights. As time went by I came to a better understanding of the Women’s League as a subordinate wing of the party, largely concerned with supervising and perpetuating the subordination of women within the party, as well as within the wider society, apparently as part of a policy of supporting what they imagined to be “traditional values.”

So I now saw the court as a better and more open forum for airing this issue, and even getting justice. And in the intervening eight years my life had changed considerably. I was no longer an employee of the University of Zambia, having resigned in disgust after various struggles concerned with gender discrimination, just as I had previously resigned from being a secondary school teacher employed by the Ministry of Education for similar reasons.

I had now embarked on a career as an independent consultant on gender and development. This began after the local United Nations Development Programme (UNDP) office, having noticed my gender activism, in 1988 asked me to review their entire country programme in order to make recommendations for better attention to gender issues. By 1992 I was becoming quite well known in this field, and had even published my 'Longwe Framework' which provided a way of interpreting the process of women's empowerment.<sup>6</sup> I now had influential friends in the sisterhood of the women's movement in many countries.

I was ready for another fight!

### *The Court Case*

The case was heard on 30 July 1992 in the High Court, before Justice Musumali. I was represented in court by Ms Lillian Mushota of Mushota and Associates, who had been provided *pro bono* by the Women's Rights Committee of the Law Association of Zambia. Representing the Inter-Continental Hotel was Mr. Mumba Malila of Russel, Cook and Company.

One most unusual aspect of the case was that the respondents did not question any aspect of my account of the treatment I had received at the hands of the hotel in the early evening of 1 February 1992. On the contrary, the argument of the hotel was entirely concerned with showing that they were entitled to treat any female visitor in this way, and that such treatment was not discriminatory.

The case had only two witnesses. Firstly there was the petitioner, myself, who was asked at length to re-affirm the facts of the incident as recounted in my affidavit. Secondly there was the witness called by the hotel, the Chief of Hotel Security, who was also a retired police officer.

The questioning and cross-examination of the Chief of Hotel Security was undoubtedly the highlight of the court hearing. Questioned by the hotel's lawyer, the Chief of Security stoutly maintained that the prohibition of

unaccompanied women was indeed a rule, and it had been instituted to keep prostitutes out of the hotel. Prostitutes had a tendency to “cause a fracas”, especially in the bar, and that was why it was hotel policy to keep them out. When asked by my lawyer whether he considered all unaccompanied women to be prostitutes, he answered “yes” without pause, and with some conviction. The answer caused a general murmur of amusement from my (few) supporters in the gallery.

At this point the hotel’s lawyer jumped up and pleaded with the judge that the witness may not have properly understood the question, due to his limited command of English. The judge asked for the witness’s mother tongue, which he said was Lozi, and the judge asked if there was present in court any member of the public who could pose the same question in Lozi. So now the lawyer had cleverly engineered an opportunity for the Chief of Security to change his opinion, and indirectly delivered a heavy hint to him that he would be wise to do so. A member of the public duly obliged to serve as a translator, and the same question was now posed in Lozi to the Chief of Security. However, the same answer was obtained, causing renewed mirth and open laughter, with the hapless Chief of Security seemingly rather angry and puzzled at so much mirth at his expense.<sup>7</sup>

The main arguments put forward by my lawyer were as follows:

- i. The treatment I had received from the hotel was a violation of my human rights, as given in Articles 11, 21 and 23 of the 1991 constitution. Article 11 guaranteed all rights given in the constitution irrespective, *inter alia*, of sex; Article 21 guaranteed freedom of movement; Article 23 prohibits discrimination on various grounds, including sex, in various forms of public provision.<sup>8</sup>
- ii. The hotel is a public place, and must follow the law in its provision of services to members of the public patronizing its premises.
- iii. Even if the court were to hold the hotel to be private premises, they would still be subject to Article 23 of the constitution in the light of the definition of a ‘person’ under Article 11 3 (1) of the constitution.
- iv. Zambia has acceded to *African Charter on Human and Peoples Rights* and to the *UN Convention on the Elimination of All Forms of Discrimination Against Women*, where the behaviour of the hotel contravened articles 1-5 of the former and article 3 of the latter. Furthermore, the Bangalore Principles of 1988, which had been formulated by Commonwealth Chief Justices, had agreed on

the relevance of looking at principles which had been ratified by a government in an international convention, even where this had not been domesticated into local law.<sup>9</sup>

In answer, the arguments of the hotel's lawyer were as follows:

- i. The principles outlined in the constitution were for the control of government and government institutions, and were not applicable to the hotel, which was not part of the government.
- ii. Even if the court were to hold that the principles of the constitution were applicable to all public places, these principles would still remain inapplicable to the hotel, since the hotel was private property.
- iii. As a private property, the management of the hotel had absolute discretion concerning whom they might allow to enter, and whom to exclude.
- iv. Even if the hotel were subject to the requirements of Article 11 of the constitution by which people were entitled to freedom of movement, the constitution did not give unlimited freedom of movement. On the contrary, the hotel had the right to exclude unwelcome visitors, and visitors also have the duty to abide by all reasonable conditions obtaining on the premises.
- v. The hotel had previously had trouble with prostitutes causing a fracas on the premises, and it was their decision to deal with this problem by excluding unaccompanied women, which was an entirely reasonable regulation in the circumstances.
- vi. The rule excluding unaccompanied women was not discriminatory against women, since a woman was excluded on the grounds that she was unaccompanied, and not on the grounds that she was a woman. In fact other women, if accompanied, were admitted.
- vii. Sara Longwe had no cause for complaint, because according to her own account she had previously been excluded from the hotel in 1984, and therefore must have known the hotel rules.
- viii. The provisions in the cited international conventions had no relevance since Zambia had 'unfortunately failed to pass an implementing statute'.

## *The Judgment*

Judgment was given on 4 November 1992. The judge agreed with all of the legal arguments put forward by the petitioner's lawyer, and found for the petitioner. The main points of the judge's decisions were as follows:

- i. That, since the exclusion of women on the basis of being unaccompanied contravenes the human rights provisions of our constitution, this hotel regulation is ordered to 'be scrapped forthwith'.
- ii. On ordinary and exemplary damages, there was no evidence adduced in either category, so a token amount of only five hundred kwacha is awarded.<sup>10</sup>
- iii. I was awarded the costs of bringing the action.

In his preceding arguments to justify the above decisions, the judge systematically demolished each of the hotel lawyer's arguments. The judge's main arguments are summarized below:

- i. On the basis of cited legal authority and the wording of the document itself, it is clear that the constitution is not applicable only to the government, but to all people.
- ii. The hotel is open to the public, and must be considered a public institution and not private property.
- iii. The exclusion of unaccompanied women was not a reasonable way of avoiding a fracas of women fighting over men in a bar, a problem which should instead be taken care of by invoking the public laws on law and order.
- iv. The judge confessed that he was "quite amused" at the hotel lawyers attempt to persuade him that the hotel rule was not discriminatory against women. It was clearly discriminatory, since there was no equivalent rule to exclude unaccompanied men. Therefore Sara Longwe was clearly discriminated against, on the basis of her sex, in both the 1984 and 1992 incidents.
- v. According to the Bangalore Principles of 1988, where the state has ratified an international convention but not domesticated them into statutory law, then the principles enshrined in this convention may be relevant to the determination of a case in the circumstance where statutory law is not sufficiently clear to make such determination, and may be cited to support such judicial determination.

The last point is rather interesting, and may seem irrelevant since the judge had determined the case entirely on the basis of the hotel's clear contravention of the constitution, and was not relying on the Bangalore Principles.

However, we may perhaps presume that that he included a lengthy statement of the Bangalore Principles, and an argument to support their potential relevance in this petition, to allow for the possibility that his judgment might subsequently be brought to appeal. If an appeal court judge were instead to decide that the provisions of the constitution were not clear enough to provide the basis for determining the case, then Judge Musumali is here laying the ground for the use of the Bangalore Principles to establish the general relevance of international conventions in determining human rights issues in cases where local law may provide insufficient basis to bring the case to clear determination.

### *The Aftermath: Did Hotels Stop Discriminating?*

Since the Inter-Continental Hotel was evidently quite immune to the earlier ruling from the Investigator General, and since it is not unlikely that women can call upon the police to take action against discrimination against them, the next question is whether the hotel has obeyed the court injunction.

Evidence from friends and colleagues are that unaccompanied women have been allowed into the Luangwa Bar from the day of the judgment. However, my husband discovered a month after the judgment that the notice prohibiting "unaccompanied ladies" remained attached to the wall at the casino entrance. He went and spoke to the General Manager about this, drawing the manager's attention to the judge's ruling. The Manager claimed that the judgment applied only to the Luangwa Bar, and not other parts of the Hotel. Roy explained to the general Manager that the ruling applied to all parts of the hotel, to all hotels in Zambia, and indeed to all public places in Zambia. The next day the notice disappeared from the casino entrance.

Even given the evident ineffectiveness of the Ministry of Tourism and the Hotels Board in controlling hotels in the treatment of women, the main hotels in Zambia could scarcely claim ignorance of Musumali's judgment, and its implication for all hotels, since the case was well reported in all three of the daily national newspapers, along with some discussion and editorial comment. Nonetheless, there have been continuing reports of occasional misbehaviour by hotels. The most notable of these was the attempt by a security guard to exclude two young women, Ms Elizabeth Mwanza and

Clotidah Mulenga, from the McGinty's pub which forms part of the Holiday Inn at Ridgeway in Lusaka. Particulars of the case are that the two women, who attempted to enter the pub at 20h00 On the evening of 8 November 1996, were told by the security guard at the door that they could not enter the pub because they were 'unaccompanied'. They then went with the security guard and to the reception in order to complain to the duty manager. But the duty manager never appeared, and apparently declined to appear.

Subsequently the two women petitioned the High Court, asking the judge to make much the same declarations as had been earlier made by Judge Musumali in response to my petition. In lodging this petition, the two women had my support and my encouragement, and I assisted them in finding supporters who were willing to pay part of the funds to pay the lawyer who would take the case.

The case was heard by Judge Peter Chitengi, who delivered his judgment on 24 June 1999, more than two years after the incident at the hotel.

In this court hearing, and perhaps forewarned by the earlier embarrassment of the Inter-Continental Hotel, the hotel's lawyer did not make the 'mistake' of not questioning the evidence, nor did he admit that all unaccompanied women were denied entrance. Instead he claimed that the policy was to refuse entry to known prostitutes and any person appearing drunk and disorderly. In the case of Ms Mwanza and Ms Mulenga, the claim was that they behaved as if drunk and disorderly, evidence of which came from the security guard that they had manhandled him and physically hauled him off to the reception, for an explanation from the duty manager.

As for the Deputy Manager who was a witness in court, he claimed to have no knowledge of the incident at the time, and only became aware when the complaint was brought before the court.

The petitioners' lawyer was at pains to counter the claim that the petitioners were drunk, with evidence that they were respectable young business women who did not take alcohol, and they had brought this case especially because they had experienced discriminatory behaviour several times previously, and they had reached the end of their patience with the hotel. The petitioners' lawyer also referred the judge to the earlier 1992 ruling from Judge Musumali that excluding women from admission to a hotel on the basis that they were "unaccompanied" was discriminatory and unconstitutional and that the judgment had directed all hotels stop such discrimination.

The main points made by the judge were that:

- i. He accepted the evidence from the security guard that the girls appeared drunk and behaved in an unruly manner, and that they had manhandled him. The judge accepted this evidence on the basis of his opinion that ‘this witness was a simple man and struck me as incompetent of fabricating the story’ (*sic*).
- ii. He considered that further proof of the security guard’s honesty was that he was quick to admit that he asked the two women whether they were accompanied by a man.
- iii. Although the “Longwe case” was “not reported in any of the Zambia Law Report Volumes”,<sup>11</sup> he was “well aware of the Longwe case”, where “Sara Longwe was totally barred from entering the hotel, and did not brow beat her way into the hotel.”

The reader does not need to be a legal expert to see that the above argument is inadequate in various particulars, to the point of being factually incorrect. On the basis of this argument the judge ‘dismissed the petition with costs to the respondents to be taxed in default of agreement.’

Subsequently I tried to persuade the young women to lodge an appeal, for which I had funding offered by an international women’s rights organization, *Equality Now*. However, the two women declined, on the basis that they were thoroughly fed up with the public misrepresentation of the case by the hotel, and very skeptical of any Zambian court delivering justice. (They actually were a pair of established and fairly prosperous young business women, and perhaps understandably did not want to attract any more of the negative publicity which had been inflicted upon them by the court.)

## Discussion of Issues Arising *Inadequacies in the Law*

The different treatment in court of the Longwe petition, as against the Mwanza-Mulenga petition, of course leads the reader to the trite observation that the law may receive very different interpretation in different courts. A main difference in the judgments may be put down to the different ideological orientations of the judges concerned, where the (late) Musumali was known as a liberal judge with a special interest in human rights cases, whereas the (late) Chitengi was of the opposite persuasion (to put the matter as politely as possible).

One limitation in the constitutional protection against discrimination on grounds of sex in Article 23 is that this protection is qualified by exceptions

from protection in the areas of marriage law, personal law, inheritance law and customary law. These qualifications were not cited in either of the cases reported above, although perhaps smarter lawyers might have made use of them. As is discussed below at Section 4.2 of this Case Study, the Chief of Security's claim, in the Longwe case, that "all unaccompanied women are prostitutes" is typical of the traditional patriarchal perspective.

It should be noted that the favourable judgment in Longwe's case followed in large part from her lawyer's success in establishing that the hotel is a public place, over the respondent's lawyer's claim that it was a private establishment. This was in the context where the constitutional protection is given only in public places, institutions or facilities. By the same token, therefore, there is no law to protect women from discrimination in private places, such as the home, or private clubs.

In addition, the (somewhat partial) protection against gender discrimination provided in the constitution is couched in very general terms, so that it is quite difficult to prove that gender discrimination has actually happened in practice. What is clearly needed is anti-discrimination legislation which defines gender discrimination not only in general terms, but clearly outlaws its various different forms in different sectors and situations, in private and in public, and in known problem areas.

Also, as is discussed below at Section 4.3, there is the difficulty in mounting a test case, which also has limitations as a means towards changing behaviour.

## The Influence of Customary Law and Tradition

Here we need to look a bit more closely at the answer from the Hotel Chief of Security, in the Longwe case, where he claimed that all unaccompanied women are prostitutes. Although this answer may seem ridiculous from a Western point of view, is understandable from a traditional Zambian patriarchal point of view, where women are supposed to be under the supervision of a husband or other supervising male relative. Therefore, from this point of view, an unaccompanied woman entering a hotel without a supervising male is self-evidently out of control, and may be presumed to be a prostitute/sex worker.

This perception also tallies with the opinion of the Chairperson of the Women's League (quoted in Section 2.2.3 of this Case Study) who was quoted in the newspaper as congratulating the hotel for excluding 'unaccompanied' women, since these women are "home-breakers." Very similarly, we here see 'unaccompanied' treated as a sign of immorality. We further see the opinion

that such women are not being properly supervised. We are implicitly being told that unaccompanied women should be controlled by the appropriate supervising male; such women are considered to be out of control. Equally implicit is the Chairperson's discriminatory attitude that there is no objection to the presence of "unaccompanied" men in the hotel who are the presumed target of the "unaccompanied" women!

Here it has to be borne in mind that Zambia has a dual legal system, although statutory law takes precedence over the (unwritten and uncoded) customary law. Most Zambian citizens' experience of the law is in local courts where matters of personal law, marriage law, divorce and minor infractions are settled under customary law. Under customary law a woman is generally treated as a minor, under the control of a male husband, father or other male relative. In customary law, adultery is an offence, but in a polygamous system it is an offence committed by women against their husbands. A man can only be held to have committed adultery if he sleeps with another man's wife. A daughter, even below the legal age under statutory law, may be given away to a man in marriage without her consent, and for payment in cattle or cash (known as lobola). A man who impregnates an unmarried girl can settle the matter by paying "damages" to her parents.

Although modern urban Zambia may ostensibly be governed mainly by statutory law, many of the mores which govern social and institutional behaviour arise from customary law. This influence of customary law is particularly relevant in the area of gender relations. Thus the social relations in the workplace and other institutions may perhaps be mainly understood in terms of modern and rather Western patterns of organization and behaviour, but the pattern of gender relations is often better understood as a reflection of the traditional domestic pattern of gender relations.

### *The Need for Better Mobilisation of the Women's Movement*

Despite some limited support from women's organisations in Zambia, my campaign against the Inter-Continental Hotel was mostly a lonely struggle. However, a lawyer to represent me in court was provided by the *Women's Legal Aid Clinic* of the Women's Rights Committee of the Law Association of Zambia, and in this way the case was supported by Zambia's women lawyers, who in 1991 established the *Women's Legal Aid Clinic*.

The importance and place of a test case in furthering women's rights is apparently not well understood amongst women's organisations, and there

seemed to be a common perception that this was “Sara Longwe’s Case” rather than a Women’s Rights Case. For example the newsletter of a regional women’s legal research association persistently referred to “Sara’s Longwe’s Case”, and saw no need to become involved as an organisation; instead individual members were invited to “give Sara their support.”

When the same women’s legal research organisation was holding a regional workshop in Lusaka at the same time as the first court hearing (30th July, 1992), the workshop did not adjourn to attend the court hearing. Instead, the members attendance at a so-called ‘women’s rights workshop’ prevented them from attending a High Court session of a women’s rights test case brought by one of their own members! This provides a sad but graphic example of the extent to which the women’s movement was a talking shop rather than an activist organization!

Only six or seven interested members of the local Zambian women’s movement attended each of the two court hearing. This lack of solidarity was in contrast to the support and assistance from the international sisterhood: IWRAW employed lawyers in the United States of America to dig up relevant case material to supply to my lawyer. After the judgment a journalist from *Ms* magazine telephoned me from New York to get the story, and IWRAW’s publication *Women’s Watch* reported the case and commented on its importance.

To understand this lack of local enthusiasm, even amongst women who are (ostensibly) working in the area of women’s rights, one has to understand the extent to which women live in a very oppressive patriarchal culture, to which professional women must conform if they are to advance within the system. There may be very real career penalties against women who in any way publicly identify with feminist principles, or challenge institutionalized male domination.

## Conclusion

In retrospect, there were some very positive outcomes from this case. My persistence did finally carry the day, and a woman was able to use a court to overcome the patriarchal establishment, therefore ending a blatantly discriminatory behaviour which was clearly against the law. Not only did this come as a shock to the hotel, but changed the behaviour of all hotels, albeit with the occasional aberration here and there.

From a publicity point of view, it made the front page of the newspapers, and provided a confidence builder for the growing local women’s movement – even if this movement hadn’t shown much enthusiasm at the time! It was

also a shock to the patriarchal establishment, that a woman could use the court to prevent a common form of discrimination which was widely not regarded as such, but instead regarded as a quite “normal” or “traditional” way of treating women.

It has to be admitted that this case was never selected by the women’s movement as a focus for legal action. Instead it was thrust upon me, in the form of an outrageous personal indignity against which I felt I had to take up arms, on behalf of myself but also on behalf of all women who suffer such treatment. It is only as women recognize such indignities for what they are, an assault upon all women, that we can work together to take collective action and properly call ourselves a women’s movement.

Looking back at this “hotel case,” it becomes clear that a well planned legal challenge to discrimination would do better to focus on an instance of discrimination which is more obviously a general obstacle to all women’s advancement, which women can therefore more easily recognize and mobilize around, and which is more difficult for the patriarchal establishment to defend. A good test case needs to be selected to focus on all of these strategic advantages.

But despite its general lack of these strategic advantages, the case nonetheless reveals the potential for using the courts as a weapon for women to obtain their rights under existing law. But such court strategies need to be married to legislative strategies for extending women’s rights in law, including the introduction of anti-discriminatory laws which ban specific forms of discriminatory behaviour

## Endnotes

1. This is the phrase used in the judgement, cf. Zambia High Court, Sara H Longwe vs Intercontinental Hotels, 1992/HP/765, pJ20.
2. It was only later that my husband and I considered that the police behaviour could very likely be explained by their probable assumption, when Roy went to the police station to lodge the complaint on behalf of his wife, that his wife was a white woman (since Roy is white). This might explain their complete change of attitude when they arrived at the hotel and found that the complainant was in fact a black Zambian woman. The relevance of this consideration is explored further in Section 4.2 of this Case Study.
3. I did not, at the time, fully appreciate the hotel manager’s indirect attempt to shift the responsibility for the incident onto Anderson Security Systems, as if the hotel was not the one responsible for the incident. This aspect of the treatment of ‘unaccompanied’ women is considered further in Section 4.2 of this Case Study.

4. A report of this meeting is obtainable from ZARD: Roy Clarke and Regina Shakakata (Eds), 1992, *Using the Democratic Process to Promote Women's Rights*, Zambia Association for Research and Development (ZARD), Lusaka. One of the outcomes of this meeting was a letter to the then President Frederick Chiluba demanding reform of the constitution in order to provide adequate protection for women against gender discrimination. The text of this letter is included in the report of the meeting.
5. It should be noted that the phrase "unaccompanied woman" is a euphemism which is far from self-explanatory. It means that a woman who is not accompanied by a man is treated as "unaccompanied." Therefore a woman who is accompanied by another woman is nonetheless "unaccompanied," so that two women who accompany each other are both "unaccompanied." Such exclusion of "unaccompanied women" was entirely at the whim and discretion of the hotel, or even the security guard of a company employed by the hotel but not a member of the hotel staff. Such exclusion was less likely enforced during the daytime, but more likely once the sun had gone down. However, there were also additional categories of women who were excluded from the rule. Excluded from the rule were all white women, and black women holding high rank within government or the ruling party.
6. See, for instance, Longwe, S, 1991. "Gender Awareness: The Missing Element in the Third World Development Project" in Tina Wallace and Candida March (Eds.), *Changing Perceptions: Writings on Gender and Development*, Oxford: Oxfam Publications.
7. Although the Chief of Security's answer caused much mirth, his answer was not without some rational basis. Firstly, he seems to have been aware, more than the hotel's lawyer, that to admit that some unaccompanied women were not prostitutes was fatal to the defence of the hotel rule of excluding "unaccompanied" women in order to keep out prostitutes. Secondly, as is discussed further at Section 4.2, his answer can be understood in terms of a traditional and patriarchal attitude towards women. Thirdly, and rather curiously, my lawyer failed to ask him whether the hotel rule meant that it was acceptable for female prostitutes to enter the hotel provided they were accompanied by a male. The answer to this question might have revealed whether the hotel rule was really concerned with controlling prostitutes/sex workers, or more concerned with controlling the movement of "unaccompanied" women (i.e. more independent women).
8. Here it may be noted that my petition took advantage of a recent reform in the constitution. The inclusion of sex as a specifically mentioned category equally entitled to fundamental rights and freedoms (Article 11) and as a category specifically protected from discrimination (Article 23) were new inclusions in the new 1991 constitution. This was an advance upon the earlier 1973 constitution which did not specifically mention 'sex' amongst the list of categories in the equivalent articles. It was these advances in the (then) new 1991 constitution which therefore provided a firmer constitutional basis for my petition in 1992. I had been one of the voices in the local women's movement which had agitated for years for this change in the constitution.

Prior to 1991, an argument for legal protection from gender discrimination would have had to lean largely on the Zambian government's ratification of various relevant international conventions, most notable amongst which was the 1979 *UN Convention on the Elimination of All Forms of Discrimination Against Women*. However, none of these international instruments had been put before parliament, let alone passed by parliament (and this remains so today, in 2011). Therefore, appeal to the court for protection on the basis of the provisions of such international instruments is normally a waste of time in a Zambia court.

9. A fuller account of both lawyers' arguments, and of the judgment, can be found in the resulting High Court Judgment, 1992/HP/765. 10. Worth about two or three dollars at the then rate of exchange.
11. Here we may note that, although the *Zambia Law Reports* is normally well behind with its publications, the judgment in the Sara Longwe verses Lusaka Hotel Inter-Continental case was made in the same Lusaka High Court in which Judge Chitengi sat, and a copy of the judgment should therefore have been readily available from Judge Chitengi's own High Court Registry.

# "What's in a (Woman's) Name?": a personal case narrative

Doo Aphane

## Introduction

In January, 2009, I presented an unprecedented case for women's rights before the Swaziland High Court. I presented the case in my personal capacity but on behalf all fellow women and especially those that are, were, and have been married by civil rites in community of property profit and loss. I challenged the discriminatory title deed laws which prevented women married in community of property from registering property in their names. Additionally, and embarrassingly the case was also about my demand to enforce my rights and those of fellow married women regardless of marital regime to retain and use last names given at birth commonly referred to as maiden names. Honestly, speaking I do not appreciate what is maiden about these names but simply view them as identities that are given to all children largely along patriarchal lines as a people that are patriarchal.

The motivation in taking the case to court was several fold; at a personal level it was to restore my dignity and that of women married in community of property, and to have registered and put to rest that women, similar to their male counterparts have identities that they are proud of, are part of their heritage and need or want to protect. At an activism level I wanted put a stop to the undue power over joint estates which the law gave to husbands, many of whom had misused to the disadvantage of their wives, children and successors in title, through selling or donating family property without their wives' knowledge nor consent. I also wished to draw attention to that women's rights are human rights, as such they should be upheld, to enable women to participate fully in all areas be they political, social or economic with the "full" backing of the law.

The frustration of being disenfranchised by the provisions of Sections 16(3) the Deeds Registry Act No. 37/1968 was coupled with my work as inaugural Legal Officer at Swaziland's first legal Aid Clinic under the auspices of the

Council for Swaziland Churches, founding National Coordinator of Women and Law in Southern Africa (Swaziland). As Women's Legal Rights Initiative Regional Coordinator, I was finding myself over exposed to women who had been disenfranchised by their husbands' misuse of marital power leading to their death, disgruntlement, homelessness, illness and lack of self esteem and powerlessness. The combination of the two factors played a pivotal role in fuelling me to take the matter of denial of women registered in community of property to register title in their own right.

## The legal context

Section 16(3) of the Deeds Registry Act provides:

"immovable property, bonds and other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bond or real rights are by law or by a condition of a bequest or donation excluded from the community."

I garnered the strength and courage to take the matter in the courts against a legal landscape which had promised a new dispensation that would lend impetus to the upholding of women's rights. The era of hope for application and implementation of women's human rights in Swaziland began in March, 2004 when the country acceded to the Convention on Elimination of All forms of Discrimination against women (women's convention) without any reservations. This was soon followed by the adoption of the national constitution, the Constitution of the Kingdom of Swaziland Act 2005, which notwithstanding its flaws in the drafting process and constitution itself has clear provisions on equality of persons before the law under Sections 20:

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- (2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.
- (3) For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

- (4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.
- (5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society. And

The Constitution makes explicit commitments to the rights and freedoms of women:

28. (1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
  - (2) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
  - (3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

My turn to litigation was prompted by an observation of the slow pace by the Ministry of Justice and Constitutional Affairs and legislature in aligning the country's laws with the Constitution of Swaziland since its promulgation in July, 2005 with an implementation directive in February, 2006. In taking the matter to court I was aware of that the country's political history of having been ruled under a decree from April, 1973 (when the Independence Constitution was repealed) to 20 (where the new Constitution had been adopted) would militate against the case been understood in its context. I knew the emphasis would be less on the rights and freedoms of women and more on what it meant to litigate against the state, an action being viewed as political and something that every Swazi is supposed to shun. Moreover, the country was still reeling under the old dispensation where both general law being Roman Dutch common law supplemented by statute was operating side by side with Swazi law and custom, without a constitution to which all of them had to defer.

The two systems of law operated simultaneously, each having legitimacy to deal with legal matters according to its own rules and interpretations.

Each system operated on par with the other with no clear hierarchy in terms of which is to take precedence in instances where the two diverge on the determination of the same issue, as they often do. This situation causes much consternation in the legal arena where the decision taken on a matter may differ simply because of the forum and law used in its adjudication. This is primarily the case in matters concerning family law in which both systems have a well developed jurisprudence. With respect to women, matters relating to the family are precisely the area in which women find themselves subordinated by patriarchy manifesting itself in the guise of societal adherence to custom and tradition. Thus, in many cases the two systems of law are in concert in their regard of the woman as a subordinate to her male counterpart. Where protection exists in one system, it may be nullified by the matter being determined according to the law that is to the disadvantage of the woman on that particular issue.

The context under which I took the matter to court was one where the status core prevailed, much against the adopted national constitution. Similarly to other countries with a history of political domination by western imperialists in the colonial era, Swaziland operated a dual legal system comprising of; Swazi law and custom, and general law (received common law supplemented by statute ). Marriage was thus governed dually; people who wish to get marriage had a choice between a customary and a civil rites marriage. Customary marriages are potentially polygynous whilst civil marriage a monogamous . Monogamy in civil marriage is protected by a bigamy clause. Under civil law it is critical to choose the proprietary consequences of one's marriage between in and out of community of property. Where parties wish to get married in out of community of property, they have to register an ante nuptial contract (ANC) prior to the marriage. Otherwise, all marriages by civil rites are automatically in community of property with the husband having the marital power which includes administration of property. Whilst customary marriages per se are neither in nor out of community of property, they have been interpreted by common law to be out of community of property. Therefore, each wife in a polygenous marriage should ideally set up her own estate.

The proprietary consequences are thus, that women married by civil processes out of community of property without their husband's marital power were always in a position to register title to property. Whilst those married out of community of property were prohibited, especially in light of

the exclusionary statutory provision under the notorious Section 16(3) of the Deeds Registry Act as cited above. Women married by customary rites could register title to land by default. In short, a marriage in community of property results in the pooling of all assets and liabilities of the couple.

The denial of women married under this regime to register title to property either jointly or on their own behalf has far reaching consequences. There are numerous cases where matrimonial homes or other fixed assets have been sold with neither the knowledge nor consent of the wife. In some instances the wives had been the sole contributor to procurement of the said asset, for instance through an employer's mortgage bond. Where wives married in community of property died intestate, predeceasing their husbands, a majority did not bother to wind the joint estate as dictated by the law, much to the disadvantage of the children regardless of age of their deceased's wives and other intestate heirs. The law made it conducive for the surviving husbands to commit the crime of non reporting of estates of deceased persons. Only a minority of the husbands have been brought to book by their adult children when they learn of their rights. It is common occurrence to find children whose mother predeceased their father fighting over an estate with the step mother on the basis that their father married her and moved in with assets of a joint estate. This happens notwithstanding this seeming protective provision;

"No widow or widower with minor children from previous marriage, other than by Swazi law and custom, may marry unless the provisions of section 93 of the Administration of Estates Act No. 28 of 1902 have been complied with."<sup>1</sup>

Where husbands predecease their wives, the surviving widows married in community of property have to bear the cost of transferring (transfer duty) their portion of the estate into the names. Needless to say, this is discriminatory and economically disadvantageous to women at a time when they are vulnerable. Due to the high costs of transfer duty, many resort to keeping the property in the deceased's name, which has its own disadvantages for instance when they need to use the property as collateral it has to be in their name.

The constitution's full implementation was effective on 6 February, 2006. I had reason to be optimistic and believe that the laws would be aligned with its provisions and that of the Convention on Elimination of All Forms of Discrimination against Women. The calmness in the women's movement over a period of four years regarding the very sluggish pace in aligning of

legislation with the constitution and convention on elimination of all forms of discrimination against women made me opt for a solo route, which I viewed as strategic. I just could not sense the pulse of the movement; my own perception was that it had somewhat lost its subversive beat which was a necessary ingredient to catalyse implementation of the constitution for women's benefit. I needed to take matters into my own hands, rather than to wait for women's movement dynamism to reheat to the point where my own issues could be addressed.

As I saw it, at the end of the day, the choice of litigation was going to give redress to women married in community of property and to myself in as far as registering of title to land was concerned. Of course, I was very much alive to the fact that women married in community of property were neither homogenous nor do they have the same view regarding the issue of registration of property. It was glaringly clear to me that some wanted to be able to register jointly with their spouses whilst for some their needs could only be addressed by registering title on their own. In as much as I was wanted joint registration in the spirit of that the marriage itself is in community of property, my prayer before the court was such that it addressed both situations.

As stated in the court records of both the High and Supreme court, my leading argument was for the abolition of Section 16(3) of the Deeds Registry Act. This would in essence mean that there would be no prohibition to women married in community of property from registering title to land, whether on their own or jointly with their spouses and whoever they choose to register with. My goal was to seize the opportunity to address and lay to rest the issue of non registration of property by women married in community of property when my husband and I decided to acquire a piece of land in 2008. I saw this as an opportunity to insist on my constitutional rights to equality before the law. I ensured that the Deed of sale between us as potential buyers and the seller was couched in the manner I wanted the title deed to be.

However, as stated in my application the attempt to register the property jointly were refuted by our Conveyancers on the basis of Section 16(3) cited above. This was the genesis of the court battle. I was aware that the offending section had to be removed to align the law with the constitution which provides for gender equality.

However, I had not bargained for the fact that even my identity, my last name Aphane, would be an issue.

This came as an affront to me. Therefore, the litigation was based on both the use of my last name in title *Aphane* and the substantive issue of being registered in the deed. The conveyancer himself could not cite the common law rule, statute or regulation that obliged me as a married woman, moreover, one married in community of property to adopt my husband's last name for purposes of registering title to fixed property. But despite the constitution, I could not register title to land. Moreover, the conveyancer would not accept my birth affidavit for the property registration in my only last name *Aphane*. The expectation was that I would register the affidavit in my husband's last name citing my own as *nee*.

The conveyancer and his team had not bargained on the fact that that I was not about to take a change in my identity lightly. I held a very vehement argument about his insistence on the use of my husband's last name which I have never opted to assume. I asked the conveyancer to furnish me with a statute that compels married women to assume their husband's names on marriage. I further cited the Registration of Names Act which merely dispenses the issues with meticulous procedures for married women who wish to assume their husband's names, and allows for a woman to retain her birth-given name on marriage.

The conveyance sighted regulations 7 and 9 of Deeds Registration Act of 1962 pertaining to property registration and practice for his insistence that I change the birth affidavit to my husband's name. The saddest part, to me, was that the conveyancer himself was not just citing what he knew and believed to be rules pertaining to property registration. He viewed these as normative - rules to which he could not see why I could not succumb, because I was admitting to be married.

My activism got the better part of me. On the pretext of trying to understand the assumption of husband's names by married women, I politely asked if he were married, and of course he played into my hands and agreed to engage along that line, he answered in the affirmative. I asked his wife's maiden name, which he gladly told me. I then informed him that from then on I was going to refer to him as Mr. his wife's maiden name. His tone and demeanour immediately changed, taking my comment as a serious personal affront. I asked him to control his temper as he is the one who had just introduced me to the assumption that people assume their spouse's last names on marriage. In the heated exchange of words he tried to reason with me that he had said only that according to custom women assume

their husband's names. I asked him whose custom he is making reference to because to date married women are called by their maiden last names, and as Swazi we have agreed that there is equality in treatment and protection by law regardless of gender, through the constitution which we adopted in 2005. Thus my interpretation under this dispensation which we are living in is that if names are changed at marriage it should be for both and therefore, by that same token his had changed. Eventually, I won the battle of logic with the conveyancer and by the time I left his office both of us had reverted to our only last names, those given to us at birth by our parents in conformity to custom and state law.

On resuscitation of the convivial relationship with the conveyancer, he registered once again his keen interest in assisting me to register the property with my name included on condition I could get an order from the High Court, to the effect that said property could be registered in name and that I could use my last name. How bizarre could things get? I walked out of his office with a promise to furnish him with a court order, which I did on 23 February, 2010.

As I walked out of my conveyancer's offices they were generous enough to inform me of a practicing attorney at law who felt as strongly as I did of the denial of women married in community of property to register title in contravention with the constitution. By then my mind was hard at work trying to identify attorneys with agency for social justice especial as this relates to women. The very same evening I discussed the matter with my husband and options of attorneys in town. My husband and I were in complete agreement that I should take lead in identifying the attorney to represent me because; of my legal background and the matter was revolving around the discrimination against me.

From the very first meeting, I was impressed with the agency of the person who was to be my attorney. He was as passionate as I am to see women's human rights being made real in Swaziland as promulgated by the constitution. From our initial conversation, there were lots of tangible things that proved my then attorney-to-be's agency in social justice. Our initial conversation centred on each of our willingness to hold on to the process regardless of the amount of political heat the case would generate. He was a bit anxious about my husband's willingness to sign an affidavit on the problems that we had experienced trying to register the property in both our names, and on his capability to stand the ground when especially at the

stage where the matter would be public. I assured him that he was going to co-operate. Independently of my feminist stance and women rights activism he is a man who objects to discriminatory practices and is strongly of the view that we should be jointly registering all property as the marriage itself is in community of property. As proof of his independence and willingness to support me in the case, I furnished the attorney with all his contact details and gave him a go ahead to make direct contact with him and each time there were affidavits for his signature. By the end of the very day, the two men who became central to my case had been in contact. Following their conversation my attorney called to once again express his willingness to represent me and we took it from there.

### **Taking steps towards the courtroom**

After decades of lobbying and advocating for changes in law to recognise women on an equal footing with men, I found it appropriate to take the matter to court and challenge the offensive section of the Registry of Deeds. The moment was opportune since it was four years after the adoption of an enabling constitution. I saw this as a moment to be ceased register through court process the frustration that women suffer under unequal laws that discriminate against them, many of whose negative impact is also passed on to their children through operation of law. Although the litigation was centred on property rights for women married in community of property, arguments around it in court were bound to raise issues around marital power its negative repercussions on women against their protection as equal citizens under the constitution notwithstanding its own flaws in the crafting process and derogations from established principles<sup>1</sup>. This was indirectly the time for reckoning with all those laws and administrative process that discriminate against women in Swaziland.

My strategy was to approach the court on an application for joint registration, which was very suitable for me on a personal level. However, I was aware that out there, there were many women who wanted to register on their own for various reasons. Thus the basis of my application was a demand that Section 16(3) to be revoked to enable me to register title jointly with my husband as per the facts and evidence of a joint deed of purchase.

The only party that I informed about the matter before its launch by the media in the public gallery was the Open Society Initiative of Southern Africa through its local representative. This is one institution that I had observed

to have continuously demonstrated its willingness to support social justice issues including making rights real for women for over a decade without fear or favour. I was not prepared to work with any individual or institution that was hesitant of the step I was making. I was looking for affirmation and support only.

As soon as the respondent, the Swaziland Government, in particular the (Registrar of Deeds, Minister of Justice and Constitutional Affairs and the Attorney General) was notified of the approach, the media caught wind of the matter and reported on it. The report was quite factual, but as often is the case, the head line was more about the litigant women's rights activist and the stunt she was pulling against government. The coverage leaned more towards inviting the public to watch the space for more, as this individual woman was taking on government on her constitutional rights, than focusing on this discriminatory law and its effect not only to women but their significant others.

After the Attorney General on behalf of government had filed a motion of intention to oppose, there was an offer made for the matter to be concluded outside court. I would be allowed to register title jointly with my husband and in my last name *Aphane*. I refused the offer, how could this be possible without removing Section 16(3) of the Deeds Registry Act? I made it clear to my attorney that to me it would be simply tantamount to accepting a favour when I have consciously taken the route of going to court because I wanted my rights to be upheld within existing law.

The asset in my own approach for rights was, of course, that these rights belong also to fellow women similarly positioned. We did not have legal access to "ordinary" registration of title deeds in our own birth-given names if we had married. The government on the other hand argued that joint registration was possible and not offensive to Section 16(3). According to the state arguments the prohibition was only in relation to registration by a woman married in community of property on her own. This argument was advanced simultaneously with conceding that Section 16(3) of the Deeds Registry Act was unconstitutional going against Sections 20 and 28 for the Constitution. Furthermore, the government was arguing that nullification of Section 16(3) would create a vacuum in law regarding the registration of real rights of persons married by civil rites in community of property. Government was arguing that the repeal of Section 16(3) should be undertaken by parliament. It viewed my demand for nullification as usurping the powers of parliament.

My journey was characterised by both challenges and uplifting moments. Being the feminist and women's rights activist that I am, I ought to have known better than to have imagined that things would travel smoothly, or that the legal arguments around discrimination, so obvious to me, would be obvious to others. Nonetheless, I was *volenti*; I took the journey with the full knowledge, appreciation and consent of the maze I was placing myself in. On the whole, I was very much at peace with myself, and passionately convinced that I was embarking on a journey whose time had come. As I stood in court as an individual *vis-a-vis* the Government of Swaziland, my hope was kept alive by the knowledge that I was neither the first nor last woman to walk a similar path. Moreover, some have walked the path without the support and resource base in terms awareness of the law and its procedures as I did.

I drew strength from the cases of women like Venia Magaya from Zimbabwe, Nonkululeko Bhe in South Africa and Unity Dow of Botswana's citizenship case. Venia Magaya fought to keep her family's property after the death of her father. Her half brother from her father's second marriage believed as male he had rights to own the property according to customary law and thus challenged her. Venia had been granted heirship by the customary court which lost in the Magistrate court and later confirmed on appeal. Magaya's total circumstances, including that she had actually bought the parent's house is humbling and a source of strength. The case of *Nonkululeko Letta Bhe and others v. the Magistrate, Khayelitsha and others* resulted in a judgment which declared the customary law rule of male primogeniture in succession to be unconstitutional, enabling two minor girls to inherit their deceased father's house. The fact that this landmark decision was made when the South African Law Reform Commission process to develop legislation was still underway also gave me hope that my case was on track. Unity Dow, a lawyer then, sued her government for being discriminated in passing on her Botswana citizenship to her children with a foreign husband. From these fellow women's circumstances and many others from African and further afield the morale behind was that I should not quit but hold on until the bitter end.

I cannot underplay the role played by the unwavering support received was assured of the support of my husband, my attorney, regional institutions human rights institutions particularly Open Society Initiative of Southern Africa (OSISA), members of the women's movement, family, and friends. My attorney took a keen and personal interest in the case and was very consultative taking my views into consideration throughout the process. Even when the tide of

opposition seemed to be getting high, I felt reassured, confident, and proud to be actively involved in the decisions made throughout the legal process. Through the valuing of my input and according me great respect as a litigant, I was continuously motivated and kept in focus. The professional treatment accorded to me felt like the beginning of restoration of my dignity. Many a time I pondered whether the same would have been afforded to any other woman. Would any other woman have the same level of interest in the case or they would just completely outsource it to the attorney as their agent who knows best? Would any other woman have access to the same level of communication network as I did, in the office, at home and mobile?

Whilst the media was crucial in its reporting of the case, its effect was both negative and positive. On the positive side, the public was informed of the case and presented opportunity to highlight, discuss and debate the status of women's experiences under unfair and inequitable laws, policies and practices of the country. On the negative side, reports were sensational and failed to disseminate the critical information to the public. This was particularly the case with the notice of intention to appeal by the Government of Swaziland and the Supreme Court verdicts. Print media was consistent in reporting about the case, radio and television were not. On the day of the High Court judgement for instance, the local broadcasting service, Swaziland Broadcasting and Information Service (SBIS) refused to cover the gender consortium and I on radio. It was only two days later that we were invited to the studio to talk about the verdict. With national television I was invited to together with the gender consortium representatives to a breakfast show, only to be turned back on the claim that leadership was against my appearance on television.

Through media discussions it emerged that while some men and women supported the court case and celebrated the eventual High Court victory, there were those who saw the move as self serving on my part, a way to build a professional profile. Some members of the public saw my litigation as an attempt to erode traditional rules and to challenge biblical interpretations which regarded women as secondary to men. Some questioned my husband's support and found it unbelievable. The media itself pressurized him to speak out about this case.

My husband's simple and humble view was and continues to be that we are married, and it is in community of property, therefore, in acquiring property both our names should appear as owners. Therefore, as I noted

earlier, throughout the case I was assured of his support in a home which was a hospitable environment allowing me to continue to be myself. My then employer did not interfere in the case, thus giving me space to pursue it and continue working normally. I ensured that colleagues I was interacting with on a day to day basis had accurate and up to date information so that they could disseminate appropriate information. They also proved to be allies, dispelling inaccurate information that was being circulated by the grapevine ranging from my alleged matrimonial problems to tales that a looming divorce was the real reason for the case. Again, I wondered about all this; many women would not have the hospitable home environment I did, nor the explicitly supportive husband and work-place.

The case also proved to be something of a time of reckoning for the women's movement, it was time to be what is it always demanding from government; delivery, action. It was time for the movement to move from rhetoric to action by demonstrating support for one of their own kind!! Mind you, the movement caught wind of the case through the media like everybody else. Members of the women's movement across the country were in the main supportive from the day the case was reported on in the media, January, 2009, albeit initially behind closed doors. However, the women's movement support was undermined by the lack of a clearly articulated prioritised agenda and resources especially for unplanned activities such as this case. Plans to create awareness around the case were also partly compromised by lack of financial resources and mobilisation strategy. The gender consortium secretariat deserves special mention for going an extra mile in trying to mobilise around the case amidst its context and challenges. There were, of course, hush-hush dissenting tones from the some in women's movement and its allies, who I believe were feeling aggrieved that the case should have been taken by a woman with some other profile, not an activist of note.

### **In the courtroom, towards conclusions**

Initially the case was to be held by a bench of three judges in the High Court. That made it very difficult to get a hearing date since they all run tight unsynchronised schedules. At some point a judge had to recuse himself for having been seen having had small talk with me at a social function. Obtaining a full bench proved impossible and eventually, the Chief Justice authorised that one High Court Judge could hear the matter. The case was fully argued on 28 July, 2009 before Her Ladyship Justice Qinsile Mabuza.

By Swaziland's standards the turnout in support of my appearance in court was quite good, at about fifty people. These were mainly women and a few men from the gender consortium, supportive institutions, family and friends. Towards the end of September, 2009 I started badgering my attorney for the verdict, as always he was giving me feedback from the judge. In October, 2009, however, the judge asked both parties to file further heads of arguments on the case. Evidently, the judge had identified a need for more arguments to be able to give a verdict that would tilt the scale of justice in favour of one of the parties.

This time around my attorney and I decided to change the line of argument from that of insisting on repealing of Section 16(3) of the Deeds Registry Act, to that of reading in changes to the Act. This meant that the same section could be retained but altered to have a different meaning. In essence, the argument was to move from having a Section 16(3) which was exclusive of women married by civil rites in community of property, to being inclusive of them. The state, whilst conceding on the unconstitutionality of Sections 16(3) was arguing that Parliament should be given a period of twenty four months to amend the statute as it sees fit aligning it to the national constitution. The state was not opposed to joint registration though. A ruling in favour of the state would have temporarily defeated part of my strategy of inclusiveness of all women married in community of property. It would only cater for instances of joint registration.

The case was won at the High Court under Judge Quintile Mabuza on the 23 February, 2010, the order of the court was: a) The words **not** and **save** are hereby severed from Section 16(3) the word **even** is read in; in place of **save**; such order is effective as of today's date. b) The applicant is granted costs on an ordinary scale.

The effect of the High Court Judgement was that Section 16(3) became inclusive reading as follows:

"immovable property, bonds and other real rights shall (not) be transferred or ceded to, or registered in the name of, a woman married in community of property, (save) even where such property, bond or real rights are by law or by a condition of a bequest or donation excluded from the community."

Through this legal sleight of hand, Section 16(3) changed from being exclusive to inclusive. In essence women married in community of property similar to their male counterparts and other women regardless of marriage status or

type of marriage could register title to land whether jointly or by themselves.

The government appealed against the judgment. As soon as the appeal was public, those who were opposed to the judgment gained ground congratulating government for making sure that “one disgruntled woman” would not change what was described as the norm which much support arguments from custom and the religion. In the meantime my conveyancers were preparing for registration, slowed down a bit by ill preparedness on the part of the seller who remained corporative. Notwithstanding, the appeal the said property No. 36 at eNtabeni 1, was registered in the names of Aphane and Zulu three days before the Supreme Court ruling of the 28 May, 2010.

The Supreme Court hearing was on the 17 May, 2010 before a full bench of five judges, including the Chief Justice. Obviously, the argument on my side was to have the High Court judgement upheld. In the alternative, the argument was that in the event the court held for government the period granted to Parliament to enact appropriate legislation should be twelve months. The Supreme court verdict upheld the appeal, setting aside the High Court order, declaring Section 16(3) of the Deeds Registry Act inconsistent with Sections 20 and 28 of the constitution and thus invalid, suspending the period of invalidity for a period of twelve months , authorising the Registrar of Deeds to register immovable property, bonds and real rights in joint names of husband and wives married in community of property, awarding the respondent, that is me, costs in both the High and Supreme Court.

A crucial aspect which played in favour of the court process was the focused interaction between myself and the seller. Without a binding deed of sale between us the case would have not sustained. For litigation to be continued, it was imperative to have a willing seller and buyer, who have initiated the property acquisition process, able to fulfil all the deed of sale conditions but for the registration which was the subject of the court process. Since I had successfully applied for a mortgage loan to pay for the balance of the plot, the bank could only release the amount owed on registration of the property in accordance with the law. The seller raised issue with the protracted case in as far as her rights to payment were concerned. With assistance from a regional human rights body with a very strong women’s rights component the seller’s demands were met without taking legal transfer of the property. Thus the seller was kept within the process because the deed of sale between ourselves remained valid, yet simultaneously the seller was kept at bay having paid her dues agenda.

Through self introspection on my journey, I have come to realise that the amount of inner strength and courage had been gathered over a very long time both consciously and unconsciously. This is a journey that begun when I chose to get married in community of property, but detested some aspects which I have advocated, lobbied for and finally litigated against. Thus I presented a different kind of litigant. Granted, the case was about my personal circumstances but simultaneously more about a bigger picture than that. I am thus tempted to deduce that there is much value in getting litigants for test cases that truly understand and appreciate the value of the case beyond their personal circumstances. Amongst the throngs of grassroots women, there are many with the requisite agency. What remains is for awareness to be created for transformation not just for the sake for disseminating information.

I have encouraged many women to walk this path and having undertaken it myself, I have come out the wiser, I believe. The journey made me realise the importance of not just strategic but also practical needs of women when they go through such cases. Neither need should be underplayed. Women's movements should be as emphatic in making provision for practical as much as for strategic needs during the case. Thus, as I continue to encourage others to venture into similar escapade, I shall now be more emphatic in providing for the needs of the litigant including emotional support. The journey clearly has potentials of unprecedented isolation. My imagination is not wild enough for me to envisage the trauma that litigants in my position go through without support both in the private and public domain.

## Endnotes

1. Section 5 of the Marriage Act No 47/1964.
2. For instance, passing on of citizenship to children and spouses is not on the same footing for women and men See Sections 43 and 44.

# Crimes and Corrections: Bride Burners, Corrective Rapists, and Other Black Misogynists

Madhumita Lahiri, Centre for Indian Studies in Africa,  
University of the Witwatersrand, Brown University

“Saying these attackers must rot in jail is not good enough. We need the death penalty because we have frequent reports of lesbians being attacked and gang-raped and these dogs roam around freely in the neighbourhoods while these women live in fear.” Ndumie Funda<sup>1</sup>

On June 13, 2011, Ndumie Funda, a self-identified black lesbian from the township, called for the death penalty against those who commit “corrective rape,” commonly defined as the sexual assault of a lesbian with the stated intention of ‘correcting’ her sexual orientation. The death penalty in South Africa has an ugly history, having always been racially specific in its implementation (primarily against blacks) and in its support (primarily among whites). Proudly abolished by the post-apartheid government in 1995, the issue has survived only in the manifestoes of right wing groups, mostly white in their membership, who support the imposition of the death penalty against what they depict as a post-apartheid crisis of crime (citation needed). This year, however, Funda, the founder of Cape Town NGO Luleki Sizwe, brought an unusual voice in support of state executions. Through the agitation around corrective rape, suddenly, black lesbian activists and the Freedom Front seemingly find common ground.

This standpoint piece argues that activism around corrective rape has often been politically and philosophically problematic, even when calls for the death penalty are not involved. To my mind, the problems surrounding this issue begin with the term itself. The “corrective” portion of “corrective rape” refers to the alleged motivations of the perpetrator, and this desire for correction is usually glossed as being a belief that the exposure to heterosexual intercourse, even under conditions of coercion, would “correct” the deviant sexual orientation

of a woman presumed to be lesbian. To some extent, this terminology is only as problematic as its purported explanation.<sup>2</sup> It would be quite reasonable, for example, to affirm that these sorts of attacks are correctional in that they punish those who challenge dominant ideas of gender and sexuality. This is, unfortunately, rarely the message that gets repeated.

The deployment of the term “corrective rape” has several repercussions. Placing these attacks within a particular narrative of curative mythology determinatively genders the perpetrators and the victims, with, I would argue, unfortunate and sometimes bewildering effects. For example, Wikipedia, that masterpiece of collective global common sense, defines “corrective rape” as “a criminal practice, whereby homosexual individuals, both lesbian women and gay men, are raped by persons of the opposite sex, sometimes under supervision by members of their families or local communities, purportedly as a means of ‘curing’ them of their sexual orientation.”<sup>3</sup> I am not aware, however, of the last “corrective rape” reported of a gay man by a woman, although articles on corrective rape document attacks on gay men by other men.<sup>4</sup> The gendered structure of the “corrective rape” discourse renders every corrective rape victim a woman. When many of these victims were killed precisely because of their contestation of the category “woman,” it is ironic, if not tragic, that they should find themselves firmly enshrined as women in the well-meaning condemnations of their deaths.

This term, moreover, has acquired geographical specificity, being used almost exclusively to describe attacks in the African continent, and particularly in South Africa. It is used, moreover, exclusively for attacks on black women by black men.<sup>5</sup> We have, as a result, a particularly invidious racist mythology at work. This mythology, to be clear, is not that of those who believe, “Raping a woman can make her heterosexual.” The mythology to which I refer, rather, is the repeated assertion that “Black South African (men) believe that raping a woman can make her heterosexual.” Certainly, rapists often provide their own accounts of their motivations for the assault, and certainly many of the attacks on black lesbians in the last decade have been accompanied by a “corrective” discourse. Yet the repeated mention of this supposedly cultural belief is mystifying, if not pernicious. One “corrective rapist,” Thato Petros Mphiti, for instance, claimed in his confession that Eudy Simelane was raped “because we did not find any money in her possession.”<sup>6</sup> The BBC, however, solemnly declares: “On the streets of Johannesburg, it is easy to find men who support the idea of ‘corrective rape.’” Their evidence becomes

a quotation from one Thulani Bhengu, age 35, who says: “When someone is a lesbian, it’s like saying to us men that we are not good enough.”<sup>7</sup> Through the British Broadcasting Corporation, one South African man’s admission of feeling inadequate becomes “support [for] the idea of ‘corrective rape.’”

The condemnation of corrective rape in the international media fetishises the corrective motivation, and it thus feeds into multiple, highly problematic discourses. By explaining spectacular incidents of violence through a purportedly African mythology, “corrective rape” naturalizes such violence, as well as the misogyny and homophobia involved in it, by rendering it a function of cultural belief of “African men”. The prevalence of “corrective rape” is often explicitly attributed to “African culture”—its homophobia, its patriarchal structure, its crisis of masculinity—with little acknowledgement that these attributes are hardly unique to Africa.<sup>8</sup> By ascribing to the African men who perpetrate such violence a supposed belief in sexual peculiarity, “corrective rape” perpetuates a long-standing belief in African sexual perversion.<sup>9</sup>

It might seem my own perversion to focus here on the ways in which the condemnation of these attackers for “corrective rape” is racist *against the perpetrators*. Certainly one can discuss the racism inherent in “corrective rape” with respect to the consequences for the victims. The Triangle Project, for example, has criticized online campaigns against corrective rape for dehumanizing its victims: “Once again black women in Africa are being cast as voiceless victims, as voiceless faces.”<sup>10</sup> Mkhize, Bennett, Reddy, and Moletsane, similarly, draw attention to the perils of rendering black lesbians “synonymous with a certain form of victimisation” (Mkhize et al, 2010:36) and caution against the sensationalist impulse of media coverage of (black) lesbianism.<sup>11</sup> My concern, however, is with the racism through which the perpetrators are depicted, which has serious consequences for African activism and for the African continent.

The emphasis upon these extreme incidents of violence easily bleeds into a popular narrative of a crisis of crime in post-apartheid South Africa, one which tends to focus on the brutality of the townships and the black nature of violent crime.<sup>12</sup> Even a measured, collaborative, and carefully authored report such as that from the HSRC turns to the language of war and conflict when describing these incidents: speaking of “complex climates of violence,” the authors equate such a context to “life within a war zone.” (20) These militarising metaphors produce the conceptual conditions under which a progressive agenda begins to merge with a conservative one, each calling for

more policing, harsher sentencing, and the increasingly extensive exercise of state power.

The discourse around corrective rape produces the figure of the “corrective rapist”: an African man, of uncertain education, mired in sexual ignorance, who believes somehow that his penis, forcibly applied, can cure lesbianism. It is no wonder, then, that campaigns against corrective rape argue for the solutions usually applied to black men everywhere: imprisonment. The change.org online petition launched in early 2011, which attracted over 170,000 signatures worldwide, calls for corrective rapists to be imprisoned for a minimum of 25 years.<sup>13</sup> One mythology of correction, purportedly deployed against black women, thus becomes the occasion to justify another form of purported correction, the punishment of black men. The most telling evidence of the racism inherent in much of this discourse might be found not only in the presence of this cultural explanation for the sexual violation involved, but also in the *absence* of *any* explanation of the horrific forms of torture and murder that often accompany these attacks. The violence of the corrective rapist, it seems, needs no explanation. Might it be because he is African?

The emergence of the term “corrective rape” within the LGBTI movement in the early twenty-first century suggests another backdrop to its discursive consolidation. Within contemporary LGBTI discourses, particularly as they emerge out of global public health funding in Third World contexts, a certain multiculturalist impulse to respect diversity collides with a certain identitarian belief in the power of naming. This produces, in the context of global liberalism, a fetishistic belief in the culturally specific name. This might be most obvious in the case of identity markers: same-sex behaviour may be universal, but it does not always take an identitarian form. Global LGBTI activists and researchers have consequently often sought to deploy culturally specific terms, from *bakla* in the Philippines to *hijra* in South Asia, to respect local variations while retaining the existing model, which is premised on the idea of “the homosexual.” In the Indian context, this has led to even the resuscitation of monikers so culturally specific as to be irrelevant to the phenomena they are then tasked to describe – and a seemingly endless extension of that list of letters.<sup>14</sup>

The institution of culturally specific names thus comes into operation when the specificities of a particular, usually Third World, context prove inassimilable to the existing, usually First World, model. They operate as a form of explanation that implicitly affirms the exceptionality of the

context which is being explained. They operate, thus, to cover that which is remaindered; that which is not already legible and comprehensible within the existing vocabulary from elsewhere. In South Asia, this remainder is transient same-sex sexual behaviours, produced as inscrutable remainders by a global LGBT discourse that tends to assume, *a priori*, a Foucauldian subject of sex.<sup>15</sup> In South Africa, in contrast, the inscrutable remainder is the dramatic violence to which queer South Africans are often subject, rendered incomprehensible within a global LGBTI discourse that tends to divorce homophobic violence from a broader socioeconomic, historical, or even patriarchal context. The horrors of “corrective rape” are considered separately from the generalized crisis of violence, particularly sexual violence, within which they occur. Without this context, they seem to demand an additional explanation, one which a mythology of correction is called upon to provide.

Whereas the intentions behind the usage of culturally or regionally specific names might be laudable, its operation is, through this remaindering process, precisely one of containment. By making available culturally specific terms for an existing global discourse, the process of regional naming does not challenge the global episteme but consolidates it. It operates, thus, as part of an essentially colonial knowledge project: difference is delineated only so that it can be contained. The term “honour killing,” for instance, which in common usage is culturally but not regionally specific, delineates a specific set of murders which are directly motivated by perceived threats to family honour. It, however, is applied almost exclusively to Islamic and/or South Asian communities, as though familial murders within other communities are somehow not related to the co-imbrication of patriarchy and social status. Within feminist thought and scholarship, both within and outside of the academy, these culturally specific terms feed into a knowledge economy of Third World expropriation.<sup>16</sup> From honour killings in “the Arab world” to corrective rape in South Africa, from female genital mutilation in north Africa to bride burnings in South Asia, the aspiring feminist can travel the world using only concepts like “patriarchy” and “gender violence,” still primarily derived from First World contexts, as her guide. Through the fixation on particularly dramatic forms of women’s violation, this litany of geographically specific oppressions occasions the expression of intense affective solidarity. This catalog of horrors, moreover, demands in its very semantic constitution the most unequivocal forms of condemnation.<sup>17</sup> With each click of an online petition, transnational feminism becomes “Eat, Pray, Love”: an affective

journey of individual growth and affirmation, not a political or intellectual engagement (let alone a collective one).

Such condemnation, moreover, is easily co-opted by the foreign policy imperatives of First World states. The ascription of particular forms of homophobia to the Third World often operates as a practice of “homonationalism,”<sup>18</sup> wherein the vocal presence of gay and lesbian life within a First World nation becomes the justification for imperial behaviour towards nations deemed (excessively) homophobic. Regardless of how much homophobia there may or may not be within that First World context, the espousal of a certain amount of support for LGBT persons within the nationalist project, combined with that nation-state’s emphatic denunciation of homophobic behaviour in other nations, operates to validate the original claim. By denouncing homophobia elsewhere, the homonationalist asserts its moral credentials, thus containing any critiques of its domestic policy on LGBTI persons. In this process, South Africa becomes more famous for corrective rape than for its enshrinement of LGBTI rights in the Constitution, and the United States, which does not grant such rights, continually voices its diplomatic concern about corrective rape.

The specific forms which violence takes is both regionally and culturally variable and worthy of our attention. However, given the structural inequalities of global discourse, even in avowedly progressive fora, the deployment of culturally and regionally specific terminology can often perpetuate the logic of racism and colonialism. This article, thus, is an intervention into what Uma Narayan termed “death by culture,” within which cultural explanations are frequently used to explain violence against Third World women though they are not used to explain violence in First World contexts. I diverge, however, from an earlier brand of feminist analysis which critiqued these tendencies through a call for ever-greater contextualisation. Through the reinsertion of these phenomena into their particular locations, it was argued, the apparently exotic would become explicable and accessible to meaningful feminist activism.<sup>19</sup> The imperative, however, to “always contextualise” overlooks the basic conundrum of contextualisation. Context is not simply pre-existing and self-evident, but rather something which is constituted in one’s search for it. The emergence of site-specific terms such as “honour killing” and “corrective rape,” for instance, are precisely the product of well-intentioned attempts at contextualisation, attempts which, however well intentioned, replicated the inequalities of global knowledge production.

Viewed from the North or the West, Third World contexts seem to generate an endless variety of culturally specific problems and conditions, problems with which we then struggle, predictably, always in relation to our own exceptional status. The subtitle of this paper uses “black” advisedly, in a deeply South African sense, to suggest that even our contexts of violence are not simply the particularised subset of an already existing white mythology, always explicated as aberrations from an existing norm.<sup>20</sup> Instead, however, of abdicating transnational feminism in favour of ever more local approaches, I want to suggest that the difficulties of the global (and the local) might be better navigated through an emphatically South–South conceptual analysis. What might we learn from looking East and South, not North and West, to understand the specificities of gender-based violence?

The phenomenon of corrective rape in South Africa might be elucidated through the analogous experience of gender-based and culturally specific violence in India, epitomized in two tropological phenomena: “bride burning” and “dowry death.” Just as the African trope of the “corrective rapist” gains traction and circulation because it draws on older mythologies of black men as pathological, primitive sexual predators, so too the South Asian trope of “bride burning” draws its weight and influence from the older colonialist preoccupation with sati, or the immolation of a woman on her husband’s pyre at his death.<sup>21</sup> Drawing, once again, on Wikipedia as the repository of the dominant global episteme, we find the following definition: “Bride-burning is a form of domestic violence practiced in India. It is not the same as ancient and long abolished (formally abolished in 1829) custom of Sati, where widowed women were forcefully placed on a burning pyre of the dead husband (usually a man in his old age) and burnt to death.”<sup>22</sup> As Wikipedia’s juxtaposition of this (very recent) form of domestic violence with an almost mythical form of ritualised sacrifice attests, the fiery exoticism of both sati and bride-burning has frequently elided the specificity of each phenomenon.<sup>23</sup> This image of highly flammable Indian women is a comical one, yet it recurs in the global literature on violence against women, if not in explicit references to sati, instead in “a curious connection made between violence and Hindu women’s relationship to fire.” (Kapur 110) The term “bride burning” foregrounds the event of the burning, separate from the context of (domestic/familial) violence within which it occurs, offering a cultural explanation instead of a contextual one. By utilizing the term “bride,” moreover, and drawing upon a continued western fascination with sati, the term then reinscribes these incidents of

violence within a sacrificial logic, producing *satis* in rhetorical if not literal terms.

The other term frequently used for these incidents is “dowry death,” which has had a rather different career in both global and domestic discourse. The mobilization of the “dowry death” or “dowry murder” trope in the mainstream movement in India, particularly in the 1980s, offered a dramatization of existing domestic violence issues that were otherwise ignored. The spectacular resonance of actual deaths from dowry harassment (as opposed to domestic violence, which in some contexts was implicitly accepted) became nationally relevant because of its consonance with middle-class concerns. This mobilization, however, was deeply invested in semantics. It involved an intentional redefinition of ordinary deaths as “dowry deaths,” an alliterative term that holds within it the constant allegation of murder. Through the terminology of dowry death, what was once understood as a routine kitchen mishap, for example, became a possible instance of patriarchal violence. In 1986 the term “dowry death” took on particular legal meaning and consonance through an amendment to the Indian Penal Code, Section 304B, which said:

“(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death” and such husband or relative shall be deemed to have caused her death.”

The definition of “dowry” here was referred back to existing legislation,<sup>24</sup> and the crime of “dowry death” was assigned the penalty of imprisonment for a minimum of seven years and a maximum of life.

This term, like any, is not without its problems. By linking death with dowry, the term has enabled an easy collapse of both illegalities, resulting in muddled discussions of dowry, a traditional practice, as though it were always linked to murder,<sup>25</sup> and an over-emphasis on the role of dowry in domestic abuse.<sup>26</sup> It has also, however, foregrounded the role of dowry, one of the many intersections of property and patriarchy, in the deaths, suicidal or homicidal, of women soon after marriage, enabling both the increased visibility of that nexus and the prosecution of those who perpetrate its worst abuses. A semantic correction, thus, becomes a societal correction.

Despite my extended critique of the use of culturally and regionally specific terminology for Third World violence, the dominance of that epistemological model for understanding violence elsewhere, even *within* the so-called progressive movement, suggests that our best hope for action lies, not in the debunking of such terms, but in their careful definition and deployment. I am sympathetic to those who wish to avoid the term “corrective rape,” but it is simply too late to ignore its resonance. Rather than abandoning the phrase, we might utilise the term’s circulation and currency for our own ends. The BBC recently asked if homosexuality were un-African; we might ask, more productively and more insistently, if “corrective rape” is really (South) African. Such semantic conditions, in theory, would change the genealogy of concerned discourse generated from the North, linking the lighter skinned attackers of Brandon Teena, for example, to their rather darker local equivalents.<sup>27</sup>

We might learn, further, from the instrumental value of “dowry death” in Indian legislation. Whereas “dowry death” refers to a subset of deaths which may have been murders originating in demands for dowry, “corrective rape” might be used to refer to rapes which are accompanied by extraordinary forms of violence, torture, and assault. Every rape is arguably corrective or punitive in its impulse, but not every rape involves stoning, stabbing, or other forms of torture. Such a redeployment of the term would still include many if not all of the attacks on black lesbians, yet it would abandon the insistent focus on the alleged motivations of the perpetrators and the alleged sexuality of the victim. By disavowing the fascination with alleged mythologies of correction, this redefinition would mark its distance from discourses of racial pathology, perversity, and primitivised homophobia. It might emphasise, instead, its proximity to crises of social insecurity, patriarchy, and violence. The crime of corrective rape, finally, might be legislated with attentiveness to the primary challenge of the South African legal context: not a paucity of laws, but a paucity of implementation. The agitation around corrective rape, accordingly, might prioritize the demand for a more prompt, and not simply more punitive, state response.

I am not, finally, in favour of the classification of “corrective rape” as a hate crime, on both semantic and strategic grounds. A long, rich, and influential body of feminist scholarship has positioned rape as an instantiation of patriarchy and heterosexism, arguing that rape is often if not always motivated in part by misogyny. Rape, corrective or otherwise, is the violent

instantiation of a patriarchal logic within which women's bodies are not their own. Whether in sexual practice or in childbearing, women's bodies are understood to belong, not only to particular men – husbands, fathers, boyfriends – but also to a larger social order which is enforced, frequently, by both men and women. In this sense, every rape is corrective, disabusing its victim of her belief in personal autonomy and subordinating her violently to the patriarchal dispensation of power. Consequently, given the incidence, the motivations, and the effects of sexual assault, feminists have argued that rape should be understood as a hate crime, one motivated by bias on the basis of gender and seeking out women as a targeted group.

The intended classification of only “corrective rape” as a hate crime, however, stands in uneasy relation to this feminist legacy. Such classification, as a hate crime on the basis of sexual orientation, would institutionalise a distinction between sexual orientation and gender which is problematic in both political and philosophical terms. Victims of corrective rape are not simply attacked for being homosexual. They are attacked, rather, for being homosexual *women*, evidenced in part by the targeting of lesbians who are non-conforming in their gender presentation. Under these circumstances, the separating out of corrective rape from ordinary rape ignores both the material conditions of these persons' victimisation and the political solidarities that can produce substantive change. It would be wonderful if no women were raped to “correct” their sexual orientation, but it would be even more wonderful if no one were to be raped at all.

## Endnotes

1. Quoted in Nicholson, Zara. “Lesbian in Nyanga stabbing attack.” *Cape Times* 13 Jun 2011.
2. See, most recently, Melanie Judge, “Changing the Language of Prejudice” *Mail and Guardian* 12 Jun 2011.
3. [http://en.wikipedia.org/wiki/Corrective\\_rape](http://en.wikipedia.org/wiki/Corrective_rape)
4. The HSRC report notes that “some personal narratives of rape and assault suffered by black lesbians include mothers, aunts and female ‘friends’ as complicit perpetrators. The actual rapes and murder are, however, committed by men.” Mkhize et al. 2010 *The Country We Want to Live In* Pretoria: HSRC Press: 49.
5. The issue of racial specificity, moreover, is rarely discussed in the research. One report, for instance, does note the possibility of this curative or corrective discourse crossing racial boundaries, yet it does so only in a parenthetical remark: “(This is not to say that men and boys of all racial groups who rape white lesbian women might not have similar motivations; this remains to be explored.)” Mkhize

et al. 45.

6. Mphiti attributes this idea to Khumbulani Magagula and claims that everyone agreed to this reasoning. See Mphiti's confession in *The State v. Thato Petros Mphiti* (CC 434/08)
7. Fihlani, Pumza. "South Africa's lesbians fear 'corrective rape.'" BBC News, Cape Town. 30 Jun 2011. Accessed online at <http://www.bbc.co.uk/news/world-africa-13908662>
8. See, for instance, Adian Prinsloo's assuredly well-intentioned and astonishingly problematic article, *Perpetrators of Corrective Rape: Uncertainty and Gender in the 21st Century*. *NGO Pulse* 6 Jul 2011. Available online at <http://www.ngopulse.org/article/perpetrators-corrective-rape-uncertainty-and-gender-21st-century>
9. This discourse was also notable in early coverage of "African AIDS," which blamed high HIV prevalence on "so-called traditional practices such as 'dry sex' or 'witchcraft.'" Hunter, M. 2010 *Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa* Bloomington and Indianapolis: Indiana University Press, 2010: 10.
10. The Triangle Project. "Online Corrective Rape Campaigns and Petitions." Available online at <http://triangle.org.za/news/2011/02/online-corrective-rape-campaigns-and-petitions>
11. "media interest in the violation of black lesbians is motivated as much by the 'sensationalist' aspect of the crime (rape happens so frequently that only 'interesting' rapes are likely to be covered by the media) as by any genuine concern.... In a context in which part of homophobia involves the overt sexualisation of lesbians for heterosexual men's consumption, and one in which violence is both glorified and exoticised by vast swathes of media discourse..., public discourse on the violence meted out against black lesbians runs the risk of being simply 'the scandal of the day,' a source... of voyeurism rather than outrage." Mkhize et al, 2010;29
12. "Given the proclivity to pin lawlessness on young black men... the 'fact' that violence is highly enclaved plays into a mass-mediated view of the townships as breeding grounds of brutality." Comaroff, J, and J. L. Comaroff. 2006. Figuring Crime: Quantifacts and the Production of the Un/Real. *Public Culture* 18.1 : 216.
13. <http://www.change.org/petitions/south-africa-take-action-to-stop-corrective-rape>
14. See akshay khanna, 2007. Us 'Sexuality Types', *The Phobic and the Erotic*, eds. Brinda Bose and Subhabrata Bhattacharya (Kolkata: Seagull Books, Ashok Row Kavi, *Kothis* Versus Other Msm: Identity Versus Behaviour in the Chicken and Egg Paradox, *The Phobic and the Erotic*, eds. Brinda Bose and Subhabrata Bhattacharya (Kolkata: Seagull Books, 2007).
15. In the sense of how Foucault describes the contemporary (twentieth century) sexual episteme, in which the subject understands himself as somehow importantly constituted through his desires in general and his sexual desires in particular.

16. I diverge slightly from the position that this is grounded purely in an economy of the exotic, though I am generally sympathetic to arguments that “there is a premium on ‘Third-World difference’ that results in greater interest being accorded those issues that seem strikingly ‘different’ from those affecting mainstream Western women. The issues that ‘cross borders’ then become the ‘Third-World gender issues’ that are taught about and studied ‘across the border,’ reinforcing their ‘iconic’ and ‘representative’ status as issues.” Uma Narayan, “Cross-Cultural Connections, Border-Crossings, And “Death by Culture”: Thinking About Dowry Murders in India and Domestic Violence Murders in the United States,” *Dislocating Cultures: Identities, Traditions, and Third World Feminism* (New York and London: Routledge, 1997) 100.
17. My argument is more focused on semantics than on knowledge production as such, but I second the caution that Multicultural education cannot be seen as a simple task of replacing ‘ignorance about Other cultures’ with ‘knowledge,’ since problems of the sort I am talking about are precisely not problems of ‘ignorance’ per se, but problems related to understanding the ‘effects’ of contexts on issues, and of decontextualised, refracted, and reframed ‘knowledge.’
18. Jasbir Puar, 2007. *Terrorist Assemblages: Homonationalism in Queer Times* Durham, NC: Duke University Press.
19. See, for instance, Chandra Mohanty’s influential argument in “Under Western Eyes: Feminist Scholarship and Colonial Discourses.” *Feminist Review* 30 (1988): 61-88.
20. This sense of “black” extrapolates upon the term as it is used in the Black Consciousness movement, most famously exemplified in the writings of Steve Biko. See Biko, *I Write What I Like* (Johannesburg: Picador Africa, 2004).
21. The Oxford English Dictionary defines sati as, first, “a Hindu widow who immolates herself on the funeral pile with her husband’s body,” and second, “as the immolation of a Hindu widow in this way.” The first usage cited in the OED entry is 1786. The practice is outlawed by the British government in India in 1829, though it continues to occur, more in fiction than in fact, with one particularly controversial sati, Roop Kanwar, in Rajasthan in 1987. An extensive account of the nineteenth-century debates can be found in Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998). For a more twentieth-century account, see “The Subject of Sati” in Rajeswari Sunder Rajan, *Real and Imagined Women* (London: Routledge, 1993). Brief if insightful analysis of the discursive constitution of sati under imperialism can be found in Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason* (Cambridge, MA, and London: Harvard University Press, 1999). The conclusive account of the
22. [http://en.wikipedia.org/wiki/Bride\\_burning](http://en.wikipedia.org/wiki/Bride_burning)
23. “The historic association of sati and ‘Indian culture’ and ‘Indian women’ results today in a metonymic blurring of sati with dowry-murder, generating a confused composite of ‘burnt Indian women’ variously going up in flames as a result of ‘their Culture.’” Narayan 101.
24. Specifically, section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

25. Narayan 108.
26. Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London: The Glasshouse Press, 2005) 112.
27. Brandon Teena, a 21 year old transman from rural Nebraska, USA, was raped and murdered in 1993. This attack became famous through the Hollywood film *Boys Don't Cry* (1999), which garnered an Academy Award for Hilary

## References

- Biko, S. 2004. *I Write What I Like* (London: The Bowderean Press, 1978) Johannesburg: Picador Africa
- "Bride burning." Wikipedia. [http://en.wikipedia.org/wiki/Bride\\_burning](http://en.wikipedia.org/wiki/Bride_burning)
- Comaroff, J., and J. L. Comaroff. 2006. Figuring Crime: Quantifacts and the Production of the Un/Real. *Public Culture* 18.1
- "Corrective rape." Wikipedia. [http://en.wikipedia.org/wiki/Corrective\\_rape](http://en.wikipedia.org/wiki/Corrective_rape)
- Fihlani, P. South Africa's lesbians fear 'corrective rape'. BBC News, Cape Town. 30 Jun 2011. Accessed online at <http://www.bbc.co.uk/news/world-africa-13908662>
- Foucault, M. 1990. *The History of Sexuality*, Vol. I. 1978. Trans. Robert Hurley. New York: Vintage Books
- Hunter, M. 2010. Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa. Bloomington and Indianapolis: Indiana University Press.
- Judge, M. 2011. Changing the Language of Prejudice *Mail and Guardian* 12 Jun 2011.
- Kapur, R. 2005 *Erotic Justice: Law and the New Politics of Postcolonialism*. London: The Glasshouse Press
- Khanna, a. 2007. Us 'Sexuality Types' in *The Phobic and the Erotic*. Eds. Brinda Bose and Subhabrata Bhattacharya. vols. Kolkata: Seagull Books
- Mani, L. 1998. *Contentious Traditions: The Debate on Sati in Colonial India*. Berkeley: University of California Press
- Mkhize, N., Bennett, J. Reddy, V. and R. Moletsane. 2010. *The Country We Want to Live In: Hate Crimes and Homophobia in the Lives of Black Lesbian South Africans*. Pretoria: HSRC Press
- Mohanty, C., 1988. Under Western Eyes: Feminist Scholarship and Colonial Discourses. *Feminist Review* 30: 61-88.
- Narayan, U. 1997. *Dislocating Cultures: Identities, Traditions, and Third World Feminism*. New York and London: Routledge, 1997.
- Nicholson, Z. Lesbian in Nyanga Stabbing Attack. *Cape Times* 13 Jun 2011. Available online at <http://www.capetimes.co.za/lesbian-in-nyanga-stabbing-attack-1.1082553> Accessed 5 Jul 2011
- Prinsloo, A. Perpetrators of Corrective Rape: Uncertainty and Gender in the 21st Century. *NGO Pulse* 6 Jul 2011. Available online at <http://www.ngopulse.org/article/perpetrators-corrective-rape-uncertainty-and-gender-21st-century>.

- Puar, J.. 2007. *Terrorist Assemblages: Homonationalism in Queer Times*. Durham, NC: Duke University Press
- Row Kavi, A. 2007. *Kothis* Versus Other Msm: Identity Versus Behaviour in the Chicken and Egg Paradox. *The Phobic and the Erotic*. Eds. Brinda Bose and Subhabrata Bhattacharya. vols. Kolkata: Seagull Books
- “Sati.” The Oxford English Dictionary. [www.oed.com](http://www.oed.com)
- “South Africa: Take Action to Stop Corrective Rape.” Change.org petition. <http://www.change.org/petitions/south-africa-take-action-to-stop-corrective-rape> Accessed 5 Jul 2011.
- Spivak, G. C. 1999. *A Critique of Postcolonial Reason*. Cambridge, MA, and London: Harvard University Press
- Sunder Rajan, R. 1993. *Real and Imagined Women*. London: Routledge
- The Triangle Project. “Online ‘Corrective Rape’ Campaigns and Petitions.” Public statement posted February 18, 2011. <http://triangle.org.za/news/2011/02/online-corrective-rape-campaigns-and-petitions>

# International Centre for Sexual Health and Reproductive Rights (INCREASE), Nigeria: Battling the Proposed Bill on the prohibition of sexual relationships and marriage between people of the same-sex, 2006

Dorothy Aken'ova, INCREASE

On 19<sup>th</sup> of January, 2006 the Honourable Minister of Justice and Attorney General of the Federation, Chief Bayo Ojo, presented to the Federal Executive Council “A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationships Between Persons of Same Sex, Celebration of Marriage by Them and for Other Matters Connected Therewith” hereinafter referred to as “The Same Sex Bill.” On 11<sup>th</sup> of April, 2006 the bill received its first reading and the provisions were further widened by the Senate of the Federal Republic of Nigeria.

## Policy background

During advocacy for language on sexual orientation and gender expression and identity at the International Conference on Population and Development (ICPD) in Cairo in 1994 and at the Fourth World Conference on Women in Beijing in 1995, women’s human rights and reproductive health activists teamed up with other groups from the globe to challenge all forms of discrimination and visibilise LGBTI rights and related issues within the UN. Back home in Nigeria, LGBTI rights were not a burning issue. They did not even featuring in the list of key issues of concern while analyzing the sexuality of adolescents. This does not mean that there were no LGBTI persons or groups in Nigeria. It also does not mean that there was recognition of LGBTI sexualities. Nigeria at the time was struggling to unseat the military totalitarian dictators and institute a democratic government. The military

governments were violating human rights with impunity. They had taken an IMF loan and subscribed to Structural Adjustment Policies despite outcry and debates that condemned the IMF loan. This led to withdrawal of subsidies from social amenities resulting in widespread poverty, disease, and corruption. Maternal mortality and morbidity was ranking one of the worse in the world, and was continually on the rise. The military junta refused to recognize and manage the surging HIV/AIDS cases, while the infection continued to creep into the productive force of the country. Gender based violence was equally on the rise. Education was falling as the institutions were deteriorating, unemployment was soaring at an all high. Surely, activists at that time were committed to redeeming the nation from failing and as it is usual in these times, sexual orientation and other related matters were the least important things to be considered by activists at the time. Lesbian and gay and bisexual social networks and individuals were living closeted life styles, only very weakly connected to any forms of activism. The transvestite communities in most parts of the North of Nigeria were going about their business, where no form of organized violence was targeted at them, and where they were not identified as any kind of target of human rights violators.

In 1999, Nigeria experienced a transition from military to civil rule. A hard earned democracy was born. This coincided with the 5 years review of the ICPD conference which revealed huge gaps between the gains made in the operationalisation of reproductive health and rights provision of the Programme of Action when compared with the provisions of sexual health and rights. The gap triggered discourse on many emerging issues and the subsequent conceptual separation of reproductive health and rights from sexual health and rights. This marked the genesis of activism for lesbian gay bisexual transgender queer rights in Nigeria to the “embarrassment” of the policy makers and community gatekeepers and religious leaders who claimed that homosexuality was non-existent in Nigeria, and that if it happened anywhere in the country, it was an imported behavior from the west. Mobilising and organizing sexual minorities and LGBTI rights advocacy began in earnest with the establishment of INCREASE in 2000.

In that same 2000, the shari’a law was expanded to include sexual offences among others. It criminalized same sex sexual relationships with up to death sentence by stoning and forcefully closed down spaces, including night clubs, which were known or suspected to be frequented by transvestites and other sexual minorities. This, in addition to the penal and criminal

codes that provide up to 14 years imprisonment to those found guilty under the sodomy and the unnatural offences law, drove LGBTQ persons further underground.

It is important to state that at the time the same sex marriage prohibition bill was introduced, very little was going on Nigeria in terms of LGBTI rights advocacy, definitely not to the point of advocating for marriage for same sex loving people. Nigeria has been able to accommodate MSMs in some of its national policies such as the national policy on HIV/AIDS and the national policy for the health and development of adolescents and youths. Despite this, policy makers continued to deny the existence of same sex loving people. This policy stance has remained until date causing sexual orientation and gender identity and expression to stand out as some of the top most controversial issues in Nigeria.

## The legal attack

Before the proposal of the Bill, the LGBTI community had come under attack in Nigeria. The attacks had worsened in the past five years ignited by the debates caused by the ordination of the openly gay bishop led by the Anglican Church, Nigerian. The Anglican Church took the front line position in opposing this progressive development. The Church leadership in Nigeria mobilized many key opinion leaders to make public statements condemning homosexuality. The president of the Federal Republic of Nigeria at the time was aired on a national broadcast saying that homosexuality was unnatural, immoral and ungodly". For the first time we observed consistent media attention on the issue of sexual orientation, even though most of the articles and reports were homophobic and hateful, it was interesting to see a nation that has over the years claimed it is a taboo to discuss sexuality related issues in the public space, do so in the pages of its dailies.

Even though there were different events at around this time that stirred debates on issues of sexual orientation with particular focus on homosexuality, with majority of holding homophobic opinions, the rationale for the introduction of the Bill Prohibiting Same Sex Marriage in Nigeria at the time it happened can only be speculated. This is especially so because the Penal Code Law (applicable in all the States in Northern Nigeria) and the Criminal Code Laws (applicable in all the States in Southern Nigeria) have provisions on unnatural offenses with draconian sentences (Section 284 of the Penal Code Law and Section 214 of the Criminal Code Law refer). The

Sharia Codes of the States that have deemed it fit to introduce them are even more draconian. Chapter III “Hudud and Hudud related offences”, Part III “Sodomy (Liwat)”, Section 128-129 of the Kano State Shari’a Penal Code Law 2000 refers.

The Criminal Code Law has been in force since 1945 and the Penal Code Law has been in force since the 60s while the Sharia Codes at the time of the introduction of the Bill had been in force for more than half a decade in some of the States. Yet in all of these years same sex relationships had not attracted the attention of government as it happened in 2005 / 2006.

Widespread speculation proposed that political rivalry may have triggered the Bill because general elections were looming and campaigns were becoming intense. It was believed by many that there were plans to indict some aspirants of the presidential and gubernatorial elections that had fallen out of favour of the ruling party, believing that the accusation of involvement in same sexual relationships would tarnish their image and render them repugnant and unable to contest for public office. It is impossible however to tell a clear story right now, however, about why this bill, at this point; the information is just not freely available.

The content of the bill, however, was under scrutiny from the moment it was introduced in the National House of Assembly but to do an analysis that would inform advocacy, we at INCREASE needed a copy of the bill - always a challenge. Thankfully, we had colleagues who had a long history of working on law reform. We requested them to use their contacts at the National House of Assembly and obtain the bill for us. We also contacted the EU and the Human rights Desk at the Embassy of the United State of America to use their connections to get us a copy of the bill.

Eventually, we had it! And was it shocking! We immediately disseminated the bill among members of the coalition and allies within and outside Nigeria. This effort was coordinated by a practicing lawyer and a human rights defender working with the Civil Liberties Organisation.

The collated views revealed that the short title of the bill was misleading: it was the Bill prohibiting Same Sex Marriage in Nigeria. This gave the impression that same sex relationships were not already penalized in Nigeria, and suggested that there had been some clamour that sought to legalize unions in the form of marriage. This was misleading to the international communities and to the population at large.

## The Bill

The Same Sex Bill was divided into 9 sections. Section 1 gives the Act a short title while Section 2 provides for the interpretation of certain words used in the Act. A section 3 asserted the validity and recognition of only marriages entered into between a man and a woman under the Marriage Act or under Islamic and Customary Laws.

Section 4(1) prohibited same sex marriage between persons and adoption of children them. Section 4(2) voided any marriage between persons of the same sex entered into elsewhere. Section 4(3) deprived persons of the same sex who entered into any marriage of recognition or entitlement to the benefits of a valid marriage. Section 4(4) made any contractual or other rights accruing as a result of any same sex marriage unenforceable in any court in Nigeria. Section 4(5) deprived any Court of Law of the jurisdiction to grant any divorce to persons of the same sex involved in a marriage.

Section 5 provided for the non – recognition of same sex marriage and mandated all arms of government and agencies of government not to give effect to any public act, record or judicial proceeding within or outside Nigeria, with regard to same sex marriage or relationship. Section 6 prohibited the celebration of same sex marriage by places of worship and the issuance of marriage licenses to parties of the same sex.

Section 7 prohibited the registration of Gay Clubs and societies in all institutions and publicity of same sex sexual relationships. The section further prohibited publicity, procession and public show of same sex amorous relationship through the electronic or print media physically, directly, indirectly or otherwise. This section punished any person who was involved in the registration, sustenance, procession or meetings, publicity and public show of same sex amorous relationship directly or indirectly in public and in private with a term of 5 years imprisonment if found guilty.

Section 8 created the offences and punishment for going through same sex marriages, performing, witnessing, aiding or abetting the ceremony of same sex marriages. All the offences carried 5 years imprisonment as punishment.

Section 9 conferred the jurisdiction to entertain all matters, causes and proceedings arising from same sex marriages or relationships on the High Court in the States and the Federal Capital Territory.

## Legal Implications

We agreed at INCREASE, and with some allies, that the bill carried enormous potential for the political destruction of individuals. We found it frightening in its possibilities for doing great damage to the fundamental rights of citizens. The provisions of the bill are in clear violation of the Constitution and international instruments to which Nigeria is a State party. The Constitution of the Federal Republic of Nigeria, 1999 in Chapter IV certain fundamental rights to all citizens. Section 34 guarantees the right to the dignity of the human person. Section 34(1) provides-

Every individual is entitled to respect for the dignity of his person, and accordingly-

- a) no person shall be subjected to torture or to inhuman or degrading treatment;

To single out any person for punishment or public ridicule amounts to inhuman and degrading treatment and therefore a violation of the provision guaranteeing freedom from this. The Constitution equally guarantees the right to private and family life in Section 37. This right is to the privacy of the person of the citizen, their home and their correspondence. Section 7(3) is a clear violation of this right and therefore unconstitutional.

Section 38 guarantees the right to freedom of thought, conscience and religion. This right in particular entitles everyone to hold and impart opinions and ideas. The right includes the right to belong to a religion or not. Whatever some proponents of a religious group might have to say about its participants' identities and behaviours cannot override the constitutional right to freedom of thought. The Constitution also guarantees the right to freedom of expression and the press in Section 39, which would clearly be taken away if the Same Sex Bill was passed into law! Section 42 of the Constitution guarantees the right to freedom from discrimination. The bill if passed into law would amount to an incitement to persecute persons on the basis of their sexual orientation.

## Mobilization

The international community was horrified by the content of the bill and taken aback that Nigeria in all its efforts to present herself as the Giant of Africa would go down this path. In March, the International Lesbian and Gay Alliance international meeting was held in Geneva. The Nigerian Same Sex Marriage Prohibition Bill received a lot of attention, and there and then,

members were asked to lend support in any they could. It was agreed that it was safe and effective to do an alert protesting against the bill and to solicit the government of Nigeria to withdraw the bill from the National house of Assembly. At ILGA 2006, we were able to obtain over 70 signatures for the alert. We also prepared a letter and there was a protest march to the Nigerian High Commission in Geneva, and even though they refused to open the gate to let delegates in, the march was able to deliver the letter addressed to the High Commissioner. In choosing this strategy, there had been a long meeting with the Nigerian delegation who decided that it was safe for them to participate in the march. The tactics developed around this were very careful not to create the perception that INCREASE was being 'controlled' by international allies, and we also worked very hard to develop local alliances.

A Strategic Meeting aimed at winning more allies and gaining a critical mass of activists to fight the bill was held in Abuja. This was not without its own surprises. It was a meeting called to expand the activism beyond the LGBTI rights Defenders and core human rights NGOs that were openly against the bill. We recognized that this was not enough to kill the bill. After a meeting with the European Union, the three NGOs present and the Alliance Rights Nigeria, then led by the founder, Oludare Odumuye, agreed to form a consortium, this consortium was charged with the responsibility of mobilizing more NGOs especially women's NGOs and mainstream human rights NGOs, to join in this advocacy effort. Our goal: *to kill the bill*.

Invitations had been sent to over 30 non-governmental organizations including those doing renowned work on sexuality, health and development of young people and HIV/AIDS. Most leading NGOs in these fields did not show up. Some did not want to be associated, even remotely with our advocacy work because they thought that it would discredit the work they have done in the past many years. Some said that openly antagonizing the passing into law of the bill would jeopardize their relationship with the communities they served.

After introductions and objectives of the meeting, we conducted a values clarification exercise at the beginning of such a task to ensure that everyone understood why we were there. Participants were asked to arrange the following in order of preference: oral sex, anal sex, vaginal sex, masturbation, sex with same gender, sex for money, forced sex, bestiality and celibacy. Of the 31 participants who were present, 25 scored sex with same gender very poorly, it was the least in order of acceptance of the 9 various sexual behaviours that were

given for them to rank. Only Forced sex and Bestiality were scored higher than having sex with a person of the same gender. The six who scored having sex with a same-gender partner differently were either gay or from NGOs that are LGBTI friendly. This was the first shocker for us, and it had to be tackled.

The question was why were we there if the notion of having sexual relationships with partners of the same-gender was perceived so poorly? We had a heated debate; most held a hard line position at first arguing that they were there to “kill the bill” but not to encourage homosexuality. Some participants maintained that homosexuality constituted sin because the two major religions in Nigeria are argued to have it so. Some said homosexuality was unAfrican; some said it led to very risky sexual behaviours. Some said allowing homosexuality was too permissive and that this was responsible for the growing number of gay people, and that they were “recruiting” children and raping innocent citizens. The Ugliest of the shocks was the fact that two participants actually came to the meeting thinking or rather hoping that we were going to advocate against LGBTI sexualities. Some of these participants were from highly reputable institutions with a sound track record of human rights. As we proceeded systematically to challenge these positions, it was clear to us that we had a Herculean battle to fight in the House, and that our strategies for the Public Hearing had to be well defined for maximum impact. The questions we asked that stirred debate and probed the minds of the participants to understand why we must advocate for the protection the rights of LGBTI persons included:

- What is scud missile, browsing, mobile phone, submarine, in the local dialect of the participants? After this, we asked for local terminologies, labels, names for homosexual behaviour / persons, transgender, transvestites, and traditional ways of addressing issues related to homosexuality?
- What is African? Does the entire continent have one culture? Why would the law legalizing same sex marriage in South Africa fail to apply to the entire continent? Why does the culture of women marrying women in some Ibo cultures not apply to all Africans? Is anything really African?
- Are there gays who are African? Are there gays in Africa? Is being gay African? On the other hand, what is the origin of Christianity? What is the origin of Islam? Where is the source of the criminal and penal codes? Are these African?

- Is heterosexual vaginal sex risky? What are the health risks? What is the rate of HIV transmission attributable to heterosexual sex in sub-Saharan Africa? Are there ways of reducing or preventing transmission in heterosexual sex for safer sex? Are there ways of reducing or preventing transmission in homosexual sex for safer sex?
- Is heterosexuality natural or not? What makes it so? Is homosexuality natural or not? What makes it so? If one sexual orientation is natural, what makes the other un-natural? And if they are both learned why would one be superior to the other (s)?
- Do people have sex only for procreation? Are there heterosexual who engage in unprotected sex and desire to have children but do not get pregnant? If homosexual are held uncountable for not procreating, what do we do to reverend fathers and sisters who have chosen to be celibate?
- Is oral sex natural? What about froterosexuality (sexual pleasure derived through rubbing of genitals)? How natural is kissing? Do heterosexuals have anal sex?

These enabled us to clarify values, using human rights and health grounds to define what is an “acceptable” sexual behaviour or practice and the debate enabled us to differentiate between consenting sexual relationships among adults, straight or queer, and forced sex or rape. And we clarified what pedophilia and pederasty are.

The second shocker was that apart from the members of the consortium and some to new partners (Global Rights and Community Development and Democracy, and the representatives of the Human Rights commission, no one else had seen the bill or read the bill. Their opinions, which were sympathetic towards the bill, were formed from newspaper reports and rumours. Despite the initial tension of the debate, relief set in as participants shared their appreciation for the forum which had given them in-depth and accurate insight into human sexual behavior, and all registered to be members of the Coalition for the Defense of Sexual Rights in Nigeria with its secretariat at INCREASE. This was a huge achievement.

## The Public Hearing

The strong mobilization around the public hearing was made possible for me, as Executive Director of INCREASE, by modern communication technologies

and was coordinated from Senegal where I was rounding up a conference and mobilising resources. I was in Dakar, preparing to board a flight back to Nigeria with a looming threat of the ground staff at the airport commencing a demonstration that very night. If the Government did not move to resolve the conflict, the airport would be closed and I'd be trapped in Dakar while the Public Hearing would continue. I resolved that mobilization for funds and for allies to participate in the Public Hearing had to be done from where I was, including whatever it would take to get the participants to Abuja for two nights, prepare statements, and present statements at the house.

The announcement for the Public Hearing fixed for the 14<sup>th</sup> February 2006 was seen in a Nigerian daily newspaper on Monday morning 12<sup>th</sup> February 2006. I took a hotel room and paid for half day internet connectivity to allow communication with INCREASE office in Minna and the Staff, providing them guidance; and to connect with with the office of Global Rights, Abuja, who were partnering with us to organize towards the Public Hearing. The home office communicated with members of the coalition to see how many members of the coalition and additional allies from the women's rights and mainstream human rights NGOs were willing to team up with us. We opened the invitation to list-serves like the E-forum, The FOI list, which have huge numbers of subscriptions with a clearly stated mission to kill the bill on the prohibition of same sex marriage in Nigeria. I sent the Email below out to international colleagues looking for direction for accessing funds.

"Hello friends, the most unpleasant expectation seems to have arrived! I just received a call that said the bill banning same sex marriage in Nigeria is coming up for public hearing on Wednesday.

That gives us only today and tomorrow and mobilise. That is tight though predicted.

We are open to advice.

I don't think this is the time to start dialogue on what is responsible for this sudden action. We must just focus our energies on what our response should be.

We do not have funding to support participation of allies. Urgent funds that can be accessed, at least in principle within these 2 days is welcomed.

Hugs,  
Dotty"

It looks casual to me now, but that the urgency was not lost in the brief email. We got a few quick responses – Urgent Fund for Africa, Open Society Institute, and Astrea Foundation reached out to us. With their pledges, we contacted the Chair of the Board of Trustee of INCREASE for permission to use funds raised from consultancies and replace the funds when the grant process is concluded and transfers are effected by these institutions. With the jitters down my already aching spine from this alert, I sat in the hotel room all day propped with pillows on all sides and my lower back that was hurting real badly and periodic contractions from my six months old pregnancy – now Adel (!)– to continue to plan. It was a period of pressure and nothing else mattered but the thousands of lives at risk of regular rights violations as a result of perceived or real sexual orientation and gender identity and expression.

We planned for a workshop for Capacity Building for Advocacy and Legal Reform to commence at 12 noon in Harmonia Hotel in Abuja on 13<sup>th</sup> February 2006. This was to give us room to travel to the meeting venue from all over Nigeria and Dakar. We had concluded before I checked out to board the flight to Lagos that the objectives of the forum would be to take stock of events since the introduction of the Bill, refresh memories on the public hearing process, share tips on the art of public speaking, tips on impactful statements, assign tasks, develop and produce statements, discuss tips for effective media interviews. Messages had come in regarding who was available provided there was funding. With the three donors' commitment, I was able to give a go ahead for invitation letters to be sent out to colleagues. We also notified other networks of our upcoming participation at the public hearing and post hearing within and outside Nigeria and asked those who could to send in statements which would be read on their behalf and or submitted to the committees hosting the Public Hearing. We also agreed that we would host a press briefing post public hearing. We assigned the task of mobilizing reporters from various Nigerian dailies and prepared invitations for those at the public hearing to participate in the post hearing media event. Finally, we agreed that we would have an evaluation session that would conclude on which way forward.

The capacity building for advocacy and legal reform closed at 5am on the 14<sup>th</sup> February 2006. We had prepared all the statements to be presented, we had downloaded statements from our international friends, Global Rights volunteered to print the statements for us, there were statements

from the coalition for the Defense of Sexual rights in Nigeria, Civil Liberties Organisation, Lawyer Alert, humanist Movement of Nigeria, Queer Alliance, Alliance Rights Nigeria, House of Rainbow, Youth Net, and statements from Human rights Watch, IGLHRC, Global rights Washington were designated to some members to present on their behalf.

We also worked out strategies around arrival within the National House of Assembly. It was rumoured that the hearing would commence at 0900hrs, but avoid any unpleasant surprises, we decided to be at the House at 6.30am. We also agreed that it was not beneficial to sit clustered on one side of the hall, but to be dispersed so that if there was a show of hands for comments or questions we would stand the chance of being heard from different corners of the hall. After wishing each other a fun Valentine day, some went to refresh for the movement to the House of Assembly while others went to print and photocopy statements.

At 6.30am, we were at the entrance of the National House of Assembly. We observed four buses that arrived after us, one labeled concerned Mothers of Nigeria, a school bus with adolescents in school uniforms belonging to a catholic school, a bus with traditional rulers in attires like those of Eastern Nigeria, and a vehicle with an Islamic inscription. While signing in to obtain the gate passes, we discovered that they had invitation letters from the Chair of the Committee of Women's Affairs who was coordinating the Public Hearing. We were stunned to know that the House had sent out invitation letters. They had passes and went in while we remained outside answering questions from the security on what our mission to the House of Assembly entailed. It became so frustrating as time ticked past. We called Global Rights Minority desk Person and complained. He got in touch with the member of the EU parliament of Italy, his home country, who called the Nigerian Mission, and got in touch with contacts in the national assembly who authorized our entry.

### **Some highlights from inside the House**

The Reverend of the House of Rainbow was asked to say the opening prayer before the commencement of the hearing. When he eventually presented the statement of the House of Rainbow, the Pentecostal Church movement and the Christian Association of Nigeria stood up during comments and made statements dissociating themselves from him.

The UNAIDS country representative made a very strong statement against

the bill as did the Human Rights Commission, who went a step further to call for the abrogation of the existing laws that criminalise homosexuality and gender expression and identities because he said everyone has a right to be and that the criminalization only helps to drive risky behaviour under ground, making HIV/AIDs intervention strategies ineffective. The presentations by members of the coalition were well done and the sleepless night was worth every second of it.

However, things were not at all rosy! The first statement to be presented after the introduction of the bill was by an ardent abortion rights advocate and renowned reproductive health researcher gynecologist who at the time was the Special Adviser to the President. He presented data that showed that gay people also engage in heterosexual relationships, that they have high rates of HIV/AIDS, engage in excessive use of alcohol, substance abuse, and have high rates of violence and have a high suicide rate. He said the statistics came from “various websites that anyone could check”. He said every population had between 4 – 10% homosexual population, and concluded that any “unbridled” sexuality is prone to health risks and various forms of social vices.

Human rights defenders challenged the partiality of the gynaecologist's data, but one of the Muslim clerics asked the House to permit the “execution of the 4% of the population to allow the survival of the rest 96%”. He said it was right in Islam to do so. To say the Human rights activists in the hall were horrified by this request would be an understatement. The other awful experience was during the presentation of the representative of the Women's Affairs Minister, who called on people at the hearing to shout some hate slogans. The Chair of the Committee of Human Rights called the forum to order and said that was inappropriate in a public hearing and asked participants to desist from heckling and booing while others spoke. This was a warning to protect the presenter from the Humanist Movement of Nigeria who said there was a culture in his community in Eastern Nigeria that allowed a woman to marry another and said the bill was an affront to his culture and that the presidency was trying to upturn the cultural values of those communities and the benefits of the culture. He almost got assaulted by the members of the house.

It was in this forum that we learnt that those we consider form afar to be allies and friends may in fact be the ones loading ammunition for the execution of LGBTI rights defenders. The most vocal and most aggressive of the members was a media reporter who had done great work while in the

television House to bring to light various forms of human rights violations including acid baths, teenage pregnancy, child abuse, serial and ritual killings, harmful widowhood practices. LGBTI rights were however a step too far for this reporter.

Fortunately, the long standing human rights activist and former president of the Civil Liberties organization in his capacity as the chair person of the House Committee on Human rights was on the high Table. We had established contact with him not long before the Public Hearing. He had said he understood the issues and was also concerned about the bill but required Nigerian protest voices to give him the impetus to challenge the bill in the house.

He kept to his word. He did not hesitate to call for order addressing his colleagues when they grew hostile towards the Human Rights Defenders. He apologized to us and urged us not to feel intimidated. He assured us that our contributions will be considered along with others towards a decision on the bill. Indeed, after the committees went back to deliberate, there were only two of them who were viewing the implications of the bill outside moral confines. The Committees failed to reach consensus. On the day the report was presented the national House of Assembly, the human rights defender's views had been dropped and he stood up and presented a minority report that led to the Senate asking them to go and harmonise their report. They failed to do so resulting in the expiration of the proposal to ratify the bill, otherwise referred to as *death of the bill*, notably also with the end of the Obasanjo Regime.

### **Concluding..... only for a moment**

The battle against this bill was intense and challenging, and we were required to use every ounce of our strategic intelligence and courage. There is no doubt in our mind that the forces in support of the bill remain powerful, and we will be faced with similar legislation again. We have learned a great deal from this battle, and are ready for the next...

*At the time of going to print, a second bill prohibiting same-sex sexual relationships and marriages had been passed by the Nigerian Senate (7 Dec, 2010) and now goes to its House of Representatives for final ratification and signature by President Jonathan Goodluck. It faces stiff opposition from the activists already gathered together through the struggles described in this Profile.*

## Review

Yaliwe Clarke, African Gender Institute, University of Cape Town

Funmi Olonisakin and Awino Okech (eds), 2011. *Women's Security Governance in Africa*. Dakar, Nairobi: Pambazuka Press

Given an increasing focus on post armed conflict reconstruction processes on the continent, as well as increased international attention on the prosecution of war crimes and security sector reform processes, this book offers a much needed feminist analysis of “security” as used by governments and international agencies. Eight authors discuss a range of African contexts. Each author engages with a central thesis – the extent to which women’s agendas are visible in security governance systems and practices in Africa. A central thesis of the book is the assumption that a people-centred and inclusive “security” would necessarily require engaging with “women’s agendas”. Part I titled *Conceptual Approaches* includes three papers that offer a critical glance at security discourse prominent amongst people who work with state systems. Funmi Olonisakin’s paper, for example, makes the argument that African states and their security infrastructure is an off-shoot of colonial governance systems that were a fundamental part of the colonising project. She places current security systems as an unfortunate continuation of these structures, only slightly adjusted to suite the lives of Africa’s elites – almost all gendered as men.

Whereas this is indeed a valuable argument (one that I myself have made in *Feminist Africa* 10)1, I find that she uses the word and concept of “security” without examining what kinds of masculine identities and lived experiences shape notions of state security. It would have been useful to focus on certain colonial patriarchal traits of security that have evolved in African contexts, especially those that have been reinforced during Africa’s myriad liberation struggles and contemporary armed conflicts. Furthermore, a more nuanced gendered analysis of security discourse could have gone beyond the idea that “women”- people have been left out of state security systems and structures. As a framing paper for the book, Olonisakin’s chapter could have examined

militarised (and perhaps elitist in some cases) masculinities *and* femininities that foreground Africa's evolving state security discourse and practice.

Awino Okech's chapter on "Alternative discourses: a feminist approach to re-thinking security" offers a much more nuanced feminist analysis that pushes beyond hegemonic masculine connotations of security within state discourse. She points out that the distinction between the public – or state space – and other spaces is in fact a false one. There is no separation between insecurity in our daily lives and that which is named as "state security". She also alludes to the existence of militarised femininities that occur in 'war' situations – pointing to the need to recognise and transform violent masculinities AND femininities. Okech draws on feminist work on Gender Based Violence (GBV) and its relevance to making links between security and gendered bodies of women. Here I find that her article struggles to make clear links between "security", bodies, and sexualities. This is a conceptual gap that feminists (who work with "security" discourse) are yet to close, or perhaps, transform.<sup>2</sup> The chapter points to the importance of drawing on years of activism and research on violence against women (VAW) and gender based violence (GBV) that is yet to be taken seriously by "security" analysts.

Comfort Ero's article on "Security sector reform: re-imagining its transformative potential" uses elements of Awino Okech's and Funmi Olonikasin's approach and applies it to transitional justice processes. Basing her work on Hamber (2006), she discusses the possibilities of transitional justice processes broadening their conceptual understanding of violence so as to embrace women's experiences of violence in a way that can 'subvert the militarised view of what constitutes safety'. She argues for transitional processes to embrace other ways of reshaping people's lives that go beyond technical legal options. She argues that transitional justice process offer an opportunity for state structures to shift meanings of "security" in a way that ensures that state systems respond to the social and economic aspects of the consequences of violence against women.

Part 2 of the book includes three country case studies: Liberia, Sierra Leone, and Mozambique. Each author provides useful contextual information on women's involvement or experiences in responding to situations of violence and "insecurity" – either in direct engagement with state systems or less formally recognised efforts. I found that a limitation of each chapter was a comfortable use of the word "women" without an effort to unpack *which* women were being discussed, along the lines of class, ethnicity or even location. This could

be construed as a simplistic 'WID'-like analysis of gender and security that assumes that all that is required is the inclusion of "women"- people in existing security systems. Each article does not offer a detailed analysis of women's diverse identities and how these shape and were shaped by situations of security and insecurity. An exception to this is Helen Scanlon and Benilde Ndhlovu's paper titled "Many truths were not revealed': the case of Mozambique" that draws on narratives of specific women's experiences of violence during Mozambique's 27-year long civil war. This chapter provides insights on the various roles women played in the war and the ways in which marriage and patrilineal inheritance systems framed women's options for reconciliation.

Eka Ikpe and Tim Murithi's articles in Part 3 provide a useful summary of commitments to gender equality and security made by the African Union (AU) and the Economic Community of West African States. Both chapters discuss various layers of government bureaucracies that have been put in place and the extent to which "women" are represented.

Overall, the book is a good presentation of conversations that are already underway in women's rights organisations across the continent. The book also reveals a need to boldly engage with long standing feminist perspectives on gender and violence so as to push notions of "security" beyond that of state structures and processes.

## Endnotes

1. See Clarke, Y. 2008. "Security Sector Reform in Africa: an opportunity to deconstruct militarised masculinities?", *Feminist Africa* 10, 49-66.
2. See Bennett, J. 2010. "'Circles and Circles'": Notes on African feminist debates around gender and violence in the c21", *Feminist Africa* 14, 21-48.
3. WID stands for Women in Development. This is an early feminist analysis of development that became popular in the 1970's. Its main thesis is that "women" have been left out of developmental processes.

## References

- Bennett, J. 2010. "'Circles and Circles'": Notes on African feminist debates around gender and violence in the c21", *Feminist Africa* 14.
- Clarke, Y. 2008. "Security Sector Reform in Africa: an opportunity to deconstruct militarised masculinities?", *Feminist Africa* 10.
- Hamber, B., Hillyard, P., Maguire, A., McWilliams, M. Robinson, G., Russell D. And Ward, M. 2006. "Discourses in transition: re-imagining women's security", *International Relations*, vol. 20, no. 4.



## Call for contributions: *Feminist Africa* 17 and 18

*Feminist Africa* 17 will be on the feminist politics and practices of e-technologies and will be co-edited by Jan Moolman, Selina Mudavanhu and Jennifer Radloff. The issue will explore issues within political activism which draws upon the multiple options of ICTs for communication and networking. The issue will also offer analysis of the implications of the “technological revolution” for African and transnational feminist work and thought.

Enquiries about the issue and proposals for pieces for consideration (feature articles, book reviews, standpoint pieces, proposals for In Conversations) should be sent to [jane.bennett@uct.ac.za](mailto:jane.bennett@uct.ac.za) by the end of July, 2012

*Feminist Africa* 18 will explore the idea of “young women” within contemporary discourses of activism and theory within African contexts. The issue will explore what this categorization, popular within NGO and some institutional spaces, entails and look at how action-research and advocacy driven by “young women” offers powerful questions about the shape and salience of feminist issues and movements.

Enquiries about the issue and proposals for pieces for consideration (feature articles, book reviews, standpoint pieces, proposals for In Conversations) should be sent to [jane.bennett@uct.ac.za](mailto:jane.bennett@uct.ac.za) by the end of April, 2012.

