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Forthcoming chapter in *COMPARATIVE CONSTITUTIONALISM AND RIGHTS: GLOBAL PERSPECTIVES*.
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Women's Rights Project, University of Victoria, British Columbia. Cambridge University Press, Forthcoming
February 2007. Not for distribution.

Women's Constitutional Activism in Canada and South Africa

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We now have a Charter which defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada. It reinforces the protection offered to French-speaking Canadians outside Quebec, and to English-speaking Canadians in Quebec. It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons.

Pierre Elliott Trudeau (1982) ¹

Freedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on board, that the objectives of the Reconstruction and Development Programme will not have been realized unless we see in visible and practical terms that the condition of the women of our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals with any other member of society.

Nelson Mandela (1994) ²

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¹ Pierre Elliott Trudeau, 'Remarks by the Prime Minister at the Constitutional Proclamation Ceremony on April 17, 1982' (Library and Archives Canada: 1982), Online www.lac-bac.gc.ca

² Nelson Mandela, 'State of the Nation Address' Houses of Parliament, Cape Town, 24 May 1994
<http://www.anc.org.za/ancdocs/history/mandela/1994/sp940524.html>

I. Introduction

Women's constitutional equality rights have evolved from decades of women's activism, drawn up from the grass roots of the daily lives of women and children, reaching into the exclusive corridors of malestream³ political and legal institutions, to impact on constitution-making and constitution-working. In the past 25 years, the world's strongest, clearest articulations of equality-based democratic rights and freedoms have been developed - including Canada's Constitution Act 1982⁴ and the Constitution of the Republic of South Africa 1996.⁵ Intensely focused women's activism during negotiations over equality text yielded substantive amendments in both these constitutions. Yet women's constitutional activism has often been treated as a "sidebar" in mainstream accounts of these formative periods in the evolution of constitutional democracies. Official and academic records say little of women's influential contributions in those intensely political arenas - advocating, at the drafting stage and, as integration of the constitutions proceeded, in each country's legal system, thereby affecting national standards and outcomes for justice.⁶

³ Radha Jhappan, 'Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship' (1996), *Studies in Political Economy*, 15 - 35 at 20.

⁴ Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), c.11 [hereinafter, the Canadian Constitution or if referenced in a section focused only on Canada, the Constitution]

⁵ Act 108 of 1996, adopted on 8 May 1996 and amended on 11 October by the Constitutional Assembly. [hereinafter, the "South African Constitution" or if referenced in a section focused only on South Africa, the "Constitution"].

⁶ Author's note: The Canadian Broadcasting Corporation (CBC) featured the 20th anniversary of the *Charter of Rights and Freedoms* in 2002, quoting only experts who happened to also be white men, making no mention of how the social movement of women shaped Canadian constitutional principles of equality. My review of archival websites for the Government of Canada yielded not a single feature on women's role in constitution-making - no mention of the national ad hoc women's constitutional coalition that numbered in the thousands, no mention of the native women's rights lobby and, for Doris Anderson, who was a pivotal and prominent media presence in the constitutional battles of 1981 - there was one radio clip, from 1970, on a different topic. In South Africa, during a personal tour in July 2004, just after the Apartheid Museum opened in Johannesburg, I was moved by the powerful, well documented exhibits of many aspects of the "negotiated revolution" including the 1991 Convention for a Democratic South Africa (CODESA) - but surprised to have been unable to discover even one write-up on the contributions of activist women, nor was there any detail on the two "Women's Charters," drafted at the grassroots in the 1950s and 1990s, that did influence the interim and 1996 constitutions. In pictures taken just a decade before - the period described by Nelson Mandela as constitutional transformation - most of the women - standing with the male leaders - were not even identified in the museum exhibits.

The rights revolution makes society harder to control, more unruly, more contentious. This is because rights equality makes society more inclusive, and rights protection constrains government power. ...What makes the Canadian political story so interesting is the way in which women's organizations, Aboriginal groups, and ordinary citizens have forced their way to the table and enlarged both the process of constitutional change and its results.⁷

.....

It is the very unity of our achieved constitutional order that enables us to pursue different goals, without fear of tearing our society apart... That is the paradox that enables us in a multitude of different and often conflicting ways, to pursue the national project called South Africa.⁸

Valuing Women's Activism in Constitutionalism

In just over a decade, the crumbling of the Berlin Wall released a flood of newly independent states embarked on constitution-making, South African apartheid was constitutionally terminated and the Canadian constitution was "patriated"⁹ from under England's authority. While the last mentioned event was hardly on the same scale of human upheaval as the first two, they are all examples of the progression of constitutionalism and constitution-making around the globe, including Afghanistan, Brazil, Eritrea, Nicaragua, Rwanda and Uganda.¹⁰ Women mobilized on every continent around their vision of women's constitutional equality rights, as a means to access and live their rights. Questions about both sides of women's constitutional activism arise -

⁷ Michael Ignatieff, *The Rights Revolution*, (Toronto: House of Anansi Press Ltd., 2000) pp.6-7

⁸ Albie Sachs, 'Foreword', in Edgar Pieterse and Frank Meintjies (eds.), *Voices of the Transition – The Politics, Poetics and Practices of Social Change in South Africa*, (Johannesburg: Heinemann, 2003) p. viii.

⁹ Peter Hogg, 'Patriation of the Canadian Constitution' (1983), 8 *Queen's L.J.* 123-131 at 126

¹⁰ Alexandra Dobrowolsky and Vivien Hart, 'Introduction: Women, New Politics and Constitutional Change' in Alexandra Dobrowolsky and Vivien Hart, (eds.), *Women Making Constitutions – New Politics and Comparative Perspectives* (Palgrave Macmillan, 2003) p. 1

one side being women's impact on constitution-making and thus on final constitutional text; the other side being the impact of constitution-making on women and their social movements. Implementation strategies - what I term evidence-based advocacy - include selective high impact litigation using constitutional text as a transformative tool. Evidence based advocacy ¹¹ can turn words on the face of constitutional documents into lived rights, and activism is at the core of "lived rights". ¹² In the hope that this chapter proves to be a useful contribution to the rather sparse discourse on women's activism and constitutional reform, observations on women's constitutional activism in South Africa and Canada are offered in four parts, prompted by such practical questions, as those below. ¹³

1. What conditions generated women's readiness for constitution making; what characteristics influenced the nature of women's constitutional activism?
2. What was wrong with early draft equality provisions; how did women activists succeed in attaining amendments?
3. What kinds of engagement (alliances) in each country proved effective in the movement toward the best textual protection possible; were strategies time limited, were alliances sustained?
4. What about "results" - what was generated from activism that had a demonstrated impact on the constitutional drafting / amending / follow-up / processes? ¹⁴

¹¹ © McPhedran 1998

¹² © McPhedran 2001

¹³ A few notable exceptions in Canada being Anne Bayesfsky, Mary Eberts, Penney Kome, Katherine de Jong, Chaviva Hôsek in the 1980s and, more recently, Alexandra Dobrowolsky. Some South African exceptions include Cathi Albertyn, Penny Andrews, Susan Bazilli, Gertrude Fester, Shireen Hassim and Albie Sachs, who have edited and authored accounts situating women's activism as significant in the constitution-making process of the 1990s.

¹⁴ The author wishes to thank Prof. Bruce Ryder of Osgoode Hall Law School, York University, Canada, for his guidance in my research on women's constitutional activism, as part of the Osgoode LL.M. Programme; Senator Nancy Ruth, Susan Bazilli and Darryl R. Peck for inestimable personal and professional support for lived rights and evidence based advocacy.

II. Putting Women on the Constitutional Agenda

To aid appreciation of the roots of constitutional activism, key events and indicators from the decades of activism that rolled up to the crucial moments of women's influence, on building the constitutions of Canada (1980s) and South Africa (1990s) are summarised.

South Africa

The imposition of apartheid in 1948 galvanized women activists of all races to come together on a number of dramatic occasions over the almost fifty years of that regime. Attempts to build a unified women's movement were undermined, politically and economically, buttressed by armed forces, yet South African women's constitutional activism has deep roots – connecting the thousands of women of all races, marching together in the 1950s, to the thousands of women involved in the nation-wide constitutional drafting consultations, forty years later.¹⁵ Given the ferocious disincentives perpetrated by the apartheid state against alternative political movements, it is remarkable that women crossed racial and class barriers as often as they did, and perhaps not surprising that “white women tended to engage the state in struggles to improve their rights as citizens and in the family.”¹⁶

The South African Oral History Project described women's issues in the 1940s and 1950s as “bread and butter” matters - food prices, identity cards, permits or passes and housing.

¹⁵ South African women's presence in the constitutional transformation has already been documented by Catherine Albertyn et al, *Engendering the Political Agenda – A South African Case Study*, (University of the Witwatersrand, 1999); Susan Bazilli (ed.), *Putting Women on the Agenda*, (Johannesburg: Ravan Press, 1991); Penelope Andrews and Stephen Ellmann, *The Post-Apartheid Constitutions – Perspectives on South Africa's Basic Law*, (Witwatersrand University Press and Ohio University Press, 2001); Jacqueline Cock, “Women in South Africa's Transition to Democracy” (1997); Shireen Hassim and Amy Goetz, *No Shortcuts to Power: African Women in Politics and Policy-Making* (Zed Press: 2003)

¹⁶ Albertyn et, *Engendering..* at 5. For example, white women suffragists in the 1920s won their right to vote, at the expense of the already small number of the racially defined minority voters. C Walker, *Women and Resistance in South Africa* (Onyx Press London, 1991) 19-24, in Albertyn et al, *Engendering*, p.4 Similarly, legislative reform under the Matrimonial Affairs Act 1953 benefited only white women.

[W]omen then organised themselves within the community to take up these challenges. One such community-based structure was the Alexandra Women's Council (AWC), which was established in the mid-1940s. The AWC became active in issues relating to squatter movements, and in 1947 it demonstrated against the Native Affairs Commission, which wanted to remove squatters.¹⁷

Women's Charter of 1954

On April 17, 1954,¹⁸ at the founding meeting of the Federation of South African Women (FEDSAW) - the first broad-based, multi-racial women's umbrella organization - created out of cooperation between the ANC Women's League (ANCWL) and unions, the *Women's Charter* was adopted, with the following preamble,

We, the women of South Africa, wives and mothers, working women and housewives, African, Indians, European and Coloured, hereby declare our aim of striving for the removal of all laws, regulations, conventions and customs that discriminate against us as women, and that deprive us in any way of our inherent right to the advantages, responsibilities and opportunities that society offers to any one section of the population.¹⁹

National women's protests

Together with the ANCWL, the Federation began to organize scores of demonstrations outside Government offices in towns and cities around the country, which mushroomed into the first national protest on October 27, 1955, when an estimated 2,000 women of all races marched on the Union Buildings in Pretoria. Not even a year later, the movement of protest had grown and on August 9, 1956, an estimated 20,000 women from all parts of South Africa somehow made their way to Pretoria, their voices raised in

¹⁷ South African Oral History Project <http://www.sahistory.org.za/>

¹⁸ Note: Ironically, April 17th has been celebrated in Canada, since 1985, as "Equality Day" to commemorate activation of the s.15 equality rights clause in the Canadian Charter of Rights and Freedoms following the three-year moratorium imposed when the Constitution Act 1982 was signed on Parliament Hill by her Majesty Queen Elizabeth and Prime Minister Trudeau, Ottawa, April 17, 1982.

¹⁹ Bazilli, *Putting Women on the Agenda*, p. 285

freedom songs to tell President Strijdom to withdraw the new law that women had to carry passes.²⁰

Wathint` abafazi, Strijdom! Now you have touched the women, Strijdom!
Wathint` imbokodo uzo kufa! You have struck a rock!²¹

Black Sash - The Women's Defence of the Constitution League

The Women's Defence of the Constitution League - commonly known as the "Black Sash" - was formed in 1955.²² An organization of white women, Black Sash began much as the Persons Case in Canada (discussed in the next section) had - as a small group of women discussing over tea, how the law was being misused.²³ By 1960, the ANC, the ANCWL and all other political parties were officially banned. The broad-based political manifestations of the 1950s virtually disappeared and legalized state suppression took some devastating new forms.²⁴ Activism had to be directed to attempts to hold on to vestiges of income, family and community that were all being destroyed.²⁵ Throughout the sixties and seventies; leadership of women's organized political resistance decreased as the intensity and frequency of suppression increased; women were being detained, tortured, exiled and, even in exile, hunted and killed, while others were scrambling to eke out support for whole families, often as single parents and or sole support providers.

²⁰ The women's resistance was child-centred. During this time, an average of over 300,000 African (Bantu) men were convicted each year for pass laws violations. If passes were extended to African women, that figure would more than double. If mothers were arrested as well as fathers, the women asked, who would care for the children? IMBOKODO: The South African National Oral History Pilot Project (2000) Accessed online August 17, 2006.

www.sahistory.org.za/pages/specialprojects/womens-struggle

²¹ IMBOKODO: The South African National Oral History Pilot Project (2000), above. The 9th of August is now celebrated as South African Women's Day to commemorate what women achieved together, because they were not prepared to comply with a rule of law that was damaging their families and communities.

²² The founders used the image of a constitution hung with mourning crepe to protest removal of "coloureds" from the common voters list. At their demonstrations, women draped black sashes over their shoulders and the media soon shortened the organization's name to the "Black Sash."

²³ After South Africa became a constitutional democracy in the 1990s, the Black Sash shifted focus from being a protest organisation in support of black women to shaping legislation and pressing for policy reform.

²⁴ The Native Law Amendment Act set the stage for forced removals from urban areas to the townships - distant, barren tracts of land with no infrastructure to support community living. The Group Areas Act divided neighbours into tribal groups, and forced them into designated townships.

²⁵ Gertrude Ntiti Shope, ANC, Malibongwe – Celebrating Our Unsung Heroines, (Jet Park: Teamwork Printers, 2002) p. 61.

Readiness - ending Apartheid

'You have nothing to say now but I will give you something to help you along...You know what that will do to your baby? It will kill it. It will burn your baby from your body.' I sit impassively, not wanting to believe what I heard. Would he seriously do this? ... Yes, he would do it. I see it in his face. Triumphant, he turns and walks from the cell, all his tension drained, confident that when he comes back, I will comply.²⁶

In her autobiography, Zubeida Jaffer, a Muslim journalist and aide to (now Justice) Albie Sachs during the constitutional negotiations, described some of the torture she endured when she was in the resistance in the 1980s. By the 1980s, all liberation movements had been banned, except, technically, the Federation of South African Women – the umbrella organization that had mobilised 20,000 women to march on Pretoria in the 1950s. In effect, the only openly active women's resistance group was the all-white "Black Sash." Black and Coloured women in the Seventies and Eighties "went to ground" and quietly built upon the branch structure that the ANCWL had started before it was banned, focusing on women's self-help initiatives. In the student movement, increasing numbers of young women identified as feminists and at the community level, women were organizing around issues in their daily existence such as reproductive and family health, including violence against women of all races.²⁷

As the eighties closed and South Africa prepared for Mandela's release from prison, South African women activists were on a cusp. In November 1990, the University of the Witwatersrand in Johannesburg hosted a South African women's pre-constitutional conference, organised by Lawyers for Human Rights - entitled 'Putting Women on the Agenda'. Feminists attended from neighbouring SADC countries, the first time that they

²⁶ Zubeida Jaffer, *Our Generation*, (Cape Town: Kwela Books, 2003), p.11 Jaffer reported that this occurred in 1985; she was also detained and almost fatally poisoned in 1980, after writing an article that angered apartheid government officials.

²⁷ Mmatshilo Motsei, Personal Interview, Pretoria July 8, 2004. Her acclaimed autobiography, *Hearing Visions, Seeing Voices* (Bellevue: Jacana, 2004) detailed personalized accounts of her community based feminist activism, including as a member of the Women's National Coalition formed to put women into the constitutional negotiations.

came to South Africa after the lifting of the boycott, to share experiences of their struggles and participation in their own recent constitutional negotiations²⁸ to “empower women to participate in all the crucial aspects of the transformation ...”²⁹ Invited to reflect on the decade since Canadian women had negotiated constitutional amendments, Elizabeth Sheehy cautioned her African colleagues,

Lessons from ... Canada may be helpful for the negotiations over women’s equality rights, but women must conserve their energy and resources. Long term struggle lies ahead in fighting off “rights” challenges to women’s few and fragile gains...³⁰

Canada

Whenever I don’t know whether to fight or not, I fight. Emily Murphy³¹

“Famous Five” Persons

In 1928, five women³² collectively petitioned the Supreme Court of Canada, to ask:

Does the word 'person' in Section 24 of the British North America Act include female 'persons'?

Chief Justice Anglin answered for a unanimously negative Supreme Court of Canada.³³

²⁸ Mary Maboreke and Elizabeth Gwaunza, Zimbabwe; Bience Gawanas and Dianne Hubbard, Namibia; Unity Dow, Botswana, and others.

²⁹ Bazilli, 'Preface', Putting Women on the Agenda

³⁰ Elizabeth A. Sheehy, 'Women and Equality Rights in Canada: Sobering Reflections, Impossible Choices' in Bazilli, Putting Women on the Agenda, p. 272

³¹ Nancy Millar, *The Famous Five - Emily Murphy and the Case of the Missing Persons*, (Western Heritage Centre, 1999) at 9 - 15. In 1916, Emily Murphy (not a lawyer) presided over the new Women’s Police Court as the first women police magistrate in the British Empire, was widely read under her popular pen name “Janey Canuck” but was less popular under her own name – Judge Emily Murphy - as the author of *Black Candle* in 1922, about addiction to opium and cocaine in Canada, and was the leader in the “Persons Case” who called the other four together to have tea on her veranda and to sign the petition to the Supreme Court of Canada in August 27, 1927. Judge Murphy paid legal costs that the other women did not, and was principally responsible for navigating the lawsuit through the courts. In 1907, as a young pastor’s wife in Edmonton, who had grown up protected by the customs of privilege in Ontario, she was shocked to hear poor women describe how they were not protected by custom or by law and so she went to the legislative library to find out for herself that property laws did not protect a wife’s interest in the family home. These inquiries led to her connection with Henrietta Muir Edwards (whose name became the lead citation for the Persons Case, of Fort McLeod, Alberta, the “convener of laws” for the National Council of Women, then Canada’s largest women’s NGO. The Supreme Court of Canada Act provided for government funding of significant questions of constitutional law. The Famous Five petitioned for an interpretation of section 24 of the British North America Act, (renamed the Constitution Act 1867), when the constitution was patriated and the Constitution Act 1982 was enacted.

³² Emily Murphy, Nellie McClung, Henrietta Muir Edwards, Louise Crummy McKinney and Irene Parlby, now known in Canada, as the "Famous Five" For more information: <http://www.famous5.org>

³³ Reference as to the Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276. “...women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not ‘qualified persons’ within the meaning of that section.”

The five petitioners had to choose a strategy, between a) convince the government to legislate in their favour or b) litigate further to the Judicial Committee of the Privy Council of England. The Five opted to appeal, but could not afford to be present.³⁴ On October 18, 1929, Lord Chancellor Sankey of the Privy Council, provided the English lords' unanimous answer,³⁵

...and to those who would ask why the word [persons] should include female, the obvious answer is, why should it not?"³⁶

Litigation was a strategic choice that few Canadian women of the time could have made. Long years of women's rights activism, relatively advantaged social positions and political access made such high impact litigation possible for these five activists.³⁷

Building national women's rights machinery

In 1967, decades after the Persons Case, responding to pressure from disgruntled women's groups, a Royal Commission on the Status of Women was mandated to

inquire into the status of women in Canada and to recommend what steps might be taken by the Federal Government to ensure for women equal opportunities with men in all aspects of Canadian identity.³⁸

³⁴ Millar, above, p. 45, describes how the Five lost control over the question that had been put to the Supreme Court of Canada. The Supreme Court Act allowed costs of the petition and appeal to be covered by the government if the issue was considered by the government to be of sufficient national importance, but it also gave the Attorney General and his government lawyers' de facto control over the case. Never presented to the court, the two questions drafted by the Five, in which they purposely omitted use of the word "persons", were: "Is power vested in the Governor general of Canada or the Parliament of Canada, or either of them, to appoint a female to the Senate of Canada?" and "is it constitutionally possible for the Parliament of Canada, under the provisions of the BNA Act, or otherwise, to make provision for the appointment of a female to the Senate of Canada?" Their government funded lawyer, Newton Rowell, traveled to London in July of 1929 to argue their appeal, paid by the Government of Canada.

³⁵ October 18th is now officially celebrated in Canada as "Persons Day" commemorated by the annual awarding of a Governor General's medal to five long-time activist women, and one young woman leader.

³⁶ Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1967, [1928] S.C.R. 276, rev'd *Edwards v. Canada (A.G.)*, [1930] A.C. 124 (P.C.) For different perspectives on this historic case, see also: D. Bright, "The Other Woman: Lizzie Cyr and the Origins of the 'Persons Case'" (1998) 13 *Can. J. of Law and Soc.* 2, 99; and K. Lahey, "Legal 'Persons' and the Charter of Rights: Gender, Race and Sexuality in Canada" (1998) 77 *Canadian Bar Rev.* 3, 402.

³⁷ Nellie L. McClung, "Women are Discontented", *The New Citizenship*, as reprinted in Cook and Mitchison, *The Proper Sphere*, at 288-289. As Nellie McClung, one of the Famous Five, and a life-long activist author, noted, "The women who are making the disturbance are women who have time of their own.... Custom and conventionality recommend amusements, social functions intermixed with kindly deeds of charity... while women do these things they are thinking, they wonder about the causes, the underlying conditions - must they always be."

³⁸ CBC Radio and Television Archives, "Equality First: the Royal Commission the Status of Women" Accessed online Aug.20.06 www.archives.cbc.ca Author's note: Based on the account of Laura Sabia, a Toronto city councillor, president of

But a year into the Commission's mandate, Pauline Jewitt queried why governments were avoiding the public hearings,

They [commissioners] know that a basic re-examination of the role of men in the status of women problem, while it may terrify the men, does not terrify the women. And they know the hearings, far from being a catharsis, have given women a new determination to ensure that they may yet be treated, in dignity and worth as equals of men.³⁹

Dissatisfaction with the Commission's 167 final recommendations culminated in April 1972, when hundreds from across the country gathered to form a new non-governmental, activist umbrella organization - known as NAC - the National Action Committee on the Status of Women.⁴⁰ A year later the federal government established the Canadian Advisory Council on the Status of Women (CACSW), then several provinces appointed women to advisory councils, which became crucial in family law reforms that moved to centre-stage in the 1970s, when the Supreme Court of Canada made decisions under the *Canadian Bill of Rights* that spoke volumes to Canadian women about the difference between "justice" and the "law."⁴¹

Readiness - women lost every Bill of Rights case

Aboriginal women and children

With their appeals heard together and rejected by the Supreme Court, Jeanette Lavell and Yvonne Bédard, Aboriginal women who had married non-Aboriginal men, argued

the Canadian Federation of University Women, the first president of the National Action Committee on the Status of Women (NAC) and a chair of the Ontario Advisory Council on the Status of Women. Laura Sabia convened the first meeting, to which she invited "young" feminist lawyers (myself among them), to discuss litigation strategies using the constitution.

³⁹ Pauline Jewitt, "Where were the MEN when Canada set out to find what makes life tough for its women?" *Macleans Magazine*, January 1968, p.12. Jewitt became a Member of Parliament who strongly supported the women's constitutional activists during the drafting negotiations in 1981.

⁴⁰ Lorna Marsden, "The Role of the National Action Committee on the Status of Women in Facilitating Equal Pay Policy in Canada" in R.S. Ratner, ed., *Equal Employment Policy for Women* (Temple University Press; 1980) 242 at 244; *Status of Women News* vol. 6 no. 2 Spring, 1980 [the now defunct quarterly newsletter from NAC]

⁴¹ *Canadian Bill of Rights*, S.C. 1960 c.44 [still in force, but subject to the Constitution Act 1982]

that s.12 (1)(b) of the federal Indian Act discriminated against women of Indian status making them lose that status upon marriage to a non-Indian, when Indian men could extend status to non-Indian wives, and in turn, their children.⁴² This loss under the Bill of Rights prompted national concern - and a dramatic activist response by a group of Aboriginal women, who took their small children, fathered by non-status men, to walk in protest from the Tobique reserve to the federal capital of Ottawa. One of their leaders, Sandra Lovelace (appointed to the Senate of Canada in 2005), successfully petitioned the United Nations Human Rights Committee⁴³ alleging violations by Canada under the Optional Protocol to the International Covenant on Civil and Political Rights.⁴⁴

Just a wife

In dismissal of her lifetime of work in ranching with her husband for more than 25 years, the Supreme Court awarded Irene Murdoch just two hundred dollars a month, agreeing with the trial judge that her "routine" work of "any ranch wife" - was insufficient to create a legal claim to the matrimonial property. Irene Murdoch's loss galvanized family law reform in every province and territory for the rest of the 1970s.⁴⁵

⁴² A.G. Canada v. Lavell [1974] SCR1349 [hereinafter Lavell]

⁴³ Lovelace v. Canada (1981) Report of the Human Rights Committee, GAOR 36th Sess., Supp. No.40 (AQ/36/40), Annex XVIII, 166. The UN Human Rights Committee held that Canada had violated Article 27 of the International Covenant on Civil and Political Rights.

⁴⁴ (1966) G.A. Res. 2200 (XXI), 21 UN GAOR, Supp. (no.16) at 59, U.N. DOC.A/6316, 1966, in force for Canada 23 March 1976. As the constitutional activism of the 1980s started to roll - almost ten years after the march from Tobique - the Government announced partial redress, giving discretion to band councils to ask the government to exempt them from s.12 (1) (b) - a change that perpetuated inequity and division among many Aboriginal communities, to this day - see <http://www.nwac-hq.org/billc31.htm>

⁴⁵ When asked to describe the nature of her work, Mrs. Murdoch replied "Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done." When asked if her husband was ever away from their properties, she replied " Yes, for five months every year." Murdoch v. Murdoch [1975] 1 SCR 423 at 443; M. Elizabeth Atcheson, Mary Eberts and Beth Symes, Women and Legal Action: Precedents, Resources and Strategies for the Future (Ottawa: Canadian Advisory Council on the Status of Women, 1984) noted that Ernest Shymka of Calgary represented Mrs. Murdoch on a contingency basis, but in the end was not paid fees or disbursements.

No protection for a “pregnant person”

Stella Bliss was fired because she was pregnant. After her baby was born, she sought, but did not find, appropriate employment, but the Unemployment Insurance Commission turned down her application – because she had been pregnant when she lost her job and she did not meet the more stringent criteria applied to pregnancy benefits. Canadian courts found no sex discrimination, because all pregnant women were equally denied regular unemployment benefits, the proper comparator was not men, but rather women - pregnant and non-pregnant persons.⁴⁶

Thus, repeated judicial denial of the discrimination rampant in Canadian women’s daily lives, plus governmental preference for less accountability⁴⁷ set the stage for a political standoff that triggered women’s constitutional activism in the 1980s.⁴⁸ When the government cancelled the CACSW women’s constitutional conference, the high stakes were widely understood by Canadian women.

The issue – whether women would have a share in the future of the nation – knit up all kinds of raggedy ends.... ‘ A lot of us sensed it and not just in the organized women’s movement. It had been building. ...this shoddy treatment of a strong and honest woman [Doris Anderson] at the same time as denying us our rights as citizens... Boom.’⁴⁹

⁴⁶ Bliss v. A.-G. Canada, [1979] 1 SCR 183.

⁴⁷ The federal government had not followed the recommendation that the CACSW should report openly to Parliament.

⁴⁸ Author’s note: When constitutional reform re-surfaced on the government agenda in 1979, the CACSW, largely due to the initiative of its new president, Doris Anderson, engaged in a national public education campaign on women’s constitutional rights. In the 1970s, there was only one widely circulated Canadian women’s magazine, *Chatelaine*, which had a women’s rights editorial policy, largely due to Anderson’s years as editor, making her a trusted and credible spokeswoman for women all over the country. It was the very public dispute between Anderson and the federal Cabinet’s Minister Responsible for the Status of Women, when she resigned over government cancellation of the CACSW women’s constitutional conference, that triggered formation of the grass roots ad hoc women’s constitutional coalition.

⁴⁹ Anne Collins, ‘Which Way to Ottawa? A Special Report on the Women’s Conference on the Constitution’, *Homemaker’s Magazine*, Holiday 1981 p. 22; Author’s note: the comment is attributed to Linda Nye, who co-chaired the women’s constitutional conference in 1981 and was a leader in the Ad Hoc Committee of Canadian Women on the Constitution.

III. Constitution-making: Canada 1981-86; South Africa 1991-96

The Shift to Constitution-Focused Women's Activism

Executive Constitutionalism v. Canadian Women

Dissent in any form, whether it touches on practical governance or not, can appear to herald the withdrawal of consent to legitimate authority; which makes legitimate authority very nervous... Ordered use of the power to disbelieve, the first power of the weak, begins here, with the refusal to accept the definition of oneself that is put forward by the powerful.⁵⁰

On the anniversary of the Persons Case in 1980, the federal minister responsible for the status of women in Canada⁵¹ gave a dinner speech to women activists, who had just attended a CACSW study day on the proposed constitutional text, learning that it was as weak as the existing Canadian Bill of Rights when it came to protecting women,

When carefully coiffed matrons banged their fists on tables in response to Lloyd Axworthy's remarks, and the Ad Hoc Committee on Women and the Constitution was born to fight for women's right to be included in the Constitution, this first step was taken. Once the weak learn to distrust the reality defined by their rulers, Janeway points out that the way is open for them to bond together, to organize and to act. This is precisely what the Ad Hoc committee did in networking with women's groups across the country.⁵²

Only weeks later, some of the women who had surprised themselves by shouting at a cabinet minister that October night were presenting before a hastily convened special joint parliamentary committee reviewing the draft constitution. Representing the largest national women's NGO, the NAC spokeswoman reminded parliamentarians that

⁵⁰ Elizabeth Janeway, *Powers of the Weak* (New York: Alfred A. Knopf, 1980), pp. 166-7. Janeway described women's unused political potential as power of the weak - just as Parliament confirmed in Canada's national anthem that "true patriot love in all our **sons** command," rejecting requests for a more inclusive term.

⁵¹ The Hon. Lloyd Axworthy, who in later years proved often to be a strong ally on human security and international women's rights, notably when Canada chaired the UN Security Council as the Taliban regime was oppressing women in Afghanistan.

⁵² Janeway, *Powers of the Weak*, in Judith Finlayson, 'Women and Power: Part 5 – Power in the Public Sphere', *Homemaker's Magazine*, November 1982, p. 59. See also Collins, 'Which way', 14.

Canada had just signed the United Nations Convention on the Elimination of all forms of Discrimination Against Women, CEDAW,⁵³ then she cautioned that,

Women could be worse off if the proposed Charter of Rights and Freedoms is entrenched in Canada's Constitution. Certainly the present wording will do nothing to protect women from discriminatory legislation, nor relieve inequities that have accumulated in judicial decisions.⁵⁴

Women's activism shifted into even higher gear when the media reported how the senator co-chairing the special joint committee said, to the NAC spokeswomen after they finished their presentation,

I want to thank you girls for your presentation. We're honoured to have you here. But I wonder why you don't have anything in here for babies or children. All you girls are going to be working and who's going to look after them?^{55 56}

Kome reviewed women's groups' presentations on the draft constitutional text, finding

Efficient coordination ensured they would not contradict each other. ... Most attention was paid to Clause 15, concerning 'Non-discrimination Rights.' ... Women wanted the section renamed 'Equality Rights', to emphasize that equality means more than non-discrimination.⁵⁷

Amendments suggested by women's groups were incorporated, to a considerable extent, in the next draft of the constitution, released January 1981. As assessed by Manfredi,

⁵³ G.A. Res. 34/180, U.N. GAOR, 34th Session, Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980) Canada acceded in 1981; South Africa in 1995.

⁵⁴ The NAC analysis was consistent with what the joint committee heard from the CACSW, see note 49.

⁵⁵ Penney Kome, *The Taking of Twenty Eight* (Toronto: Women's Educational Press, 1983) (Second edition published as e-book: <http://www.lulu.com/content/213547,2005>), p.36

⁵⁶ During the negotiations on constitutional text, unguarded comments by male authority figures (in this case, Sen. Hays) acted as a catalyst because the media treated it as "news" and thus the information spread across the country – at no cost of time or money to the women activists, other than interviews. The special joint committee was composed of Members of Parliament and Senators, co-chaired by MP Serge Joyal from Quebec and Senator Harry Hays from Alberta. With increasing corporate concentration of media ownership seldom held by socially progressive owners, my observation is that neither of these responses to women occur much anymore - officials are very careful with public statements and women's issues in Canada are generally not considered "news", and as well, neo-conservative women columnists are now the most widely read.

⁵⁷ Kome, p. 35

this success before the special joint committee represented “only the first stage in the feminist effort to redesign Canadian institutions through constitutional modification.”⁵⁸ For most of 1981 - primarily through the new grass roots alliance known as the Ad Hoc Committee of Canadian Women on the Constitution - thousands of women in Canada mobilised to respond to the cancelled women’s constitutional conference and to push for amending the equality rights provisions in the draft constitution. Newly minted women lawyers volunteered to lobby federal politicians in Parliament, while crowds of angry women joined government appointed women’s advisory council members in confronting political leaders at home, on the steps of their legislative buildings - laying claim to a place in Canadian constitutional history in headlines of the time. Nevertheless, most Canadian historians and mainstream media commentators paid little attention to women’s constitutional activism in retrospective accounts.⁵⁹

But by the end of 1981, Attorneys-General of the national and provincial governments moved back behind closed doors, responding to the Supreme Court of Canada’s constitutional reference decision that summer, which encouraged the federal government to redress its unilateral constitutional process.⁶⁰ However, the amended constitutional

⁵⁸ Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: UBC Press, 2004) p. 48

⁵⁹ Some exceptions being Ramsay Cook and Wendy Mitchison (eds.), *The Proper Sphere— Woman’s Place in Canadian Society* (Toronto: Oxford University Press, 1976); Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada; The Start of Liberation* (2nd ed.) (Toronto: University of Toronto Press, 1978), Patrick Watson and Benjamin Barber, *The Struggle for Democracy*, (Lester & Orpen Dennys Ltd, 1988). Penney Kome entitled a chapter of her book, *The Taking of Twenty Eight on Canadian women’s constitutional activism, “The Invisible Woman”* and documented examples of exclusionary reporting. Kome noted that Canada’s “national” newspaper, *The Globe and Mail*, devoted 453 column inches to the “Native lobby” compared to 143 column inches to the women’s rights lobby. This comparison does not come out of a constitutional rivalry between Native leaders and women, though some journalists erroneously reported that, and Premier Blakeney of Saskatchewan did make support for both a condition of his endorsement of the women’s position. Author’s note: the broader-based women’s lobby argued for “Indian rights for Indian women”. In 1982, when the *Globe and Mail* published a special supplement on the constitutional negotiations and final text, women’s activism was not listed among the major influences of outcome. In Robert Sheppard and Michael Valpy, *The National Deal: the fight for a Canadian constitution* (Toronto: Macmillan of Canada, 1982) the Ad Hoc constitutional conference was omitted from the chronology and discussion of significant events shaping the constitution.

⁶⁰ At this point, the author must become narrator. During the extensive lobbying I conducted on behalf of the Ad hoc committee, I diarised on steno pads, for example, [with my added explanations for the purpose of this paper written 25 years later, in square brackets]: “Mon. 9 Nov/81 Laura Sabia: jumping the gun on [holding a women’s protest] public forum. Flora [McDonald – then the senior Progressive Conservative women MP, having been in Joe Clark’s cabinet] says 0 in writing yet & not till the 20th. [Referring to the Nov.5.81 Accord to which premiers agreed “in principle” but the drafting was done by

text had passed both the House of Commons and the Senate before the Supreme Court reference. This left thousands of women, who had mobilised across Canada, believing that a significant political and legal victory had been secured by amendments to the Charter, including the last -minute insertion of s.28 - an Equal Rights Amendment (ERA) fought for by Canadian women's constitutional activists - heightened by awareness of the American ERA campaign being lost during this time.

Section 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.⁶¹ In those closed federal/provincial negotiations an optional override on certain rights was proffered. Women constitutional activists described the override as surtax on their hard won constitutional rights. The Ad Hoc alliance re-mobilised against the "taking of twenty eight", the s.33 override was lifted from s.28, but not from s.15 equality rights.⁶² The grass roots battle for s.28 was validated by legal commentary of the time, which anticipated it would serve as a protective legal tool for women.⁶³

Section 28 should not be dismissed as being a "mere application" of section 15. The principle of sexual equality is now a legal standard of the highest priority.⁶⁴

officials, after the politicians had gone home] Advises MP lobbying as best tactic." In Special Collections, Osgoode Hall Law School Library, York University, Toronto, Canada.

⁶¹ Canadian Charter of Rights and Freedoms, part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), c.1

⁶² Kome, Taking, p.90 notes that Alberta's Premier Lougheed, as the first to agree to lifting the s.33 override from s. 28, referred to the "Famous Five" - all Albertan women - who won the Persons Case in 1929. (See part II of this chapter)

⁶³ N. Colleen Sheppard, 'Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms' (1986) 10 Dal. L.J. 195 at 222; Mary Eberts, 'Sex-based Discrimination and the Charter' in Anne F. Bayefsky & Mary Eberts, (eds.), Equality and The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 183; Catharine A. MacKinnon 'Making Sex Equality Real' in Lynn Smith, (ed.), Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986) 37 at 41, in Diana Majury, 'The Charter, Equality Rights, and Women' (2002) 40 Osgoode Hall Law Journal.3 & 4, 298 -335 at 307: "Colleen Sheppard saw this in relation to the enhancement of section 7 rights for women: 'The radical potential of this section [28] becomes apparent if we contemplate the notion of equal liberty or security of the person for women and men.' Mary Eberts argued that section 28 'should ... lead a court to require a high level of justification [under section 1] for any sex-based distinction.' Rosalie Abella postulated that section 28 'means that in interpreting the onus on a respondent to justify the reasonableness of a limit to an otherwise guaranteed right, gender equality is an immutable right.' According to Catharine MacKinnon, 'Anti-subordination could be the distinctive guiding interpretive principle of section 28.'"

⁶⁴ Katherine J. de Jong, 'Sexual Equality: Interpreting Section 28' in Bayefsky & Eberts, at 528

South Africa - unmaking a patchwork quilt of patriarchies

Described, as a “patchwork quilt of patriarchies,” South African constitution making was fraught with implicit and explicit demands on women to place racial equality and cultural traditions at the pinnacle of priorities.⁶⁵ In January 1990, South African women activists travelled to Amsterdam for the Malibongwe conference, to strategise with exiled colleagues on integrating women’s emancipation into national liberation struggles. Mere months later, Frene Ginwala spoke optimistically at the 1990 “Putting Women on the Agenda” conference just as the ANC was about to form the government, and its plans for turning South Africa into a constitutional democracy were taking shape.⁶⁶

Discrimination is more a symptom than a cause. It is the product of the whole way in which society works. To attack it, then, we have not only to legislate and act against it itself but also to work for shifts in the deeper causes which underlie it. As the ANC national executive committee's statement on the emancipation of women says: ‘To achieve genuine equality, our policies must be based on a real understanding of gender oppression and the way in which it manifests itself in our society.’⁶⁷

The contrast between the largely ad hoc, unsupported, unfunded women’s constitutional activism in Canada and the investment in consultations, conferences and coalition building in the constitutional development of South Africa is evident in the following summary of the constitutional drafting/ amending processes involving women activists, illustrating the degree of integration of women’s emancipation into the national liberation struggle and the resulting interim and final constitutions of 1994 and 1996.⁶⁸

⁶⁵ B. Bozzoli, ‘Marxism, feminism and South African Studies’ (1983) 9 *Journal of South African Studies*, 2, in Albertyn et al, *Engendering*, p. 3

⁶⁶ Exiled in 1960, Frene Ginwala was long a gender equality advocate within the ANC and after returning, she headed up the ANC Commission for the Emancipation of Women, which in 1992, became the Women’s National Coalition (WNC).

⁶⁷ Ginwala, ‘Women and the Elephant - The need to redress gender oppression’ in Bazilli, p.62

⁶⁸ The engendering of the ANC platform can be seen in May 1990 changes to the ANC Constitutional Guidelines and the campaign vision for a Women’s Charter in the ANC Statement on the Emancipation of Women in South Africa, “We call upon the ANC Women’s League to initiate a campaign for the Charter involving all other structures of our organisation, the membership and supporters throughout South Africa. The campaign should involve millions of women

Table: Chronology of constitutional development & South African women		
* Primary Sources: Bazilli (ed.), Putting Women on the Agenda; Albertyn et al, Engendering the Political Agenda		
WHEN + WHO	WHAT	WHAT NEXT?
1984 - South African Journal on Human Rights (SAJHR)	Founded during apartheid, by U of the Witwatersrand Law School	To promote research, writing (and advocacy) in human rights for S. Africa
1988 - the African National Conference (ANC)	First draft of ANC constitutional guidelines was circulated within the country illegally.	
1989 , January - the South African Law Commission	Draft Bill of Rights	Circulated to academics and legal practitioners to comment
1989, April - Institute for a Democratic Alternative for South Africa (Idasa), Harare	Convened women's constitutional in Harare, as 1 st major access for exchange between SA women from inside the country and those in exile	Zimbabwean women, who had just lost their struggle, urged the women of S. Africa to organise immediately for constitutional rights
1989, August - Idasa organised a conference on Women and the Constitution in Cape Town	To open discussion and to share information from the Harare conference	
1989, December - ANC	Joint meeting of ANC legal/constitutional committee + ANC women's section in Lusaka on national policy on women + family	Follow-up needed on attempt to formulate national policy for the emancipation of women + a 'family policy' for the future South Africa
1990 , January - Malibongwe conference held, discussion papers released	"Turning point" where 350 women from inside South Africa met SA women in exile, Amsterdam	Follow-up on resolutions: integrate women's emancipation into national liberation struggle, participatory research necessary
1990, February - Mandela released after 27 years in prison + political organisations unbanned	Mandela assumes leadership of ANC and peace negotiations	Extreme violence escalates.
1990, May - ANC national executive committee	ANC statement on the emancipation of women released confirming women's rights as fundamental ANC policy	The 1 st comprehensive statement on women's emancipation released by any political party or organisation in South Africa to that date. Women's Charter and women's leadership in "creating a non-sexist South Africa" stressed
1990, October - South African Council of Churches	Women + Constitution Conference, Durban on emancipation	Council's endorsement serves as catalyst (70% women in SA religiously affiliated)
1990, November - the Lawyers for Human Rights	'Putting Women on the Agenda' Conference	Reinforcement from Botswana, Canada, Namibia, Zimbabwe that constitutional equality wording + structures needed
1990, November - ANC Commission on Gender	Cape Town 'Gender Today+ Tomorrow' Conference,	
1991 , February - University of Natal in Durban	Women and Gender in Southern Africa Conference	Proportional Representation recommended to CODESA.
1991, December – CODESA begins. Convention for a Democratic S. Africa,	Negotiations to turn SA into constitutional democracy	6 months later, CODESA stopped due to extreme violence
1992 , April	WNC, Women's National Coalition founded as multi-party, civil society+ academic alliance	Influencing negotiations in all party delegations Began highly participatory writing of "Women's Charter for Effective Equality"
1993 – Multi-Party Negotiating Process (World Trade Centre Talks) resumes where CODESA left off.	Women secured 50% representation on official delegations	Women secured "at least one" expert on each technical committee drafting constitution
1993 Interim Constitution	Gender Equality in Preamble, Equality protection + remedies s.8,	Customary (tribal) leaders insist on exclusion from women's equality clause in negotiating final constitution
1994 – ANC Election Platform	Policy for constitutionally entrenched gender equality mechanism	Adopted "Women's Charter for Effective Equality" for the "New South Africa"
1996 – Act 108 of 1996	Constitution of the Republic of South Africa with Commission on Gender Equality	

directly in the process of determining how their rights would be protected in a new legal and constitutional order. Such an

IV. Women's global constitutionalism

In closing her autobiography on resistance to apartheid in South Africa, Zubeida Jaffer wrote,

The plane shudders as it lands on the runway in Port Elizabeth....I am seated next to a young woman with whom I have had the usual inane conversation one has with people who sit next to you. She is of average height, with her hair tightly braided against her scalp and she exudes a pleasant self-confidence...She tells me that she has just been interviewed for a job as manager of Environmental Affairs at Eskom, the national energy supplier. And has been successful. A young black woman. A manager? Environmental Affairs? ... Eskom? ...Every single idea a complete impossibility under apartheid.⁶⁹

Lived rights - race, class, gender intersected

Jaffer is describing "lived rights" - the intersection of race, class and gender in the context of a new constitutional democracy where the women's movement had a demonstrably influential impact on creating: constitutional text, constitutionally entrenched national gender equality machinery, and unprecedented opportunities for women. Millions of women in South Africa mobilised around the Women's Charter for Effective Equality a decade ago; thousands of Canadian women were similarly galvanized twenty five years ago. Women are not prepared to risk being left out of new legal or political systems and constitution making is a principal means of attempted inclusion. This paper cannot explore much beyond how women's activism changed final constitutional text on equality - in both South Africa and Canada. Examples of evidence based advocacy resulting from women's constitutional activism - participatory,

initiative will provide the opportunity to set an example of democracy in practice, and be a major agency for stimulating women to break the silence imposed on them." Statement reproduced in Bazilli, p.277

⁶⁹ Jaffer, *Our Generation*, p.157

interdisciplinary rights research, women's political participation to create / amend legislation, or high impact litigation merit more thorough discussion elsewhere.⁷⁰

There is no doubt that academic discourse on the detriments and benefits generated by women's constitutional activism will only expand, particularly as the many constitutions forged over the past decade – in diverse countries such as Afghanistan and Rwanda – mature and retrospectives elongate. Most of this paper has focussed on the connection between women's activism and altered constitutional text - the impact of activism on text. In conclusion, the impact of constitutional equality text on women needs to be examined in a global context,

Our ability to articulate a vision of equality that resonates domestically and internationally to enable full participation and membership of citizens in all societies is particularly pressing in our interconnected global community. National appellate courts throughout the world are increasingly looking to the judgments of other jurisdictions, particularly when making decisions about human rights issues such as equality, to guide their decisions.⁷¹

To move toward this next stage of analysis, then, a brief discussion follows of group differentiated rights, one of the most compelling areas of inquiry into women's lived rights.

Aboriginal women in Canada

Before South Africa became a constitutional democracy, a cabinet minister from the Apartheid regime held a press conference in Canada to describe the similarities between the *Indian Act* and Apartheid principles, and a furor in Canada ensued.⁷² He had a point. As a definable racial group, Aboriginal women in Canada have the most in common with the oppression lived by colonised and racialised women in South Africa. Aboriginal

⁷⁰ See: Manfredi, *Feminist activism*; Faraday, Denike and Stephenson, *Making Equality Rights Real*; Marilou McPhedran, 'Section 15 Equality Rights - Beacon or Laser?' *National Journal of Constitutional Law* (Forthcoming 2007)

⁷¹ The Honourable Claire L'Heureux-Dubé, 'Preface', in Faraday et al (eds.), *Making Equality Rights Real*, p.3.

⁷² CBC Archives. www.cbc.ca

women activist lawyers have taken different points of view on seeking or relying on constitutional protections for Aboriginal women's equality rights. Before her judicial appointment, Mary Ellen Turpel-Lafond questioned why Aboriginal women would strive to attain a legal form of "equality" when the standard to be achieved was in fact the white woman's equivalent of the lived privileges of white men.

I do not see it as worthwhile and worthy to aspire to, or desire, equal opportunity with White men, or with the system that they have created. We do not want to inherit their objectives and positions or to adopt their world view.⁷³

Aboriginal women's rights activists were deeply involved in attempts to craft an equality guarantee specifically for Aboriginal women, as part of the promised negotiations on Aboriginal rights, to be added to the Constitution, which began soon after patriation in 1982. Spokeswomen for the largest Aboriginal women's organization (NWAC) took the position that white men's model of patriarchy so pervaded Aboriginal communities, on and off reserve, that Aboriginal women needed to rely on their constitutional rights. But NWAC leaders were acutely disappointed with what was enacted to address their rights in the 1983 amendments. Faced with these weakly worded constitutional amendments, NWAC developed a constitutional litigation strategy and increased participation in rights fora outside Canada, to secure stronger protections for Aboriginal women. By the nineties, NWAC had sued the prime minister and the federal government over exclusion of Aboriginal women from yet another round of constitutional negotiations.

Aboriginal women have been legally, politically and socially subordinated by the federal government and by Aboriginal governments.we have been shut out from our communities because they do not want to bear the costs of programs and services to which we are entitled as Indians. ...Under sections 15, 28 and 35

⁷³ Mary Ellen Turpel-Lafond, 'Patriarchy and Paternalism: the Legacy of the Canadian State for First Nations Women' (1997) *Can. J. of Women and the Law*, 180

(4) of the *Constitution Act, 1982*, women are entitled to substantive equality rights.⁷⁴

Since the 1983 constitutional Aboriginal gender equality amendments have been so limited, Aboriginal women's activism has increasingly turned elsewhere, developing a domestic legislative response to matrimonial property injustices on Indian reserves,⁷⁵ mobilizing a national /international campaign on violence against Aboriginal women⁷⁶ and linking it to the proposed UN Declaration on the Rights of Indigenous Peoples, approved in June 2006 by the UN Human Rights Council, for delivery to the General Assembly for consideration.⁷⁷

Customary law in South Africa

The international human rights community is watching closely as the Council of Traditional Leaders, South African Commission on Gender Equality and Constitutional Court try to find an equitable balance arising from the compromises that had to be made at the constitutional negotiating table in the 1990s, in order not to be engulfed in violence in the early days of building a constitutional democracy. Albertyn et al summarised these tensions as manifested at the bargaining table between women and traditional leaders who demanded to be exempt from the Bill of Rights.

When the negotiations towards a new Constitution began, women initially focused on broad issues of political inclusion and gender equality. However, when the traditional leaders objected to the application of the equality clause to customary law and the system of male lineage, women activists, academics and politicians were quick to intervene. Within civil society the WNC united a broad spectrum of women behind the issue, while organisations such as the Rural Women's Movement (RWM) represented the voices of those most affected, namely, poor, rural women. The WNC lobbied the Multi-Party Negotiations directly on the issue.

⁷⁴ National Speaker of NWAC, Gail Stacey-Moore, 'Aboriginal Women, Self Government, The Canadian Charter of Rights and Freedoms, and the 1991 Canada Package on the Constitution' Text from address to the Canadian Labour Congress, Ottawa, Canada, December 3, 1991

⁷⁵ <http://www.nwac-hq.org/news.htm>

⁷⁶ <http://www.sistersinspirit.ca> and http://www.amnesty.ca/take_action/actions/canada_stolensisters_2005.php

⁷⁷ Although the Declaration is a non-binding aspirational statement, only Canada and one other Council member voted against it.

As an organisation of rural women removed from the technical niceties of constitutional negotiations, the RWM relied on technical assistance from key service organisations such as the Centre for Applied Legal Studies (CALs) and the Transvaal Rural Action Committee (TRAC) and the political support of key ANC women. Methods of lobbying and protest used by the RWM included picketing outside the negotiations venue, holding workshops with churchwomen and lobbying politicians.

Customary law subject to equality

As a result of these efforts, customary law was made subject to the equality clause, although the court cases that are now emerging are revealing dilemmas for judges and for women plaintiffs.⁷⁸ The Constitution now includes mechanisms that are supposed to balance these tensions: the Council of Traditional Leaders and the Commission for Gender Equality. The Council has the power to review legislation affecting customary law and while it cannot veto, it can delay the process. To counterbalance the chiefs' power, the Commission for Gender Equality has similar authority specific to any law affecting the status of women.

In a 2006 speech on women's activism and constitutional reform, Gertrude Fester - at the time a commissioner on the constitutionally entrenched Commission for Gender Equality (CGE)⁷⁹ - observed that,

... women in South Africa are more polarised now, in spite of South Africa's 'women friendly state' feminism and 'national gender machinery of the most integrated & advanced set of structures world wide as well as one of the most liberal constitutions.'⁸⁰

⁷⁸ Kristina A. Bentley, 'Are the Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights? Three Conceptual Arguments' (2005) 6 Human Rights Review, 4, 48-68

⁷⁹ Section 187 of the Constitution Act of South Africa 1996; Commission on Gender Equality Act No.39 of 1996

⁸⁰ Gertrude Fester, Address to the Forum on Women's Activism in Constitutional and Democratic Reform, Ottawa, Canada, 13-15 February, 2006, citing Hassim, 'A Conspiracy of Women', 696; A. Gouws (ed.), (Un)thinking citizenship: feminist debates in contemporary South Africa (Aldershot: Ashgate Publishing Ltd., 2005) p.1; Link to video interview from the Forum, National Film Board of Canada, Reel Community - Women's voices for change (2006) <http://citizen.nfb.ca/onf/info?aid=6001&eid=15006&atid=21>

Fester concluded that the CGE mandate to promote, protect, monitor and evaluate gender equality is undermined by lack of capacity, reminding her activist colleagues at the forum,

It's difficult to start a revolution, more difficult to sustain it. But it's later, when we've won, that the real difficulties will begin.⁸¹

Resources to compensate for inadequacies of communication or production can seldom be accessed by activists - tough choices have to be made and activists have to find ways to compensate.

These women started life as ordinary women, but were made extraordinary by their refusal to put up with unacceptable life conditions.⁸²

Hindsight is a luxury activists seldom have and academics can be helpful in bringing perspectives forward that help to hone strategies. As the South African Women's Charter process demonstrated, participatory action research can be a powerful tool for women's rights, fought for by ordinary women who want to be able to live their rights, and as is so often the primary driver for women, to build a place for their children and grandchildren to live their rights. In Canada, after exhausting months of political battle all through 1981, described earlier, women were faced with the s. 28 sex equality ERA disappearing under the s.33 override, so activists fought for it – substantially and symbolically.

[T]he battle began all over again. ...Said Gerry Rogers, one of the Newfoundland activists – in a phrase that applies to so much of the work of democracy – 'It's sort of like doing dishes – they're never done. There's *always* another dirty dish.'⁸³

More than 20 years later, Majury was not optimistic on s.28,

⁸¹ Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest*, (New York: Routledge, 1995), p.388, referencing lines from Giles Pontecorvo's film. *The Battle of Algiers*

⁸² Albertina Sisulu, "Preface" in Gertrude Ntiti Shope, ANC, Malibongwe – *Celebrating Our Unsung Heroines* (Jet Park: Teamwork Printers, 2002), p.6

⁸³ Patrick Watson and Benjamin Barber, *The Struggle for Democracy*, (Lester & Orpen Dennys Ltd, 1988) at 166.

There has been no engagement in the decisions of the Supreme Court of Canada with the question of what, if anything, section 28 adds in terms of equality protection for women (or for men).⁸⁴

In contrast to Majury, Beverley Baines⁸⁵ wrote in 2005, that s.28

... may yet prove multifunctional, capable of working strategically against, or substantively with, section 15. Thus I'm hoping for another defining moment in which scholarship and jurisprudence collude to recognize a purposive interpretation of section 28 that will sustain the intentions of its feminist drafters.

⁸⁶

At the time of writing⁸⁷, such a purposive interpretation for s.28, the Canadian "ERA" remains to be seen, and, of the five sex equality appeals litigated by women to the Supreme Court of Canada, all have been lost.⁸⁸ The LEAF model, while respectful of the Rule of Law, grew directly from women's constitutional activism; it's interdisciplinary, intergenerational, evidence based advocacy, incorporating high impact litigation and other strategies to attain lived rights. Golub takes a similar approach to legal empowerment, against "Rule of Law orthodoxy."

Numerous studies by academics and development organizations highlight the importance of building the capacities, organization, or political influence of civil

⁸⁴ Diana Majury, 'The *Charter*, Equality Rights, and Women' (2002) 40 Osgoode Hall Law Journal.3 & 4, 298 -335 at 307-309. "It is interesting to speculate why this happened-whether section 28 was seldom invoked and accordingly has languished forgotten and untested; whether groups were unable to come up with a distinctive section 28 argument; whether it was eclipsed and made redundant by stronger section 15 jurisprudence than was anticipated; whether judicial discomfort and/or uncertainty about section 28 led to its abandonment; or whether women's groups developed discomfort about the apparent privileging of sex discrimination claims over other forms of discrimination. "

⁸⁵ Author's note: Professor Baines was the principal academic advisor to the Ad Hoc Committee of Canadian Women on the Constitution during the drafting negotiations in 1981.

⁸⁶ Beverley Baines, 'Section 28 of the Canadian Charter of Rights and Freedoms: A purposive interpretation' (2005) 17 Canadian Journal of Women and the Law, 1, 2005, 45-70. "However, time has yet to reward section 28's promise. In fact, section 28 is seriously compromised by arguments that relegate it to impractical strategic domains, or worse, fail to address its substantive interpretation."

⁸⁷ This chapter was written in 2006, following the international and intergenerational conference celebrating 25 years of women's activism on the constitution, The Canadian Forum on Women's Activism in Constitutional and Democratic Reform (Ottawa, February 2006), and just prior to the 16 years review of Putting Women on the Agenda (Johannesburg, November 2006). Both of these events are projects of the International Women's Rights Project (IWRP) Women and Constitutions Project. See www.iwrp.org.

⁸⁸ Beverley Baines, 'Equality, Comparison, Discrimination, Status' in F. Faraday, M. Denike, M.K. Stephenson (eds.), Making equality rights real: securing substantive equality under the Charter (Toronto: Irwin Books, 2006) p.78. As of September 2006, the five Canadian appeals lost are: *Symes v. Canada* [1993] 4 SCR. 695; *Native Women's Association of Canada v. Canada* [1994] 3 SCR. 627; *Thibaudeau v. Canada* [1995] 2 SCR 627; *Vancouver Society of Immigrant and Visible Minority Women v. Canada* [1999] 1 SCR. 10; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)*[2004] 3 SCR. 381

society - all of which legal empowerment contributes to - in improving the lives of the disadvantaged. A growing array of qualitative and quantitative research more specifically suggests that legal empowerment has helped advance poverty alleviation, good governance, and other development goals.⁸⁹

For all the differences and disappointments that are woven within the small and not-so-small victories that strengthen good governance in the constitutional venues inhabited by women - where women's activism has changed constitutional text and machinery - let's say:

Malibongwe Igama Lamakhosikazi

Let the name of the women be thanked.⁹⁰

⁸⁹ Golub, Rule of Law Orthodoxy, above, Legal empowerment differs from Rule of Law [ROL] orthodoxy in at least four ways: (1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; (3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; (4) even more broadly, the use of law is often just part of integrated strategies that include other development activities. Numerous studies by academics and development organizations highlight the importance of building the capacities, organization, or political influence of civil society-all of which legal empowerment contributes to-in improving the lives of the disadvantaged. A growing array of qualitative and quantitative research more specifically suggests that legal empowerment has helped advance poverty alleviation, good governance, and other development goals.

⁹⁰ Sisulu, Malibongwe, above