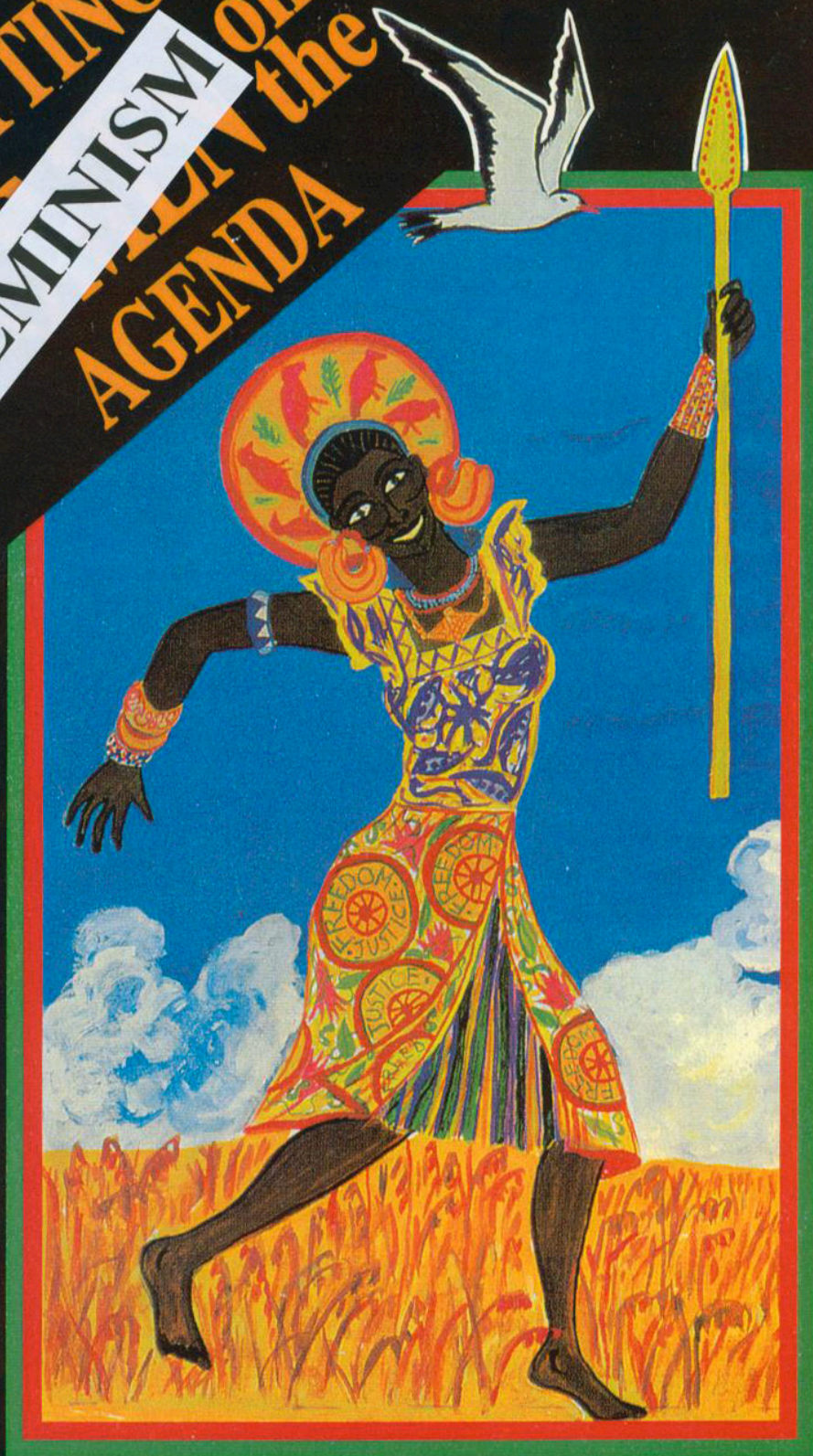


PUTTING
WOMEN ON
FEMINISM on
the
AGENDA



Edited by
SUSAN BAZILLI

Putting Feminism on the Agenda

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Putting Feminism on the Agenda

Introduction

Susan Bazilli (Ed.)

November 2008

This introduction provides a brief summary of the events leading up to the colloquium *Putting Feminism on the Agenda*, held in November 2006 at the Centre for Applied Legal Studies, as well as a short description of the papers in this edited e-publication.

Background

November 2006 marked the 15th anniversary of the conference and subsequent publication of *Putting Women on the Agenda*. This was the first regional conference held to galvanize the struggle for women's rights in the possibility of a new constitutional dispensation in South Africa. Together with others that followed, it was a significant event in the development of the South African women's movement as a place for engaging the new democracy: network building and consolidation, formulation of policy and advocacy strategies, legislative drafting, consultation on the creation of the national gender machinery; and providing support for women who moved from activism to the state.

That conference was attended by over 450 academics, activists, lawyers, judges, law professors, ANC members returning from exile, representatives from NGOs and participants from the Southern African region. Many went on to help shape the Constitution and the laws that would create the new democratic South Africa and many have become significant players in the new South Africa.

As democracy has become entrenched, the women's movement has engaged the state on a range of issues, often prioritising formal legal gains over building new leaders and capacity and strengthening links with community organisations. As the debate has shifted from opposition and protest politics to one of implementation and delivery, the national women's movement has become disparate and less visible, and the activists, legal advocates and scholars have necessarily shifted their focus to proactive policy and advocacy activities. Women have worked in a sector specific and segmented manner within the areas of their expertise and analysis such as land reform, gender violence, reproductive rights, HIV/AIDS, constitutional litigation, customary law, health, etc. However, both the focus on formal gains in the state and the declining collaboration between and among sectors has weakened the movement's ability to advocate for women's rights in a more coherent way. Thus what was historically a national women's movement using opposition to the apartheid regime as a cohesive focus, became national and local women's movements, struggling with how to work with the newly elected democratic government, comprised of many of the feminists who came from the movement itself.

In addition, new gaps emerged. For example, the continuing focus on feminist policy analysis and advocacy by women outside the state became seen in many instances as an attack on the new fragile State structures rather than contributing valuable analysis and critique on how to entrench women's equality rights. In reverse, the feminists who went into government now found themselves confronted by the criticism of their sisters

and former comrades because of the slow and hampered nature of the reconstruction and redevelopment of the inherited apartheid state. In effect, this was democracy at its fledgling inception; messy and contradictory and idealistic and frustrating – but revolutionary.

This herstory raises a number of critical questions for feminists about the nature of contemporary political institutions, the possibilities for radical change through the state (including the courts), and the kinds of processes within the women's movement that need to accompany state-focused political and legal strategies. South Africa is far from being representative of the continent as a whole, as well as other emerging democracies or established ones, but the dilemmas faced within the context of democratization finds resonance globally. The particular combination of political will, institutional development and linkages between activists in the state and in civil society suggested a different trajectory to the usual forms of engagement between the women's movement and the state.¹ The South African situation thus raises a set of interesting and important questions for women in SA, and globally:

- What is the relationship of the South African women's' movements to the state, and to other social movements?
- How can feminists continue to use constitutional rights to advance the position of women in South Africa, especially in a way that meets their fundamental needs, such as bodily integrity, economic inequality, poverty, protection in relation to HIV/AIDS etc?
- How can we build a feminist rights agenda that speaks to the needs of the most vulnerable women?
- How can we ensure that a new generation of feminist activists builds on these struggles?
- How can coalition building be re-vitalized and resourced?
- What is instructive for South African women is the experience of Canada and other regions of the world, and *vice versa*?
- How can the learning from civil society actors globally contribute to more effective advocacy and entrenchment of women's rights within the state?

This project, initially called Putting Women on the Agenda 2 (PWOTA2), and renamed by the organizers as PFOTA, was seen by the organizing committee members and by the lead organizations, CALS and IWRP, to be aimed at providing the space, time and reflection needed to further develop an explicit feminist (rights) agenda for the future. It is recognized and understood that "feminism" in an African context and within the South African disparate communities is often a controversial term. How to include feminist analysis and critique in large national gatherings is neither productive nor useful, as the debate becomes one of semantics and terminology rather than one of pragmatic policy development or political and legal strategies. Rather, reflection on the past twelve years during PFOTA was to form the basis for critical thinking to develop rigorous policy proposals, political and legal strategies and "think pieces" that were to be taken forward by activists at, and after, PFOTA.

¹ Shireen Hassim, *Terms of Engagement: South African Challenges*, for the Social Movements Project, Centre for Civil Society, University of KwaZulu-Natal. 2004. See further, Shireen Hassim, *Women's Organizations and Democracy in South Africa: Contesting Authority*. UKZN Press, 2006.

The conceptualization of PFOTA has been a partnership between CALS at Wits University in South Africa, and the IWRP at the University of Victoria in Canada. Canadian feminist legal scholars have been working in partnership with South African feminist legal scholars since the 1980's. Much exchange and learning has taken place between them, particularly regarding Canadian constitutional jurisprudence on the Charter of Rights, and South African jurisprudence especially on socioeconomic rights. It is a fundamental belief that the research, expertise, and learning is "South/North" and "North/South". It is also a fundamental commitment of the partnership that academics and legal scholars work in equal partnership with civil society feminist activists who have been working on the challenges of making women's constitutional rights become "lived rights" in both countries.

The colloquium that was held was strategic, focused, analytical, facilitated and small in number but representative of regional geography, key sectors, race, age, and organisations. Of the 100 participants invited, we had 70 in attendance.

In conceptualising this conference, it was agreed that it would focus especially on constitutional rights activism in critical areas of women's lives. These were identified as

- Gender based violence
- Custom and culture
- Religion
- HIV and AIDS
- Sexual and reproductive rights
- Land Rights
- Socioeconomic policy
- Globalization and trade

Objectives

The objectives of PFOTA were:

- To enable feminist advocates, lawyers, activists and academics to come together to identify and debate issues on how to make women's constitutional rights become real "lived rights"
- To learn from comparative experiences in Canada and the SADC region
- To enhance capacity and understanding of constitutional rights activism, including amongst young women and girls
- To identify practical legal and advocacy strategies for action in critical areas
- To further develop a feminist rights agenda and forward looking strategies
- To disseminate the contents of discussion and 'plan of action' through ongoing websites and listservs
- To improve local networking between organisations and with community based women and women's organisations, as well as with government

- To develop intergenerational networks and relationships
- To seek ways of establishing a regional mentoring network to assist in building the capacity of the next generation of leadership in the women's rights movements
- To develop consensus positions across the multiple sectors of women's rights issue to be used as ongoing policy documents
- To create a 'safe space' for dialogue, debate and discussion and to build support and solidarity for women's besieged rights advocates

Research Papers

Research papers were commissioned from key researchers/activists and presented in summary on panel sessions with key discussants, and then followed by wide ranging discussion from the participants. The process was facilitated by a key group of trained and experienced facilitators. The discussion was captured by a rapporteur to produce a final document from the conference, and the summary of those transcripts is found in this e-publication.

In order to include the active participation of key young women and girl's activists, there was an all day Girls Forum held the day prior to the conference where 10 young women and girls between the ages of 14 and 20 attended. This Forum was held to work with the girls on the key summaries of the issues papers and they were given a role as discussants on each session to ensure that their perspectives were heard. More information on the Girls Forum can be found at the GirlsNet website.

There was participation from Namibia, Swaziland, and Zimbabwe in order to share the learnings from the region with South Africans as well as to expand the conversation. Globalization has impacted on the SADC region, as has South Africa's dominance. The situation for women in Zimbabwe and Swaziland, in particular, has worsened over the past decade.

The participation of the Professor Elizabeth Sheehy of the Faculty of Law of the University of Ottawa, and as well as IWRP Director Susan Bazilli, ensured that the lessons from women in Canada and the recent massive cuts to women's equality advocacy would be shared as lessons as well. Both Lee Lakeman of the Canadian Association of Sexual Assault Centres, and Marilou McPhedran, were also supposed to be in attendance, but personal circumstances in Canada prevented them from travelling. However, we have included their presentations in this publication.

The tone of the gathering was set by the first presenter, Elizabeth Sheehy. As a participant in the 1990 conference, she was asked to update her presentation some 16 years later, to see how women have fared in Canada since the introduction of the Charter of Rights and Freedoms. Her response, entitled *Formalized Inequality - Women's Equality Rights in Canada 1990-2006*, was a rather shocking reminder of how fragile rights are, the need for the women's movement to stay vigilant, and the tremendous losses that Canadian women have faced. Cathi Albertyn had said that in 1990 her presentation had been a "morose" one, however Sheehy now says that she was being overly optimistic at that time. She provides a review of the ways in which the

equality provisions of the Charter of Rights and Freedoms have in fact impacted adversely against women. Her 'sobering reflections' from 1990 have in fact become 'shocking'. She concludes by arguing the need to defend women's right to defend themselves and their children against violence. An issue that we can see is just as timely in South Africa today.

Anu Pillay's *Violence Against Women in South Africa – Where to From Here????*, provides a context for examining VAW from a South African feminist perspective, and reviews the many initiatives undertaken by feminist anti-violence workers in the past decade or so. She poses the questions - What happened? What did we do right? And what went wrong that allows violence against women, in all spheres of the lived realities of women's lives, to continue to prevail unabated? Her chapter encourages our discussion and debate about the way forward.

Sisonke Msimang's *Women and HIV/AIDS* paper is divided into three parts. The first section tells the story of the political debates. The second section looks at the personal experiences of women, and the third section looks at what the analysis means in terms of feminist activism and leadership. Critically, the paper grapples with the question of what AIDS mean for a nation beset by poverty, inequality, lost identities and dispossession, a nation struggling to be a democracy not in name only, but in practice.

Sibongile Ndashe addresses the fact that the reform of customary law, particularly with regard to removing aspects that are considered discriminatory towards women, has progressed and regressed at the same time. Her *Customary Law* paper argues that the cause of the problem is a series of failures ranging from misdiagnosis to well-intentioned but misguided interventions. She points out that the issues to be addressed have not been articulated with sufficient clarity and that this has adversely impacted on the strategies adopted to date, and that the interventions as made run the risk of failure because they are superficial. She concludes by making a case for a conceptual rethinking of the customary law debate with a view to extending a courteous invitation to some of the stakeholders that have abandoned the process of development and dragging back to the debate those who have shunned their Constitutional obligation to develop customary law.

In *The King's Rule is Considered Supreme: The Impact of Religion and Culture on Gender Equality*, Gertude Fester uses the *Women's Charter for Effective Equality* as a guide to explore, from a feminist perspective, the current strategies used by women in SA and why women have not achieved their demands 12 years after democracy. She argues that many women's lives have not changed because of the profound impact that religion and culture have on women, despite the constitution and progressive legislation. The average women's life is closer to her religion or culture than the constitution. Some questions she considers are: What are the opportunities and political spaces for feminists? How do feminists use the positive space created by the African National Congress (ANC) policy and which alliances /coalition or partnerships should be formed to realise women's rights and gender equality? How do we reconcile aspects of the diverse South African cultures and religions with the human rights culture articulated by the Constitution and legislation?

Aninka Claassens and Sizane Ngubane's chapter, *Women, Land and Power: the Impact of the Communal Land Rights Act*, examines the likely impact of the Communal Land Rights Act 11 of 2004 on rural women in South Africa. This paper is an elaboration on

the discussion document presented at PFOTA by Claassens. Their work is based on research undertaken in the context of the legal challenge to the Act. The Act deals with the content and vesting of land rights as well as the powers and functions of the structures that will administer 'communal' land. The chapter looks at the interplay between land rights and power over land. The discussion begins with a description of some of the problems facing rural women in the former homeland areas covered by the Act. It then describes the two main objections to the Bill raised by women's organisations in late 2003 during the parliamentary process leading to the passing of the Communal Land Rights Bill. They make the discussions very poignant by outlining some of the case studies from their research.

In *Turning gender rights into entitlements: Women and welfare provision in post-apartheid South Africa*, Shireen Hassim answers the question to what extent is the democratic state directing public resources in ways that advance gender equality? She explores the extent to which one key area of policymaking, social welfare, has attempted to integrate gender rights into the allocation of resources by focusing on the elaboration of a social policy framework – the groundwork for what could perhaps be called Africa's first welfare state. Social welfare is a useful lens through which to refract the different expectations that different social groups have of the state and to examine the ways in which different needs have been interpreted by the state and other social actors as legitimate bases for entitlements. She argues that while women have made enormous strides in gaining recognition for their particular political disadvantages, there has been slower translation of political rights into social rights.

Mohau Pheko's *Trade and Globalization Through South African Women's Eyes* explores the contradictory nature and complexity that globalization and international trade brings to women in South Africa. It exposes new forms of poverty and presents some lived experiences to confirm the evidence that the power structures in South Africa are organized around patriarchal assumptions that bestow to men monopoly over power, authority and wealth. During her presentation at PFOTA, it became clear that while every subject area discussed at the symposium should be considered "cross-cutting", the issue of globalization impacted on every other issue raised.

In fact, this analysis is continued by Lee Lakeman in her use of the example and metaphor of the New Orleans 'disaster' in the *Relevance of Rights for Systemic Change for Women* to discuss sex, race and class and institutionalized oppression. She places examples of the Canadian state's refusal to act in cases of violence against women within a debate about 'rights'. As with Sheehy's paper, she paints a dire picture of the situation for women's equality, or rather inequality, in Canada. Lessons that we all need to take to heart, and to action. Lakeman concludes that democratic, self-organized and sustained independent women's groups and coalitions are essential, a point that is part of ongoing debate amongst the women's communities in Southern Africa.

The final chapter, *Women's Constitutional Activism in Canada and South Africa*, by Marilou McPhedran reminds us all that the struggle is ongoing. She reviews the engagement of women in both countries in terms of equality provisions in the constitutions, and the grassroots movements that led to both. She also places women's constitutional activism in an international context of the last decade.

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Without the generous funding from the International Development Research Centre, the Ford Foundation, and HIVOS, we would not have been able to carry out the symposium itself, or gather the papers together into this publication.

Formalized Inequality: Women's Equality Rights in Canada 1990-2006

Elizabeth Sheehy

November 2006

Introduction

Sixteen years ago I participated in a historic conference in South Africa, "Putting Women on the Agenda," organized by Susan Bazilli and Lawyers for Human Rights. Held in November 1990 in Johannesburg, this conference helped put women on the political agenda at the time when the African National Congress was engaged in the development of a constitution for a post-apartheid South Africa. Nelson Mandela had been released from prison in February 1990 and all political parties had just been unbanned. In May 1990, the ANC executive had released a statement—the first of its kind ever in that country—enshrining the emancipation of women as foundational policy. "Putting Women on the Agenda" was one of several meetings in the period 1989-91 that discussed and debated the fundamental issues affecting women's lives in South Africa that needed to be addressed by the proposed constitution.

My contribution to this conference was a modest one, and as Cathi Albertyn recalls, a morose one at that. My paper, reproduced in Susan Bazilli's edited collection, *Putting Women on the Agenda*, was titled "Women and Equality Rights in Canada: Impossible Choices; Sobering Reflections".¹ In it I described to South African women our experiences in the first five years of equality litigation under Canada's *Charter of Rights and Freedoms*. I reported on the cases women lost, the narrow grounds on which the few wins women won were decided, the ways in which rights strategies and litigation can divide and weaken the women's movement, and, most worrisome of all, the cases won by men, for patriarchal privilege that rolled back women's hard won legislative gains in the name of men's right and freedoms. I thus foretold gloom and doom, but also suggested some criteria by which to measure the potential of a new constitution for women.

Sadly, the negative prognosis for judicial vindication of women's equality rights has been borne out in Canada in the sixteen years that have passed since I delivered that speech. In retrospect, one could even call my earlier analysis overly optimistic, in that in 1990 we had yet to have our substantive equality hopes dashed. In contrast and happily, I have been proven dead wrong in the context of judicial interpretations of women's equality rights in South Africa. The extensive reach of South Africa's constitutional guarantees to include the actions of private citizens and the inaction of the state, as well as the creation of an entirely new branch of the judiciary, the Constitutional Court, designated as the highest court in the land and drawn from the ranks of liberation thinkers rather than the commercial bar, have no doubt contributed to the vibrancy and relevancy of South Africa's equality jurisprudence.

In what follows, I will describe the trends in Canadian equality law over the last 10 years. In this paper I discuss the state that Canadian equality law is in: I set out the evidence in support of the frequently made claim that our Supreme Court has reverted to a formal

¹ Elizabeth Sheehy, "Women and Equality Rights in Canada: Impossible Choices; Sobering Reflections" in Susan Bazilli, ed. *Putting Women on the Agenda* (Johannesburg: Ravan Press, 1991) 262.

equality formula to resolve equality challenges; I expose how rarely substantive equality claims prevail, and specifically that women have yet to win a substantive equality case; and I show how much women have lost in the wake of men's *Charter* litigation.

Supreme Court equality jurisprudence is at a dead-end

Equality law in Canada is easily the most complex—some would say incomprehensible—of any of the *Charter* jurisprudence. Several books and countless law review articles have painstakingly parsed, analyzed and critiqued what Sheila McIntyre and Sanda Rodgers call the “elaborate taxonomy” of a s. 15 analysis.²

The test used to determine a potential violation has undergone many transformations and interpretations through split majority and dissenting opinions over the more than two decades since s. 15 came into force in 1985. While the first case decided by our highest court in 1989 seemingly rejected formal equality as the test for s. 15 violations,³ subsequent decisions saw various members of the court invoke differing tests and understandings of the equality guarantee. Finally, in 1999 in *Law v. Canada*⁴ the court reached a majority position that held that the critical issue in terms of a claimed equality violation is whether differential treatment on prohibited grounds amounts to “discrimination,” conceptualized as an affront to dignity and tested by reference to historic disadvantage, the correspondence between the ground and the circumstances of the group affected, any ameliorative purpose of the law, and the nature of the interest at issue.

In spite of what seemed to be a positive development—a unified court and a contextual approach to equality grounded in human dignity--the resulting interpretations of *Law* have produced a jurisprudence that is incomprehensible, erratic, unpredictable and unprincipled. Many commentators have noted how the court manipulates the concept of “dignity” and requires a rights claimant to parade her experience of indignity, itself an affront to the essence of the equality right. The focus is off systemic structures that produce inequality and is instead trained on the individual experience of insult. Commentary has also pointed to the standpoint from which “dignity” is assessed: it is judges who decide whether a “reasonable person”, without sex, race, class, or disability, would experience an affront to dignity.

In fact, most cases have been decided against the claimant using the “ameliorative purpose” of the law to declare that it is not discriminatory. They have held that there is no affront to dignity because the reasonable claimant would realize that the measure corresponds to their actual needs or capacities. Besides confounding the question of whether a law discriminates with the question of whether the differential treatment is justified, which in Canadian constitutional law should be a separate inquiry under s. 1 of the *Charter*, the *Law* test as interpreted by a majority of the court moves the burden of proving a compelling state interest from the government seeking to uphold a law under

²Sheila McIntyre & Sanda Rodgers, “Introduction” in Sheila McIntyre & Sanda Rodgers, eds. *Diminishing Returns. Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis, 2006) 1 at 10 [hereinafter McIntyre & Rodgers].

³*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 183; See generally Mary Eaton, “*Andrews v. Law Society of British Columbia*” (1990) 4 C.J.W.L. 276.

⁴[1999] 1 S.C.R. 497.

s. 1 and places it squarely upon the rights claimant, who is now hobbled by another evidentiary and persuasive burden of proving unreasonableness.

Not surprisingly perhaps, in light of the malleability and complexity of the test, section 15 claims are the least successful *Charter* claims.⁵ Furthermore, time and again, the Supreme Court has chosen to avoid pronouncing on s. 15 arguments where it can possibly resolve the case without explicating a s. 15 analysis,⁶ creating yet another disincentive to framing claims on the basis of equality violations. Thus in Sue Rodriguez's challenge to the criminalization of assisting suicide, where she argued that the prohibition imposes discriminatory effects upon those with disabilities who require aid to end their own lives, the court refused to rule on her s. 15 argument because it said that a violation would be justified under s. 1 in any event. It went on to dismiss her claim under s. 7 (principles of fundamental justice not offended) and s. 12 (not cruel and unusual punishment).⁷ In the prisoner voting rights case, the court struck down a law that disentitled federal prisoners from voting, relying on s. 3 of the *Charter*, the right to vote, and avoided commenting on whether prisoners' equality rights were offended by the prohibition.⁸

The post-*Law* jurisprudence could also be described as punitive. So, for example, the claimant in *Gosselin* lost her equality claim that challenged Quebec's provision of drastically reduced social assistance for people under 30 who did not participate in "employability programs." The majority's reasoning was that it would not offend her dignity to be forced to live on savagely low benefits in the interests of reducing her future dependency. No matter that Gosselin herself experienced disabilities that effectively rendered her unemployable, and no matter that Quebec in fact could offer placements to less than half of those who were expected by the eligibility rules to secure them. So, even though participation in a public works program was factually impossible for Gosselin and thousands of others like her, the court was prepared to treat the law that gave her one third of the amount Quebec had judged to be necessary as a bare minimum to survive,⁹ as somehow consistent with poor people's dignity.

Formal equality is the Supreme Court's game

Under cover of this murky and muddled jurisprudence, Canadian courts have beat a furtive yet steady retreat from the promise of substantive equality back to the end-game of formal equality. It is true that the Supreme Court of Canada had trumpeted the dawn of a new era in its famous decision of *Andrews v. Law Society of British Columbia*¹⁰ in 1989, wherein it eschewed a technical or narrow interpretation of s. 15 of our *Charter* and instead read the equality guarantee as requiring a contextual approach that considered discriminatory effects of particular laws. However, since then it has all but

⁵ Bruce Ryder, Cidalia Faria & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103.

⁶ McIntyre & Rodgers, "Introduction," *supra* note 2 at 10.

⁷ *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519.

⁸ *Sauvé v. Canada*, [2002] 3 S.C.R. 519.

⁹ Gwen Brodsky & Shelagh Day, "Women's Poverty is an Equality Violation" in Fay Faraday, Margaret Denike, & Kate Stephenson, eds. *Making Equality Rights Real. Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 319 at 323.

¹⁰ [1989] 1 S.C.R. 143.

overruled itself in *Andrews*.¹¹ The rhetoric of substantive equality continues to be invoked by judges and particularly at the Supreme Court, but it is formal equality that is in fact used as the measuring rod in the vast majority of equality cases as methodology and it is formal equality that rules in outcome.

The s. 15 cases where the Supreme Court has found an equality violation are few and far between, as noted above, and those few successful cases tend to be formal equality claims (with three exceptions, discussed in the next section). Where the claimant argues that the law fails to treat likes alike by unfairly excluding them from a benefit or singling them out for a burden, the case seems to have a markedly increased chance of success.

Consider, for example, the following successful s. 15 arguments:

**Tetreault-Gadoury v. Canada*¹² (*Unemployment Insurance Act* discriminatory on basis of age for disenfranchisement of persons 65 and over from regular UI benefits);

**Egan v. Canada*¹³ (*Old Age Security Act* discriminatory for failure to provide spousal allowance to same sex partners);

**Miron v. Trudel*¹⁴ (provincial law denying accident benefits to common law spouses discriminatory);

**Benner v. Canada*¹⁵ (*Citizenship Act* discriminates by requiring more onerous citizenship process for children born abroad of mothers as opposed to those of fathers);

**M. v. H.*¹⁶ (*Family Law Act* discriminatory for excluding same sex couples from spousal support obligations);

**Corbiere v. Canada*¹⁷ (*Indian Act* discriminatory for exclusion of Aboriginal off-reserve band members from voting rights in band elections);

**Lavoie v. Canada*¹⁸ (*Public Service Employment Act* discriminates by imposing limits on employment opportunities for non-citizens);

**Trociuk v. British Columbia*¹⁹ (*Vital Statistics Act* discriminates against unwed fathers by precluding their participation in the birth registration process); and

**Nova Scotia v. Martin*²⁰ (*Workers' Compensation Act* exclusion of chronic pain from compensation system discriminates on the basis of disability).

¹¹ Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in McIntyre & Rodgers, *supra* note 2 at 95.

¹² [1991] 2 S.C.R. 22.

¹³ [1995] 2 S.C.R. 513.

¹⁴ [1995] 2 S.C.R. 418.

¹⁵ [1997] 1 S.C.R. 358.

¹⁶ [1999] 2 S.C.R. 3.

¹⁷ [1999] 2 S.C.R. 203.

¹⁸ [2002] 1 S.C.R. 769.

¹⁹ [2003] 1 S.C.R. 835.

²⁰ [2003] 2 S.C.R. 504.

Some of these “wins” were technical only because they were negated by rulings under s. 1 of the *Charter* that upheld the violations as limits “demonstrably justified in a free and democratic society.” Thus in *Egan* the court held that the denial of spousal allowances for same sex spouses was justified because government is entitled to provide exclusive support and recognition to procreating heterosexual couples as a fundamental social unit in which children are raised and nurtured, to the benefit all of society; in *Lavoie* the limits on public service employment for non-citizens were upheld in furtherance of the government’s claimed objective of enhancing the meaning of citizenship among Canadians by valorizing it and to encourage naturalization by immigrants.

The astute reader will note that only two of these formal equality wins seem to bear on women’s equality rights. In fact, neither was framed in terms of women’s rights. Yes, *Benner* declared the additional burdens on the children born abroad of Canadian mothers as unconstitutional, but given the fact that most such laws were long ago abandoned and the numbers affected always small, one might call this case a small dart that grazed the limb of patriarchy. More importantly, *Benner* lacks any analysis or critique of the role of patriarchy in “citizenship” and furthermore, the equality claim was framed as discrimination against the child—here Benner himself—and not to his mother or women more broadly. *Trociuk* is even worse. It constitutes a major boost to father’s rights and removes the one vestige of power left to single mothers—the right to name their children without interference from fathers who may be absent, uninvolved, downright hostile, manipulative or abusive.²¹

Commentators have noted that this retreat to formal equality and away from “redistributive” equality also tracks the privatization of equality rights. This is perhaps most obvious in the context of equality issues that would require shifts in resource allocation or priorities by governments were substantive equality to be realized. With two exceptions, the successful claims carried no obvious costs to the public purse and, if costs were involved, these were costs to be borne by private insurance schemes such as in *Miron v. Trudel*, by employers as in *Nova Scotia v. Martin*, or by private individuals, as in *M. v. H.* Both *Tetreault-Gadoury* and *Eldridge* require some public expenditure to provide for the under-included services, but as Sheila McIntyre and Sanda Rodgers note, “the only direct government payout ever ordered by the Court occurred in *Eldridge*, where the estimated compensation ordered, \$150,000, was not only a mere fraction of the government’s litigation costs but formed part of the justification for the order to pay for the service.”²²

The biggest gains through this litigation have been achieved by lesbian and gay activists who have won numerous cases recognizing the legitimacy of their spousal relationships in law. Yet these wins also bear the stamp of formal equality, as they were argued and won using heterosexual unions as the comparator group and arguing that same sex couples were “the same” in terms of their commitment, love and capacity.²³

²¹ Hester Lessard, “Fathers, Mothers, and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004) 16 C.J.W.L. 168.

²² McIntyre & Rodgers, “Introduction,” *supra* note 2 at 1 at 13.

²³ McIntyre & Rodgers, “Introduction,” *supra* note 2 at 12.

Substantive equality claims rarely upheld by our highest court

Substantive equality claims, whereby the claimant argues that they do not receive the equal benefit of the law or that the law has a differential or disparate impact upon them, worsening their experience of systemic discrimination, often founder on the rocky technicalities of proving discrimination. Overall, members of equality-seeking groups have seen increasingly disheartening results as they have lost case after case at the Supreme Court of Canada. Only two substantive equality cases (*Vriend* and *Eldridge*, below) were won prior to *Law*; the only successful substantive case since *Law* (*N.A.P.E.*, below) lost at the s. 1 justification stage.

Consider this list of losing cases brought by women's equality advocates:

*We lost the challenge to the revenue law of Canada that excluded child care expenses from being deducted from business or professional income, as a cost of doing business.²⁴ In spite of the fact that men's club memberships and sporting fees have always been deductible as business expenses, the court characterized child care expenses as a personal expense and furthermore found that the claimant had not proven that women as a group bear the economic costs of child care!

*We lost the challenge to the exclusion of the Native Women's Association from funding and participation in constitutional negotiations, side-by-side with Aboriginal organizations dominated by men, on the basis that there is no constitutional obligation to provide funding or to consult.²⁵

*We lost the claim that women, as the majority of the poor who are single heads of households and custodial parents, should not be forced to bear the tax burden of child support that they received from non-custodial fathers. The court said that no burden was placed on women and their children: rather, the revenue law's allocation of the tax deduction to the payors—predominately men—would ultimately be shared by the "post-divorce family!"²⁶

*We lost the challenge to the denial of charitable status to Vancouver Society of Immigrant and Visible Minority Women, the court holding that the benefit was withdrawn not on grounds protected by *Charter* s. 15 of race and sex, but because the organization advocated political change on their behalf!²⁷

*We lost the claim that common law wives should be entitled to equal division of matrimonial property just as married women are entitled under provincial laws. The court said that there are fundamental differences between these two types of relationships and that it must respect the "choice" not to marry along with its implications for property division upon breakdown of the relationship.²⁸

²⁴ *Symes v. Canada*, [1993] 4 S.C.R. 695.

²⁵ *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627.

²⁶ *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

²⁷ *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10.

²⁸ *Nova Scotia v. Walsh*, [2002] 4 S.C.R. 325.

*We lost the challenge to a social welfare law that cut by 2/3 the benefits of recipients under 30 years of age who did not participate in government “training” programs, even though there was a dearth of available spaces and these programs were not appropriate for all recipients. Essentially, the court found that the benefits reduction was not discriminatory because the program aimed to reduce long-term dependency.²⁹

*We lost the claim that women who are separated common law spouses should have access to survivors’ pensions under the Canada Pension Plan, because the court found that this group is more like divorced spouses than married but separated spouses, again invoking the motif of “choice.”³⁰

Of course women are not the only losers in the equality game. Substantive claims have also been lost by, for example, disability rights groups, most notably in *Granovsky v. Canada*³¹ and *Auton*. Perhaps one of the most shocking losses was the failed challenge, on behalf of children and youth in Canada, to s. 43 of the *Criminal Code of Canada*, which exempts children from the protection of the prohibition against assault if force is administered by categories of adults such as parents and teachers by way of “reasonable correction”. *Canadian Foundation for Children, Youth and the Law v. Canada* involved no clear state costs associated with a declaration of invalidity, unless we count incursions upon the “privacy” of the family and the patriarchal power to “discipline” children as costs to the state. This decision flew in the face of Canada’s international obligations, the consensus of 100 nations that have banned the use of force against children, and the position taken by the Children’s Aid Society and the Canadian Medical Association. Instead our highest court managed to find that children’s equality rights were not infringed upon because their dignity interests were enhanced, not trampled, by s. 43: family privacy and the use of reasonable correction are in children’s best interests!³²

It is galling to notice how rarely women’s rights figure in equality cases and in other litigation by and about women where equality is clearly at play. Only one of the three successful substantive equality claims, *Newfoundland v. N.A.P.E.*,³³ squarely addressed systemic discrimination against women, and further, the case was ultimately rejected, like *Egan* and *Lavoie* above, by the invocation of s. 1 to justify the discrimination. In *N.A.P.E.* the court accepted that the provincial government’s repudiation of a pay equity settlement for thousands of women workers that it had agreed to, and its indefinite deferral of wage increases and unilateral extinguishment of arrears, amounted to sex discrimination against female employees. However, it upheld the law as justifiable in light of what was described as a fiscal crisis in the province. Thus, illegally underpaid women workers were forced to bear the burden of the province’s debt load as “demonstrably justified in a free and democratic society.”

Neither of the other two successful substantive equality cases was decided by the court on the grounds of sex discrimination. In *Vriend v. Alberta*,³⁴ the Supreme Court declared

²⁹ *Gosselin v. Quebec*, [2002] 4 S.C.R. 429.

³⁰ *Hodge v. Canada*, [2004] 3 S.C.R. 357.

³¹ [2000] 1 S.C.R. 703.

³² *Canadian Foundation for Children, Youth and the Law*, [2004] 1 S.C.R. 76.

³³ [2004] 3 S.C.R. 381.

³⁴ [1998] 1 S.C.R. 493.

a positive obligation on government to legislate with respect to discrimination on the basis of sexual orientation. In *Eldridge v. British Columbia*,³⁵ it held that s. 15 required the government to provide sign language interpretation for hearing impaired individuals who are otherwise unable to access publicly-funded health services.

This is not to say that these cases could not have been framed in feminist terms—to the contrary. Discrimination against lesbians and gays in *Vriend* could have been framed by the court as based in patriarchal values and thus as a form of sex discrimination. The disability claim in *Eldridge* involved what Fiona Sampson might call “gendered disability discrimination.”³⁶ Two of the three appellants in *Eldridge* were women and one, Linda Warren, was in fact a deaf woman who gave birth prematurely to twins without sign language interpretation. One can hardly imagine a more deeply gendered deprivation of medical services!

Furthermore, not only is there no jurisprudence from our highest court that confronts systemic racism as an equality rights violation, but the decided cases have studiously ignored the sex of the claimant in several of the high profile cases that raise systemic racism and the role that sexism played in generating the litigation. The jurisprudence around Aboriginal peoples’ rights have not been articulated by the court as equality issues but rather as Aboriginal rights, and to be fair, some Aboriginal groups avoid the equality box altogether, for very good reasons.³⁷ Yet, it is inexcusable for the court to write a benchmark decision on the appropriate sentencing principles to be used for Aboriginal offenders that exhaustively canvasses the legal, historical and social context of the over-incarceration of Aboriginal offenders without once venturing to discuss the situation of Aboriginal women, even when the claimant herself is an Aboriginal woman—and an Aboriginal woman who has killed a violent male partner at that!³⁸

In one of the two cases³⁹ that have touched upon systemic racism against African-Canadians, “the Court came perilously close to holding that a judge who adjudicates mindful of the operation of systemic race discrimination demonstrates a reasonable apprehension of bias.”⁴⁰ Not coincidentally, *R. v. R.D.S.*⁴¹ was an attack on the impartiality of Nova Scotia’s only African-Canadian woman judge. While some members of the court held that a reasonable apprehension of bias must be tested against a

³⁵ [1997] 3 S.C.R. 624.

³⁶ Fiona Sampson, “The Law Test for Discrimination and Gendered Disability Inequality” in Fay Faraday, Margaret Denike, and M. Kate Stephenson, eds. *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 245.

³⁷ Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6 C.J.W.L. 174.

³⁸ See, for example, *R. v. Gladue*, [1999] 1 S.C.R. 688; for commentary see Jean Lash, “Case Comment: *R. v. Gladue*” (2000) 20 Can. Woman Stud. 85. See also *Corbière*, supra note 17, where only Justice L’Heureux-Dubé, speaking for herself and two other justices, articulated the equality issue as one involving race and sex, in light of the disparate loss of band membership experienced by Aboriginal women in consequence of sex discriminatory *Indian Act* provisions that excluded Aboriginal women (and their ancestors) who married non-status men, while allowing similarly situated Aboriginal men not only to keep their status but to confer it as well on their non-Aboriginal wives and children.

³⁹ The other case was *R. v. Golden*, [2001] 3 S.C.R. 679, which involved a strip search of an African-Canadian man in a semi-public venue. *Golden* was argued solely as a s. 8 “unreasonable search and seizure” case and not as a s. 15 violation.

⁴⁰ McIntyre & Rodgers, “Introduction,” in McIntyre & Rodgers, supra note 3 at 16.

⁴¹ [1997] 3 S.C.R. 484.

reasonable person who adheres to *Charter* values, including equality, no judges gave explicit consideration to the role of systemic male backlash and resistance to female authority in the challenge to the ruling by Judge Sparks.⁴²

Men's *Charter* litigation has made significant incursions upon women's equality

At the same time that women have lost so many of their equality challenges, men's *Charter* victories have undermined some of women's progress in law. Consider, for example, the following wins for patriarchal power:

*Male accused successfully challenged the constitutionality of statutory bars on their access to women's sexual history for the purpose of defending themselves against sexual assault charges. The court asserted that the accused's s. 7 fair trial rights could not be compromised in the name of women's equality. The decision returned the issue to judges, once more re-investing in them a discretionary authority to determine whether the proposed evidence about a woman's sexual past is relevant and admissible.⁴³

*Male accused won a broad right to disclosure of women's private records, again in the name of their s. 7 fair trials rights in the context of defending themselves against sexual assault allegations.⁴⁴ Women's competing ss. 7 and 15 rights were once more relegated to a subordinate role in the hierarchy of rights.

*Male accused managed to persuade the court that a women's rape crisis shelter was an agent of the state (against the weight of the jurisprudence) for the purpose of declaring that a man's s. 7 fair trial rights were violated when the crisis centre destroyed a woman's counseling records, as part of a routine practice of records destruction for any cases likely to end in court. Here the accused wished disclosed in the hope –unsubstantiated--that they would aid his defence against sexual assault charges.⁴⁵

*Male accused successfully challenged the common law rule that barred drunkenness as a defence to certain offences, called "general intent offences," which included common assault, sexual assault and manslaughter, among others. Accused thereby gained the possibility of complete exoneration for these kinds of crimes on the basis of intoxication that is "akin to automatism."⁴⁶

*A father successfully challenged the British Columbia law that had given unmarried women the right to name their children without interference from the putative father.⁴⁷

⁴² For an article that focuses on the backlash against women judges see Constance Backhouse, "The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case" (2003) 15 C.J.W.L. 167.

⁴³ *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

⁴⁴ *R. v. O'Connor*, [1995] 4 S.C.R. 536.

⁴⁵ *R. v. Carosella*, [1997] 1 S.C.R. 80.

⁴⁶ *R. v. Daviault*, [1994] 3 S.C.R. 63.

⁴⁷ *Trociuk*, *supra* note 19.

Women's gains few and tenuous

The few and arguably small advances by women in Supreme Court jurisprudence over the last 15 years have been eked out of very harsh terrain. Little has been won cleanly or clearly in the name of equality. For example, while *R. v. Morgentaler* was a very important victory for women's rights in that the *Criminal Code* prohibition on abortions performed other than in conformity with the therapeutic abortion committee was declared unconstitutional, this ruling was based on violation of s. 7 (s. 15 was not then in force) as the court found that women's security of the person interests were put in jeopardy without adherence to the principles of fundamental justice protected by s. 7. In *R. v. Butler*,⁴⁸ the Supreme Court upheld the constitutionality of the *Criminal Code* prohibition on obscene materials in part on the basis of women's competing s. 15 equality rights. But that decision also depended on a s. 7 analysis that found no violation of men's due process rights or their s. 2 freedom of expression rights under s. 2.

Yes, it is true that the court upheld new criminal laws (fought for and won by the women's movement) that put some outer limits on the use of women's sexual history⁴⁹ (*R. v. Darrach*⁵⁰) and women's counselling records⁵¹ (*R. v. Mills*⁵²), in part once again by referring to women's equality rights. But, like the *Butler* decision, these cases also found no s. 7 violation, such that the s. 15 mention (it is by no means an analysis) is somewhat superfluous. These cases in particular are tepid "wins" for women⁵³ given that the legislation at issue had conceded huge tracts of women's equality already in order to conform with the safeguards for male accused decreed by the Supreme Court in striking down the old law that barred women's sexual history evidence for most rape trials (*Seaboyer*) and in making women's private records a virtual free-for-all to be used by accused in rape trials (*O'Connor*).

Some of our "wins" have been in the form of rhetoric—cases where the court has affirmed its commitment to women's equality (*Seaboyer*) or where the court has characterized certain areas of law, such as sexual assault law, as ones implicating women's equality (*R. v. Osolin*⁵⁴). Sadly, these affirmations have been recited in cases where women's equality rights were in fact trampled upon, where we were dealt major blows by the decision itself. As noted above, *Seaboyer* struck down the *Criminal Code* bar on women's sexual history in rape trials; *Osolin* ordered a re-trial for a man convicted of kidnapping and sexual assault on the basis that he was entitled to rely on the woman's statements to her therapist that she felt responsible for her own rape as evidence providing an "air of reality" to his claim that he was mistaken as to her consent.

⁴⁸ [1992] 1 S.C.R. 452.

⁴⁹ Bill C-49, proclaimed in 1992, as discussed by Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian V. Roberts and Renate M. Mohr, eds. *Confronting Sexual Assault. A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

⁵⁰ [2000] 2 S.C.R. 443.

⁵¹ Bill C-46, proclaimed in 1998, as discussed by Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 49 Osgoode Hall L.J. 251.

⁵² [1999] 3 S.C.R. 668.

⁵³ For commentary describing the dilution of the law purporting to protect women's confidential records effected by the Supreme Court's decision in *Mills* see Stephen Coughlan, "Complainants' Records After *Mills*: Same As It Ever Was" (2000) 33 C.R. (5th) 300.

⁵⁴ [1993] 4 S.C.R. 595 at 669.

Other wins are derived from the invocation of s. 15 as an interpretive value in the adjudication of human rights legislation and the common law. Thus, in *Brooks v. Canada Safeway*,⁵⁵ s. 15 was used to find that pregnancy discrimination is sex discrimination, over-ruling an earlier precedent, and in *Janzen v. Platy*⁵⁶ it was used to find that sexual harassment is prohibited as sex discrimination. In *Norberg v. Wynrib*,⁵⁷ a successful tort claim by a woman whose doctor exploited her drug dependency in order to secure her sexual submission to him, and *R. v. Morgentaler*,⁵⁸ where our court declared the criminal prohibition on abortion unconstitutional for infringement of women's due process rights, s. 15 was not addressed explicitly by the courts, although the equality value seems to have had an influence, at least in the women justices' judgments.

Canadian women have won some significant lower court decisions like *Jane Doe v. Metropolitan Toronto Police*⁵⁹ that clearly and resoundingly vindicated women's equality rights. What we have not been able to do is to sustain or expand these victories, or use them to achieve systemic change. For example, the next "Jane Doe" case was lost where the lawyer did not advance a breach of women's equality as one of the legal theories for the case.⁶⁰

Concluding thoughts

At the same time that the Supreme Court has fundamentally betrayed Canadian women's equality aspirations, the Canadian state has played its own role in rendering women's inequality invisible. It has to some extent captured the feminist movement—the independent women's movement—by: conditioning funding for rape crisis and battered women's shelters on the eradication of radical practices such as resisting the disclosure of women's rape crisis and counseling records; absorbing, medicalizing and de-politicizing feminist support for women victimized by male violence through creation of victims' services for courts and rape crisis services in hospitals; and de-gendering who does what to whom, by promoting "gender analysis," "gender rights," "family violence," and "victims' services."

At this historical moment for Canadian women, the situation is indeed dire. The Supreme Court has shut down women's drive for equality at a time when, over the past 16 years, another half a million households have sunk below the poverty line; the number of single mothers living in poverty in cities has increased by 50%; food banks are now used by 2.4 million Canadians; the rate of homelessness for women and children in Toronto has doubled since 1989; we still do not have a national day care program although it has been promised by successive governments since 1984; Aboriginal women are five times more likely to experience male violence than other women; visible minority women

⁵⁵ [1989] 1 S.C.R. 1219.

⁵⁶ [1989] 1 S.C.R. 1252.

⁵⁷ [1992] 2 S.C.R. 226.

⁵⁸ [1988] 1 S.C.R. 30.

⁵⁹ (1998), 39 O.R. (3d) 487 (Ont. Ct. Gen. Div.). See also *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.), where the judge refused to send an Aboriginal woman to the federal Prison for Women on the basis that her incarceration there would violate her s. 15 rights on grounds of race and sex. The decision was reversed on other grounds: [1991] 5 W.W.R. 340 (Sask. C.A.).

⁶⁰ *Mooney v. Canada*, [2004] B.C.J. No. 1506 (B.C.C.A.); for commentary see Elizabeth A. Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions With What We Know about Male violence Against Women, Or, From *Jane Doe* to *Bonnie Mooney*" (2005) 17 C.J.W.L. 87.

experience poverty at a rate of 37%; and Aboriginal women earn \$13,300 per annum on average.

Under the current government of Stephen Harper, there is no pretense of a benevolent state. His government has slashed funding for the remaining women's advocacy organizations such as the National Association of Women and the Law, abolished progressive institutions like the Court Challenges Program and the Canadian Law Commission, and removed "equality" from the mandate of the Status of Women. Without listing all of the regressive bills emerging from this government (such as a private member's proposal to make a foetus a human being for certain purposes under the criminal law), it would not be an understatement to claim that women's equality is literally under siege from all sides: the courts, the state, men's rights groups, the media.

In this bleak context, where I want to invest myself is in participating, as a researcher, writer, and educator-lawyer, in promoting laws that require judges, police, and other state agents to expose the patriarchal assumptions and norms that undergird Canadian law and its enforcement and interpretation. In this moment, we need to force them to lay bare the state's contempt for women and children's safety, health and well-being. The other urgent priority in this desperate context is to defend—no, expand—women's legal rights to liberty and to self-preservation: we must creatively defend women's criminal acts committed to this end. Women's right to save themselves and their children, whether by theft or violence, even homicide, deserves our attention in time such as these.

VIOLENCE AGAINST WOMEN IN SOUTH AFRICA

WHERE TO FROM HERE???

Anu Pillay¹

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INTRODUCTION

This discussion paper attempts to provide a broad overview of where we are today, globally and locally, outlining the myriad attempts and channels that have been used to eradicate violence against women (VAW) at the global level, in South Africa and to some extent, in the Southern African region. It alludes to the analytical tools and frameworks that have guided our understanding of this phenomenon over time and teases out the tensions between individual, society and context. It asks the following questions: What happened? What did we do right? And what went wrong that allows violence against women, in all spheres of the lived realities of women's lives, to continue to prevail unabated?

This paper has been written to provide a basis for discussion, debate, critique and analysis on the issue of violence against women in South Africa and is not intended to be an academic exposition. Rather, it is a compilation of ideas, analyses, facts and figures from various reliable sources indicated in the reference list. It does not comprehensively cover every issue that intersects with VAW. Instead it highlights some of the pertinent issues in the hope that discussants and participants will grapple with the content and add in other critical perspectives to allow for dynamic exchanges and interaction.

As feminists, the issue of violence against women has been high on our agenda as an indicator of the status of women in society. We are compelled now to deeply reflect and ask ourselves seriously, what is the next logical step from here? We developed the term 'the personal is political;' as a tool to open up the space for the gendered nature of violence to be realised, and have used that tool vigorously to move violence from behind closed doors into the public sphere. How do we understand this term? Is it enough to move into the public, political arena or do we need to understand the 'personal' more deeply as the 'self'? What do we bring with the 'personal' when we enter the public space and what do we encounter in that space? What is the process that happens internally that allows transcendence of the violent experience and how do we capture that, theorize it and integrate it into the work that needs to be done externally?

For all the advocacy work that we have done over the years, the shift that we were aiming for seems to have failed to happen. We engaged the state through a legalistic understanding of human rights and forced reform of the criminal justice system and embraced the idea of women empowerment. We found ourselves emulating the mainstream images of power in order to dismantle the patriarchal system that underpinned the androcentric status quo in our attempts to demonstrate equality and to

demand equity. Perhaps the point is that we all agree on the answer, which I see as creating a safe world for women, but are we asking the right questions, in the right places, to the right people? Did we challenge the existing cultural, '*masculinist*' world? Violence against women is much bigger than we are but perhaps we have focused on one way of seeing, perceiving and understanding. We have focused on women, on empowerment of women and have constructed men as the problem using patriarchy as the explanatory model. Is that still useful? Perhaps we need to re-examine those constructions and bring in other ways of seeing and knowing that brings more focus to relationships, to the gendered nature of power and authority, to more systemic thinking and maybe moving away from the empowerment model to a transformative model that will bring together the self, the other, and the context.

THE GLOBAL PICTURE

Despite substantial progress in the last two decades to raise awareness of gender-based violence as a serious human rights violation, today's world is no safer for women and girls. The scale of the problem has reached epidemic proportions - globally, one in three women will be raped, beaten, coerced into sex or otherwise abused in her lifetime. Since the World Conference on Human Rights, held in Vienna in 1993, and the Declaration on the Elimination of Violence against Women in the same year, civil society and governments have acknowledged that violence against women is a public policy and human rights concern. While work in this area has resulted in the establishment of international standards, the task of documenting the magnitude of violence against women and producing reliable, comparative data to guide policy and monitor implementation has been exceedingly difficult. The misperception that home is a safe haven for women has been challenged and it has been shown that women are more at risk of experiencing violence in intimate relationships than anywhere else. This violence is more often than not perceived to be 'normal' which further complicates an already complex situation. Nonetheless, international human rights law has been clear: States have a duty to exercise due diligence to prevent, prosecute and punish violence against women. Violence against women has a far deeper impact than the immediate harm caused. It has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children. It shames States that fail to prevent it and societies that tolerate it. Violence against women is seen to be a violation of basic human rights that must be eliminated; be it through political will, legal and/ or civil action that must occur at every sector and level of society.

THE NATIONAL PICTURE

South Africa has seen a massive mobilising of resources and energies around gender-based violence since 1994. While this is unprecedented in the region, it appears to respond to specific issues or to symptoms of systemic violence evidenced by much legislation and policy making. For example, harsher sentencing is not necessarily a deterrent and the issues of 'masculine' behaviour and the risk of being caught that acts as an incentive for youth cannot be addressed by legislation and/or policy. Similarly, the DVA cannot by itself address the complex ways in which some women, limited by economics and social taboos, may choose not to take legal action against their abusers.²

² D. Lewis, Gender-Based Violence. (East London: Masimanyane Women's Support Centre, 2004).

As South Africa enters its 12th year of democracy, its challenge appears to lie in implementing policies in line with the far-reaching and progressive constitution. Violence against women and children is widely recognized as a serious concern in South Africa. Human Rights Watch (2005) reports that 55,114 rapes and attempted rapes were reported to the South African police between April 2004 and March 2005 (though the real number is almost certainly significantly higher.) This is an increase from the previous year over a similar period.

The South African Parliament considered the Sexual Offences Bill to remove anomalies from the existing law by broadening the definition of rape and focusing on the victim rather than the perpetrator with respect to violence against women in 2005. Police and the court officials continue to receive training in handling cases of violence against women and children. The government established fifty-two sexual offences courts to adjudicate and focus specifically on cases related to gender violence by end 2004. Even though these courts are under threat of closure and the subject of debate in the country, their establishment was a progressive move. What is happening now is not clear and seems to be pointing towards a larger backlash against the progressive actions that were instituted as a result of women's activism in the country. This trend is reported from other countries as well, eg Canada. It appears to be a dismantling of initiatives around the world to support gender equality and the eradication of gender based violence and is cause for alarm.

South Africans however, largely agree that progressive laws, a Constitution that guarantees equal status, and even a political leadership that has accepted women's role in nation building does not add up to a society where women feel free, where women are safe, where women have the chance to realise their full potential. Today, the biggest oppression that the majority of women in the country face is that of violence, at home and on the street. South Africa has one of the highest rates of domestic violence and of rape in the world. In addition, HIV/AIDS afflicts as many women as men. According to one statistic, an estimated 30.2 per cent of pregnant women in South Africa were HIV positive in 2005. But it is the violence that ultimately tells on women's lives regardless of whether they are enmeshed in the poverty that predominates amongst women or they are the ones who have successfully broken through the glass ceiling and are at the top of the corporate ladder. As People Opposing Women Abuse (POWA) observed, "we've fallen into the trap of formal equality, of saying we have women business and political leaders, but too many women still go home to violence and / or oppression. We need to change the mindset in the country; we need to transform institutions — it is not only about writing new laws and thinking that's enough." It seems that even though South Africa has set an example for the rest of the world with one third representation in parliament, 43 % of Mbeki's cabinet being women; Thabo Mbeki himself commented that South Africa has not yet achieved gender equality and that we are still a long way from a non-sexist society.³

The Zuma Case, which had a global impact in confirming South Africa's reputation as a country where men violate women with impunity, exposed many of the anomalies and gaps in the system outlined above. More importantly, it revealed the fragmentation of women's efforts to eradicate GBV and laid bare the underbelly of

³ [The Hindu](http://www.hindu.com/2002/05/05/stories/20060820), Aug 20, 2006.
<[www.hindu.com/2002/05/05/stories](http://www.hindu.com/2002/05/05/stories/20060820)>www.hindu.com/2006/08/20

attitudes, beliefs and biases that form the foundation of South African society. It publicized our understanding of consensual sex; the impact of ongoing unequal sexual relations based on power (teachers who provide gifts of food to families while raping their daughters), and the deeply patriarchal cultural values that are upheld by men and women in South Africa. If nothing else, it has provided the impetus for feminists in South Africa to really question whether we have indeed made much progress in transforming South Africa.

DEFINITIONS AND KEY CONCEPTS (UNICEF, 2000)

There is no universally accepted definition of violence against women. Some human rights activists prefer a broad-based definition that includes "structural violence" such as poverty, and unequal access to health and education. Others have argued for a more limited definition in order not to lose the actual descriptive power of the term. In any case, the need to develop specific operational definitions has been acknowledged so that research and monitoring can become more specific and have greater cross-cultural applicability. Key forms of gender-based violence in the South African context are rape, child abuse, domestic violence, femicide, harmful traditional practice, sexual harassment and sexual exploitation.

The United Nations Declaration on the Elimination of Violence against Women (1993), defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."⁴ This definition refers to the gender-based roots of violence, recognizing that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men." It broadens the definition of violence by including both the physical and psychological harm done towards women, and it includes acts in both private and public life. The Declaration defines violence against women as encompassing, but not limited to, three areas: violence occurring in the family, within the general community, and violence perpetrated or condoned by the State.

Domestic violence includes violence perpetrated by intimate partners and other family members, and manifested through physical abuse such as slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon, and murder. It also includes traditional practices harmful to women such as female genital mutilation and wife inheritance (the practice of passing a widow, and her property, to her dead husband's brother). Sexual abuse also exists in the form of coerced sex through threats, intimidation or physical force, and forcing unwanted sexual acts or forcing sex with others.

Psychological abuse which includes behaviour that is intended to intimidate and persecute, and takes the form of threats of abandonment or abuse, confinement to the home, surveillance, threats to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation.

Economic abuse includes acts such as the denial of funds, refusal to contribute financially, denial of food and basic needs, and controlling access to health care,

⁴ The United Nations. <<http://www.un.org/rights/dpi1772e.htm>>

employment, etc.

Acts of omission are also included as a form of violence against women and girls. Gender bias that discriminates in terms of nutrition, education and access to health care amounts to a violation of women's rights. It should be noted that although the categories above are listed separately, they are not mutually exclusive.

Femicide

A term coined by feminists, femicide draws attention to the way murder is motivated by the gender identities of the murderer and the victim. It refers mainly to the killing of women by their intimate partners and is often linked to escalating patterns of domestic violence. The likelihood and prevalence of femicide increases with separation or threatened separation from the abusive partner.

Gendercide

In recent years, systematic attention has begun to be paid to the phenomenon of gendercide or gender-selective mass killing. It is defined as patterned human behaviour, enduring over time that leads to large scale disproportionate mortality among a particular gender group, understood as referring to the two sexes, male and female, within the context of society. It includes gender crimes among forms of persecution against a group or collective and pays attention to gendercidal institutions such as female infanticide, maternal mortality, and gendered deficits of health care, education and nutrition also known as the female deficit.

THE BROAD CONTEXT AND STRUCTURAL CAUSES OF VIOLENCE AGAINST WOMEN

Feminist analysis of violence against women has repeatedly affirmed that violence is illustrative of a general devaluation and objectification of women that is most extremely expressed in acts of violence. Within such a framework the abuse of women is construed in the broadest of terms and includes every obstacle to a woman living life to her full potential. The following (points 1-3), are excerpts from the study on VAW commissioned by the UN Secretary General and covers the underlying causes that feminists have attributed to VAW.⁵

1. Patriarchy and other relations of dominance and subordination

Violence against women is both universal and particular. It is universal in that there is no region of the world, no country and no culture in which women's freedom from violence has been secured. The pervasiveness of violence against women across the boundaries of nation, culture, race, class and religion points to its roots in patriarchy — the systemic domination of women by men. The many forms and manifestations of violence and women's differing experiences of violence point to the intersection between

⁵ These are direct excerpts from the WHO study on VAW. For references for the quotes and other information not referenced in this section see the original document at: <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf>

gender-based subordination and other forms of subordination experienced by women in specific contexts.

Historically, gender roles — the socially constructed roles of women and men — have been ordered hierarchically, with men exercising power and control over women. Male dominance and female subordination have both ideological and material bases. Patriarchy has been entrenched in social and cultural norms, institutionalized in the law and political structures and embedded in local and global economies. It has also been ingrained in formal ideologies and in public discourse.

Patriarchy restricts women's choices but does not render women powerless, as evidenced by the existence of women's movements and successful claims by women for their rights. Patriarchy has had different historical manifestations and it functions differently in specific cultural, geographic and political settings. It is intertwined with other systems of subordination and exclusion. It is shaped by the interaction of a wide range of factors, including histories of colonialism and post-colonial domination, nation -building initiatives, armed conflict, displacement and migration. Its expressions are also influenced by: economic status, race, ethnicity, class, age, sexual orientation, disability, nationality, religion and culture. Analysis of the gender-based inequalities that give rise to violence must therefore take into account the specific factors that disempower women in a particular setting. Such contextualized analyses of women's experiences of violence reveal that women exercise agency and varying degrees of control over their lives even within the constraints of multiple forms of subordination.

A number of key means through which male dominance and women's subordination are maintained are common to many settings. These include: exploitation of women's productive and reproductive work; control over women's sexuality and reproductive capacity; cultural norms and practices that entrench women's unequal status; state structures and processes that legitimize and institutionalize gender inequalities; and violence against women. Violence against women is both a means by which women's subordination is perpetuated and a consequence of their subordination.

Violence against women serves as a mechanism for maintaining male authority. When a woman is subjected to violence for transgressing social norms governing female sexuality and family roles, for example, the violence is not only individual but, through its punitive and controlling functions, also reinforces prevailing gender norms. Acts of violence against women cannot be attributed solely to individual psychological factors or socio -economic conditions such as unemployment. Explanations for violence that focus primarily on individual behaviours and personal histories, such as alcohol abuse or a history of exposure to violence, overlook the broader impact of systemic gender inequality and women's subordination. Efforts to uncover the factors that are associated with violence against women should therefore be situated within this larger social context of power relations.

People's perceptions of the causes of violence may or may not encompass these structural factors. In a 2005 study on intimate partner violence in Malawi, for example, researchers found that while most women identified social and cultural norms as major causal factors for the violence, including the practices of polygamy, wife inheritance and bride price, most men attributed violence largely to individual interpersonal dynamics. Intimate partner violence is significantly correlated with rigid gender roles that associate

masculinity with dominance, toughness, male authority in the home and threats to male authority.

Violence against women also operates as a mechanism for maintaining the boundaries of both male and female gender roles. The norms governing these roles may be expressed in moral codes or in widely held social expectations. According to a World Health Organization (“WHO”) assessment on intimate partner violence and HIV/AIDS, “men use violence against women as a way of disciplining women for transgressions of traditional female roles or when they perceive challenges to their masculinity.”

Impunity for violence against women compounds the effects of such violence as a mechanism of control. When the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalized.

The relationship between violence against women, and patriarchy; was highlighted in a landmark decision by the Constitutional Court of South Africa in 1999. The Court found that the South African Constitution imposed a direct obligation on the State to provide protection from domestic violence. The Court linked this right to protection to the right to equality and non -discrimination. Judge Albie Sachs, explained that “to the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form”

2. Culture and violence against women

While some cultural norms and practices empower women and promote women’s human rights, customs, traditions and religious values, some norms are often used to justify violence against women. Certain cultural norms have long been cited as causal factors for violence against women, including the beliefs associated with “harmful traditional practices” (such as female genital mutilation/cutting, child marriage and son preference), crimes committed in the name of “honour”, discriminatory criminal punishments imposed under religiously based laws, and restrictions on women’s rights in marriage.

However, the cultural bases of other forms of violence against women have not been adequately examined, at least in part because of narrow conceptions of what constitutes “culture.” Culture is formed by the values, practices and power relations, which are interwoven into the daily lives of individuals and their communities. Social behaviour is mediated by culture in all societies and culture affects most manifestations of violence everywhere. But the particular relationship between culture and violence against women can only be clarified in specific historical and geographic contexts. Since culture is constantly being shaped and reshaped by processes of material and ideological change at the local and global levels, the capacity to change is essential to the continuation of cultural identities and ideologies. Culture cannot be reduced to a static, closed set of beliefs and practices.

Culture is not homogenous. It incorporates competing and contradictory values. Particular values and norms acquire authority when political, economic and social developments bring their proponents to power or positions of influence. Determinations of what needs to be preserved change over time, as, for example, when male leaders

willingly accept technology that massively affects culture, but resist changes in women's status, reflecting a tendency to treat women as the repositories of cultural identity.

Women are also actors in constituting culture: they "influence and build the cultures around them, changing them as they resist, and reinforcing and recreating them as they conform." Key aspects of women's individual identities are interwoven with their cultural communities and their participation in cultural customs and practices. Women not only suffer from negative aspects of the cultures in which they live, they also benefit from and are supported by positive cultural values and practices within their communities.

Cultural justifications for restricting women's human rights have been asserted by some States and by social groups within many countries claiming to defend cultural tradition. These defences, are generally voiced by political leaders or traditional authorities; and not by those whose rights are actually affected. Cultural relativist arguments have been advanced in national contexts and in international debates when laws and practices that curtail women's human rights have been challenged. The politicization of culture in the form of religious "fundamentalisms" in diverse geographic and religious contexts has become a serious challenge to efforts to secure women's human rights.

The tension between cultural relativism and the recognition of women's human rights, including the right to be free from violence, has been intensified as a result of the current heightened attention to State security issues. The resort to cultural relativism has been "made worse by the policies adopted since 11 September 2001, by many groups and societies that feel threatened and under siege". This tension poses a notable challenge in ensuring that violence against women is kept firmly on the international and national agendas with the priority it requires.

The ways in which culture shapes violence against women are as varied as culture itself. For example, the phenomena of "date rape" and eating disorders are tied to cultural norms but are not often labelled as cultural phenomena. In the United States of America, researchers report high rates of violence against women in casual and longer-term romantic dating relationships, which are a culturally specific form of social relations between women and men, with culturally constructed expectations. According to one agency "40 per cent of teenage girls ages 14 to 17 say they know someone their age who has been hit or beaten by a boyfriend [and] one of five college females will experience some form of dating violence". Eating disorders, including starvation dieting (anorexia) and bulimia (binge eating), are similarly tied to cultural values: "studies show expectation of body weight and appearance, particularly oriented towards girls, come from parents, peers, the dieting industry and images in the media".

Various manifestations of femicide (the murder of women because they are women), illustrate the interrelationship between cultural norms and the use of violence in the subordination of women. Femicide takes place in many contexts: intimate partner violence, armed conflict, workplace harassment, dowry disputes and the protection of family "honour". For example, crimes committed in the name of "honour", usually by a brother, father, husband or other male family member, are a means of controlling women's choices, not only in the area of sexuality but also in other aspects of behaviour, such as freedom of movement. Such crimes frequently have a collective dimension, with the family as a whole believing itself to be injured by a woman's actual or perceived

behaviour. They are often public in character, which is integral to their social functions, which include influencing the conduct of other women. In other cultural contexts, preoccupation with women's sexuality is manifested not only in practices for enforcing chastity but also in the way female sexuality is turned into a commodity in the media and advertising.

The role of culture as a causal factor for violence against women must therefore be investigated within diverse cultural settings, taking into account the many ways in which the concept of culture is used. Culture can be most usefully viewed as a shifting set of discourses, power relations and social, economic and political processes, rather than as a fixed set of beliefs and practices. Given the fluidity of culture, women's agency in challenging oppressive cultural norms and articulating cultural values that respect their human rights is of central importance. Efforts to address the impact of culture on violence should therefore take direction from the women who are seeking to ensure their rights within the cultural communities concerned.

3. Economic inequalities and violence against women

Economic inequalities can be a causal factor for violence against women both at the level of individual acts of violence and at the level of broad -based economic trends that create or exacerbate the enabling conditions for such violence. These economic inequalities can be found at the local, national and global level. Women's economic inequalities and discrimination against women in areas such as employment, income, access to other economic resources and lack of economic independence reduce women's capacity to act and take decisions, and increase their vulnerability to violence.

Despite overall advances in women's economic status in many countries, many women continue to face discrimination in formal and informal sectors of the economy, as well as economic exploitation within the family. Women's lack of economic empowerment, also reflected in lack of access to and control over economic resources in the form of land, personal property, wages and credit, can place them at increased risk of violence. In addition, restrictions on women's control over economic resources, such as household income, can constitute a form of violence against women in the family. While economic independence does not shield women from violence, access to economic resources can enhance women's capacity to make meaningful choices, including escaping violent situations and accessing mechanisms for protection and redress.

Policies such as structural adjustment, deregulation of economies and privatization of the public sector have tended to reinforce women's economic and social inequality, especially within marginalized communities. Economic restructuring has reduced the capacity of many national Governments to promote and ensure women's rights through public sector programmes and social spending.

WHO has noted the disruptive effects of globalization on social structures and consequent increases in overall levels of violence in society: "societies with already high levels of inequality, which experience a further widening of the gap between rich and poor as a result of globalization, are likely to witness an increase in interpersonal violence. Rapid social change in a country in response to strong global pressures — as occurred, for instance, in some of the states of the former Soviet Union — can overwhelm existing social controls over behaviour and create conditions for a high level

of violence.” Since many existing social controls already rationalize or endorse various forms of violence against women, the social changes triggered by globalization in many contexts have tended to produce new forms or worsened existing forms of violence against women, including trafficking on a global scale.

The large-scale inequities and upheavals associated with globalization exacerbate the conditions that generate violence against women by amplifying disparities of wealth and social privilege and impoverishing rural economies. They can also expose women to violence in the form of exploitative working conditions in inadequately regulated industries. At the same time, industrialization and economic migration offer women waged work outside the traditional boundaries of gender roles within their communities. The destabilization of traditional gender roles coexists with new permutations of gender subordination, however, and women are employed primarily in sex-segregated and low-wage industries.

The current Special Rapporteur on Violence Against Women has noted that while women’s migration as workers or as “members of transnational households has the potential to empower women and give them direct access to international human rights law, opposing trends have also been observed. Some local and ‘traditional’ forms of violence against women have become globalized and others such as trafficking have become increasingly prevalent”.

In many countries, women migrants also face discrimination based on race, ethnicity or national origin, little or no access to social services and increased domestic violence. Women who are undocumented or who do not have legal migration status are at even greater risk of violence and have even less access to protection or redress.

4. Militarism and Violence Against Women

Cynthia Enloe, professor of international development and women’s studies at Clark University, has written extensively on gender and militarization. She says: “United Nations and humanitarian workers in war zones now talk about the causal relationship between military and domestic violence -- that is not a trivial understanding.”⁶ In a groundbreaking case in Israel, reported in the Mail and Guardian on October 26, a young Israeli girl Idan Halili, just 19 years old, has written a feminist critique that has astounded established feminist voices around the world. Her analysis takes the form of a letter sent to the Israeli army asking for exemption from compulsory service, based on a feminist rejection of militarism. Last December, having spent two weeks in military prison because of her refusal to serve, Halili was exempted from conscription. “The army is an organisation whose most fundamental values cannot be brought in harmony with feminist values,”⁷ she wrote in her request for exemption. Halili argues that military service is incompatible with feminist ideology on several levels: because of a hierarchal, male-favouring army structure; because the army distorts gender roles; because of sexual harassment within the army; and because of an equation between military and domestic violence.

According to feminist scholars, traditional theories of militarism and militarization are inadequate because they are gender-blind. They point to the importance of

⁶ Mail & Guardian, 26 Oct, 2006.

⁷ Ibid

analysing the linkages between different categories of violence, oppression and threats to security and understanding that all three are mediated by factors like race, class and gender. Many argue that militarism and patriarchy are inter-dependent, while militarization and conventional notions of masculinity are intertwined. Some see parallels between sexism and militarism, with the former propounding the notion that men are aggressive by nature and the latter proposing that the social order must be maintained through force. If patriarchal structures are reinforced by militarization, the latter props up gender differences, affecting men and women in dissimilar ways. The sexual violence experienced by women in situations of armed conflict, whether between states or communities, is but one example of this reality. Ammu Joseph, Indian journalist writes: "Militarism and Women is pertinent for the connection it establishes between seemingly disparate developments which link up to form a grid of oppression and violence. And it is mostly women who are at the receiving end."⁸

STATE RESPONSIBILITY

In many ways, governments create the conditions for gender equality. They can remove legal barriers and change the law to promote gender justice; they can pay attention to gender equality in the design of policies and programmes; and they can encourage supportive institutional environments. As the biggest direct and indirect employers, government can set standards and provide an example to others. Finally, political leaders can advocate and promote gender equality, and encourage their followers at all levels to do so. The South African government displays a superficial understanding of gender equality and how it links with violence against women. Human rights is understood much more in the political context than in the social context in terms of how it translates into the home, into individuals rights and freedoms. It is largely framed legalistically with an emphasis on recourse being provided for violations of human rights rather than a systematic roll out of awareness and in depth education of the population. This is evidenced, among other indicators, by the huge focus on events and celebrations like National Women's day and the 16 days of activism and the inadequate resources and programmes.

THE LEGAL FRAMEWORK

The development and discourse of women's rights was fomented in the 1990's, as part of the transition to democracy. It was in the context of the building of women's rights discourses among proponents of a new democratic government that the apartheid government introduced the Prevention of Family Violence Act in 1993. Since 1994, a pivotal mechanism for challenging gender based violence is the Bill of Rights, as contained in Chapter 2 of the Constitution, 1996, Act No 108 of 1996. This entrenches the right of every person to equality and to freedom and security. It applies to all people in the country and requires respect for the rights of all people. Most importantly, it imposes a duty on the government, including the police, to take appropriate steps to ensure that the human rights of persons are respected. Watchdog bodies, entrenched under the Constitution to protect women's rights are the Commission on Gender Equality and the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women. Both bodies have addressed

⁸ The Hindu, 12 May 2002. www.hindu.com/2002/05/05/stories.

gender-based violence as pivotal obstacles to women's rights, security and freedom. The Legal Framework with the Human Rights Instruments and Gender Focal points established nationally, provincially and locally demonstrate a similar superficial understanding and internal integration of human rights, women's human rights and the intersection of the upholding of those rights with gender based violence. These instruments do not work in co-ordination or from a systems perspective.

THE HUMAN RIGHTS FRAMEWORK

Fisher (2005), writing for a UN expert group meeting, says that a human rights approach provides a framework within which governments and others can be held to account and which can be used to demand women's rights:

1. Human rights are universal - they belong to all people equally.
2. They are indivisible - no one right is more important than another rights. All rights are of equal value and they cannot be separated.
3. Human rights cannot be taken away or abrogated - the exercise of some rights can be limited, but only temporarily and under very exceptional circumstances.
4. Human rights are interdependent - the promotion and protection of any one right requires the promotion and protection of all other rights.

One of the main reasons for using a human rights framework to oppose VAW is the credibility it lends to the claim that challenging VAW is a public responsibility, requiring legal and social redress. It also makes the more powerful appeal that VAW, no matter the cultural context, is not a legitimate practice and that the individual woman's body is inviolable. Often, making this point has required courageous work on the part of women's organizations. Human rights law offers women more protection against violence than is usually recognised.

Some feminists working on the ground with VAW find that using the Human Rights framework, as the basis for the VAW work is limited. In some cases, the political will to translate the international treaties into domestic law has not happened, and where it has, it is most often not implemented adequately. There is no integrated approach from enforcing agencies and Fisher, although making a strong case for using the Human Rights, acknowledges that stopping VAW will not be achieved by legal and policy reform alone. It must be combined with changes in attitude, prejudices and beliefs that foster and reinforce VAW.

The statement from the Human Rights Watch and the Centre for Women's Global Leadership⁹ highlights the clear expectation for governments and the United Nations need to take action. The recommendation is that with political will, funding and programmes, VAW will be reduced. Our experience since 1994 shows that this is not likely to happen; at least not in the way that it is expected. Government does have immense political will but to what end is it exercised? It does not appear to be to end violence against women. There is a growing sense of unease amongst feminist activists that government's agenda is to perpetuate control over women. This agenda was brought out into the open with the Zuma case and calls into question the reliance we are placing on governments internationally and nationally to act as if they have a sincere will to end VAW.

⁹ See appendix C.

Feminist activists further state that the Human Rights framework has remained a legal tool and has not been translated nor understood in terms of how it filters down into individual rights and freedoms. More importantly, the gendered nature of rights and how they impact on women is not clear to most people. One example of this happened to a rural woman who, empowered by her training in human rights, removed the traditional head gear required to be worn in public by all married women. Her husband just calmly said that she could leave his house and was not allowed to enter his car as she continued to insist on embarrassing him in public. She caved in realising that her new knowledge could not help her, and donned her son's jacket as a temporary head cover. Additionally, the Human Rights Instruments and National Machinery have become organisations and institutions with their own 'resourcing' and capacity problems and appear to bend to party politics rather than take an unpopular stand in favour of feminist ideals.

FORMS OF SERVICE PROVISION

Civil society organisations, NGOs and women's groups have proliferated at the national, provincial and community levels since 1994. Importantly, there has been an awareness of the need for national co-ordination in recent years. This awareness led to the formation of three central national organisations: the Network of Violence Against Women, the Reproductive Rights Alliance and the South African Gender-Based Violence Health Initiative. The National Network on Violence Against Women was formed with great enthusiasm and expectation that it would become a national voice, working on behalf of regional and local organisations at the national level, creating a space for the voices of women on the ground to be heard at the highest levels in the country. This did not happen and again, South Africa witnessed intense jostling for power amongst the people appointed to carry out this task, unilateral decisions being taken without consultation on the ground, territorialism, and insecurity around the devolution of power amongst many other ills that befell this initiative. At present, some of the provincial networks are limping along with the support of local organisations (i.e. Eastern Cape Network) while the Gauteng Network and the National Network have completely collapsed.

4. Men's Organisations

Many of the men's movements around gender-based violence are linked to those surrounding HIV/Aids. The dual focus sets out to challenge the gender roles, sexual behaviour and attitudes that infringe on women's rights, jeopardise their well-being and that increase the risk of HIV infection for both women and men. The oldest and most widespread programme is the Men as Partners Programme.

Long-established organisations such as the Masimanyane Women's Support Programme have begun to establish men's programmes. Some feminists and women's organisations argue that self-contained men's programmes run the risk of focusing solely on men's concerns, losing sight of the extent to which men gain from preserving gender relations and, ultimately reinforcing masculine privilege and domination.

This is borne out in South Africa. Recent years have witnessed a rapid rise in the growth of men's movements, only some of which are conceptually and politically allied to feminist goals. A report on the Masimanyane Men's Programme therefore states: "One of the core philosophies underlying the establishment of the MMP was the belief that

projects aimed at working with men need to be closely linked with women's groups. The MMP believe that if this link is not present then there is a great risk that the realities of women's lives and experiences will be discounted and focus solely on men's lives and accounts"¹⁰ Smaller organisations include Men For Change, based in Alexandra and focusing on awareness workshops, counselling and gender training.

There is a widespread perception from women's organisations that the men's movement is largely opportunistic. These activists maintain that men see VAW as a way to gain visibility and view the issue mainly from a political and economic perspective. For example, in Butterworth as soon as the Minister Balfour heard that men were working on VAW, he swooped in to offer support despite the fact that thousands of women were being violated and needed support. Also, male activists are often more eloquent, articulate and better educated than their female counterparts (patriarchal advantages of power, language etc) and say the right things. However, in some cases, it has been known to happen that these very advocates for ending violence are themselves perpetrators of domestic violence. An example of this; is offered by Masimanyane in the Eastern Cape who employed a male gender field worker. They later discovered that while he displayed an excellent understanding of gender-based violence, he was violent and adulterous, and when found out simply absconded from the organisation. In Cathcart, Ikhwezi women's support centre trained men as part of their programme. These men are now the self appointed spokespeople for the organisation and regard the work that they do as the most important aspect. The women interviewed on this issue felt strongly that the men's movement has allowed some men to find new ways to oppress and marginalise women. They are not accountable to the women's movement and take on a life of their own and claim to be helping women like knights in shining armour. They work from a protectionist approach and claim to be helping women because they are not capable of helping themselves, evidenced by the lack of progress after so many years of activism.

Some of the women were of the opinion that this is a simplistic view and that the men's movement did have some men who are really concerned and genuinely want to be involved. However, they all agreed VAW gave men access to funding and that it was problematic that they were usurping the voice of women in some instances. The women felt that men should be engaging with masculinity issues, and understanding violence in their lives, for example what allows them to be violent and so forth.

CHALLENGES FOR IMPLEMENTATION

The UN VAW study reports the following:

1. Inconsistent efforts and inadequate resourcing, indicating lack of political will

Despite the progress of recent decades and the emergence of promising practices in many areas, the struggle to eliminate violence against women continues to face multiple challenges. At the same time, some good practices may encounter drawbacks in application, which need to be addressed. For example, while specialized procedures may be established for the purpose of expedited reporting, investigation and prosecution of cases of violence against women, in practice such procedures may be marginalized and not receive the support and resources they need to function effectively.

¹⁰ Lewis, p.5

They may at the same time result in mainstream mechanisms of justice, including the police and courts, not developing the required expertise for handling violence against women cases professionally and effectively. Similarly, alternative dispute resolution mechanisms have to be examined critically for their appropriateness and the consequences of moving responsibility for the issue of violence against women out of the mainstream justice system, especially if such alternative mechanisms place high priority on community cohesion or family reputation rather than the rights of victims.

While women's agency and empowerment are crucial dimensions of good practices, it is not always clear how these goals can be most effectively pursued. For example, so-called no-drop policies, under which the State undertakes an investigation and prosecution even if the victim/survivor wishes to drop the case. The imposition of appropriate punishments for acts of violence against women, including prison terms, may also function as a disincentive for victims/survivors to report cases when they do not want their abusive partner to be prosecuted or incarcerated for various reasons. Inconsistent efforts and inadequate resources indicate a lack of political will, and State efforts to address violence against women are neither consistent nor sustained. Many specific shortcomings; in efforts to eliminate violence against women at the national level have been identified by the human rights treaty bodies. While the reasons for such a lack of systematic effort may vary, violence against women is generally not treated as seriously as other forms of crime or human rights abuse. The level of investment and resources allocated to legal and support services, let alone prevention, remains minimal compared with many other issues.

2. Lack of a comprehensive and integrated approach

While there is wide agreement that comprehensive and coordinated multi-sectoral efforts by multiple stakeholders are necessary to eliminate violence against women, such efforts are rarely forthcoming on a large scale or in a sustained manner. Although models of comprehensive integrated approaches have been developed, these have been sporadically implemented and replication has not always been successful, owing to the absence of vital components, and resources.

3. Lack of funding

Legal, service and prevention efforts to address violence against women require a sustained funding stream. The main sources of funding are States and donors. State funding for such initiatives has historically been inadequate. Funding from donors is often project-driven, not sustained and sometimes not in line with the aspirations of women's groups working on these issues. To ensure viability and sustainability, it is being recommended that initiatives on violence against women obtain funding from the general national budget and not only from specialized funds.

4. Failure to end impunity

Although efforts to reform criminal justice systems are ongoing, including the enactment of new laws and more effective implementation of legislation, perpetrators of violence against women continue to enjoy impunity. Ensuring that perpetrators are brought to justice is more important than increasing the penalties for violence against women. In fact, demanding draconian sentences and sanctions may have the unintended consequence of decreasing reporting and convictions. At the same time,

women lose faith in justice systems where sentences are minimal and fail to offer them any protection.

5. The intersection of multiple forms of discrimination

The intersection of male dominance with race, ethnicity, age, caste, religion, culture, language, sexual orientation, migrant and refugee status and disability — frequently termed “intersectionality” — operates at many levels in relation to violence against women. Multiple discrimination shapes the forms of violence that a woman experiences. It makes some women more likely to be targeted for certain forms of violence because they have less social status than other women and because perpetrators know such women have fewer options for seeking assistance or reporting.

6. Lack of evaluation

While research on interventions has expanded considerably, the ability to demonstrate “what works” continues to be limited. Insufficient resources have been devoted to developing methodologies that can trace the subtle and profound changes necessary to end violence against women.

THE NATIONAL PLAN OF ACTION

Approximately 200 South Africans from all walks of life were invited to a three day conference outside Johannesburg to formulate a national plan of action to end violence against women in May 2006. This followed the 16 days of activism in 2005 and was held under the banner of 365 days of action to end violence against women. The conference went out of its way to accommodate language differences and to encourage the participation of every organ of society from national to grassroots in the formulation of the plan. The conference agreed on actions to be taken, time frames and roles and responsibilities in ten thematic areas. A declaration and an all-encompassing document of actions emerged to form the plan of action to end violence against women in South Africa. This conference is seen to be a watershed

While this intervention was based on concern for the rising levels of violence against women, it appears to have emerged out of ‘we must be seen to be doing something’ rather than as a result of strategic research, analysis, consultations and reflections. Organisations and individuals who participated in this exercise were largely disappointed by the fact that it was arranged by an organisation that is not seen to be a key player in the sector and therefore without a deep understanding of the issue, that it was geographically biased towards Gauteng with an emphasis on coming out with a product (declaration and plan of action) rather than with new insights into the problem and innovative ways to address it. While the plan is comprehensive and concrete, it appears to be an ambitious undertaking with a significant focus on the criminal justice and legal systems and does not have the required buy-in from all the stakeholders, especially the NGO sector who are the largest service providers. Many of the participants returned from this exercise more concerned than ever that this was yet another example of more sophisticated ‘lip service’ designed to maintain the status quo by appearing to be working towards change without the change actually happening.

CONCLUSION AND RECOMMENDATIONS

So, we have thought and talked ourselves almost to death, campaigned ourselves to exhaustion, advocated for and set in place legislation and punitive measures, fought for the overhaul of the criminal justice system, trained women around the country to understand their rights, set up economic empowerment projects to break the dependency on the abuser and still we cannot see a significant reduction in violence against women, let alone a sign that eradication is possible. What is missing? Sifting through all this information of best practices, promising practices, lessons learned, models for change there is no evidence of work being done on transformation. This is transformation of the self, others and the context. How are we working on self transformation? How are we changing ourselves so that we as feminists no longer see ourselves as under siege, fighting for space or having to fight to be heard? Can we change in ways that not only enhances all that we have learnt and transformed within ourselves and work in ways that draws in the other and the context rather than setting it up as oppositional or conflictual? Are we continuing to perpetuate territorialism, destructive competitiveness and one-upmanship in the very way that we perceive gender power and authority to be manifesting and used against us?

Moreover, does love have a place in the way we work and where does it fit in? What of spirituality, the feminine as opposed to masculinity, building relationships, encompassing rather than excluding? Are young activists; who enter the feminist arena supported by a disciplined cadre of experienced, mature leaders who are willing to mentor them, and pave the way forward for them, in a way that supports their growth and maturing process? Do we taking this process for granted? Could we perhaps develop incubators, schools where young people can be mentored into transformative-thinking that brings together the inner work as well as the intersection with gender and other socio-political issues?

This is a radical move away from the external restructuring that we have been engaging in for the past 25 years in South Africa and more than 50 years in the world. We have worked in a fragmented way, with ideas like inner transformation, or personal self growth, of love and transformation all being talked about in pockets or special places and sometimes sneered at as flaky, esoteric and new age nonsense. Many have only been able to withstand the challenge of remaining in this highly contested sector precisely because of the inner transformation work that has happened, consciously or unconsciously. Whether we call it maturation or wisdom, the process is one that requires deep self-reflection and the ability to take responsibility for ones own issues and understand what can be changed internally and what has to be worked on externally. Monica McWilliams, an effective gender activist who brought about profound changes in Northern Ireland and continues to work towards changing the context there, attests that she would not have managed to continue to engage in the struggle there if she was not able to nurture herself internally and garner unconditional loving support from the women around her. How do we as women support and work with each other in a way that allows growth and advancement? Or do we just don the mantle of masculine power as soon as we are in a position to flex some muscle and become imitators of our oppressors, lashing out at both men and women whom we perceive as threats to our power? Do we model the changes that we want to see in society, personally, organisationally and in our communities?

It seems what is missing is intersectionality and integration – a working together of all the different parts that make up the whole. We need to bring together the disparate

elements of transformation that make up the whole i.e. the self, the other and the context and work on them simultaneously, with a clear understanding of the linkages between them as a whole system and how impact on one part affects the other parts. Until we see the connections between the self, the other and context and until we see how the whole system works together as a whole, noticing how changes in each part affects the other parts, we will just continue to struggle in a disjointed way to change only parts of the whole. It will take courage, because it means radically transforming from the personal to the political. Are we bold enough to take those steps or is it more comfortable to stay with what we know?

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Lesley Ann Foster: Director, Masimanyane Women Support Centre, East London

Prof Sheila Meintjes: Feminist, Wits University, Johannesburg

Fezeka Maqwati, Director: Peddie Women's Support Centre, Eastern Cape

Doreen Foster: Trainer, Masimanyane Women's Support Centre

Reported interviews with beneficiaries through Fezeka Maqwati

Lumka

Mzwandile

Khanyisa

Appendix A

Selected Instruments of Law, Policy and Practice on Violence Against Women

International Treaties

Convention on the Elimination of All Forms of Discrimination against Women
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
International Covenant on Civil and Political Rights and Optional Protocol
International Covenant on Economic, Social and Cultural Rights
International Convention on the Elimination of All Forms of Racial Discrimination
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Convention on the Rights of the Child and Optional Protocols
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations
Convention against Transnational Organized Crime
Rome Statute of the International Criminal Court
Geneva Convention relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention)

Regional Treaties

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

International Policy Instruments

Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights
Programme of Action of the International Conference on Population and Development
Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women
Outcome document of the twenty-third special session of the General Assembly entitled: "Women 2000: Gender equality, development and peace for the twenty-first century" (General Assembly resolution S-23/3)

Selected recent General Assembly resolutions

Declaration on the Elimination of Violence against Women, resolution 48/104
Crime prevention and criminal justice measures to eliminate violence against women, resolution 52/86
United Nations Millennium Declaration, resolution 55/2a
Traditional or customary practices affecting the health of women and girls, resolution 56/128
Elimination of domestic violence against women, resolution 58/147

Working towards the elimination of crimes against women and girls committed in the name of honour, resolution 59/165

Trafficking in women and girls, resolution 59/166

Violence against women migrant workers, resolution 60/139

2005 World Summit Outcome, resolution 60/1b

Security Council resolution

Resolution 1325 (2000) on women and peace and security

Commission on Human Rights resolution (most recent)

Elimination of violence against women, resolution 2005/41

United Nations treaty bodies

Committee on the Elimination of Discrimination against Women: general recommendation No. 12, violence against women

Committee on the Elimination of Discrimination against Women: general recommendation No. 14, female circumcision

Committee on the Elimination of Discrimination against Women: general recommendation No. 19, violence against women,

Committee on the Elimination of Racial Discrimination: general recommendation No. 25, gender related dimensions of racial discrimination

Human Rights Committee: general comment No. 28, equality of rights between men and women (article 3)

27 06-41974

Committee on Economic, Social and Cultural Rights: general comment No. 14, the right to the highest attainable standard of health

Committee on Economic, Social and Cultural Rights: general comment No. 16, the equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3)

Inter-Parliamentary Union

How Parliaments can and must promote effective ways of combating violence against women in all fields, resolution of 12 May 2006

a) Particularly para. 25.

b) Particularly para. 58 (f).

c) General Assembly resolution 60/251 established the Human Rights Council. It also transferred to the Council all existing mandates, mechanisms, functions and responsibilities of the Commission on Human Rights. The resolution also extended these mandates by one year within which the Council is to complete a review.

Appendix B

UN: New Report Says Violence Against Women Is a Human Rights Violation *Classification Obliges States to Punish Perpetrators and Prevent Abuse*

(New York, October 9, 2006) – Human Rights Watch and the Center for Women’s Global Leadership at Rutgers University welcomed a report issued by the United Nations today that classifies abuse against women – whether it happens in the home or elsewhere – as a human rights violation. As such, states are obliged by international human rights standards to hold perpetrators accountable.

The 140-page report, entitled “In-depth study on all forms of violence against women,” which was issued by Secretary-General Kofi Annan’s office, confirms that violence against women by spouses, family members and employers is a human rights violation, settling any outstanding debate on this issue. By squarely stating that it is, the report says that governments have an obligation to protect women whether the perpetrators are state or non-state actors.

“This report acknowledges for the first time from the highest levels of the United Nations what human and women’s rights advocates have documented over the past few decades: violence against women is a massive human rights violation that is both a cause and a consequence of deeply ingrained inequality between men and women,” said Charlotte Bunch, executive director of the Center for Women’s Global Leadership at Rutgers University, and a member of the secretary-general’s International Advisory Committee for the study.

The report describes promising practices in the fight against violence against women, but dismisses state efforts so far as mostly ineffective. Even with a sophisticated analysis of the problem and, in certain cases, strong laws related to this violence, most national-level responses have been inadequate, and have not eradicated the impunity perpetrators too often enjoy.

LaShawn R. Jefferson, executive director of Human Rights Watch’s Women’s Rights Division, provides that “the secretary-general’s study conveys a very simple message.” Furthermore, “the individual who carries out any form of violence against women has committed a crime. A government that does not develop, fund and implement all necessary laws and programs to prevent and to punish this violence violates international human rights law. Both the individual committing the violence and the government blithely letting it happen must be held responsible.”

The study highlights the need for additional attention to violence suffered by women from marginalized groups (such as indigenous peoples or ethnic minorities). The report also draws attention to the problem of under-documentation of violence and control of women’s bodies and sexuality as an insidious component of gender inequality. In addition, the study addresses violence in conflict situations, pertinent issues related to criminal justice systems, service provision for survivors, the need to work with men to address violence, and needs of women who are facing multiple forms of discrimination.

It is incumbent upon the next UN secretary-general to commit to advancing the specific recommendations set out in Kofi Annan’s study, and it is imperative for human rights advocates to keep pressure on governments to fulfill their responsibility, said

Human Rights Watch and the Center for Women's Global Leadership upon the launch of the report.

The report's recommendations are directed at member states and at various entities within the UN system, and include a call to document and register all forms of violence against women and to provide leadership at all levels in the condemnation and prevention of violence against women.

"What the secretary-general's study makes clear is that this violence is not inevitable: with sufficient political will, funding, and carefully developed and targeted programs, violence against women can be significantly reduced," said Bunch. "The issue now is, will governments and the United Nations make a firm commitment to act on the findings of this report?"

Women and HIV/AIDS

Sisonke Msimang

November 2006

Thembi: We are very close. Everyone knows we are very close. If they see Melikhaya they see me. We are always together. He met me and I met him and that was it. [singing] I remember when I find out about my HIV status it was very painful to tell him. I thought, what if I've also infected him? Now I've ruined my life and I've ruined everybody's life.

Thembi: Melikhaya, do you ever wish that maybe you would have never met me?

Melikhaya: No, [laughs] just because the only thing is that I love you. You know that?

Thembi: Yes, but I am the one who has infected you.

Melikhaya: I don't want to blame you. You didn't chase after AIDS. You didn't go to the top of the mountain and say you want to have AIDS, you know? And I don't want you to blame yourself. Just be strong.

Thembi: OK. For me what scares me most is I think we are not going to die at the same time if we die.

Melikhaya: I know that you think that if you die first I'm going to have another girlfriend. [laughs]

Thembi: No! [laughs] No! Really I'm thinking if one of us dies, how would it be. At least if we were going to die [Thembi and Melikhaya speak simultaneously] we should die at the same time [laughs]

Melikhaya: Give me a kiss for that. [kiss]

Thembi Ngubane¹

Introduction

There are two stories of AIDS in South Africa. The first has dominated the nation's headlines for the last ten years. It has been the story of an obstinate government, unwilling to listen to the voices of the most marginalised in society, a government that refused - for over ten years - to accept that it had a serious public health challenge because its president did not like the associations between sexuality and race that happened to accompany this epidemic. It has been the story of a government that was eventually brought to the table by legions of brave activists, kicking and screaming. It has been the story of leaders so aloof that they had to be forced by the highest court in the land to uphold the principles firmly laid out in the Constitution.

¹ "Out of Hiding, Into the World: Thembi's AIDS Diary." All Things Considered. National Public Radio. 19 April 2006. Transcript.
<<http://www.npr.org/templates/story/story.php?storyId=5311801>>.

The second story is that of a rapidly rising stack of numbers; the steady curving upwards of the death axis on demographic charts, the ascending line indicating the sharp inclines in 'HIV prevalence' year after year after endless year. It is the story of the spike in the middle of the mortality graph, the large bulge in the middle of so many PowerPoint presentations, pregnant with pain. It has been the story of those women who sit in the middle of the ages, dying in their thirties; women who should be alive today if they had been born in a different country, under different circumstances, in a different time.

This second story does not carry the whiff of newsprint. It has not been a particularly well-documented aspect of the story. For a media enamoured of political headlines, the human side; the steady waves of death across our communities have been left largely uncovered. And who could blame them? Beyond the pictures of emaciated bodies, bones poking through black and white photographs, what more has there been to say? It is not easy to write a story that smells of vomit and diarrhoea, that reeks of the deaths of brothers and sisters, favourite Aunties and cousins, nephews who could have been somebody, nieces who already were somebody.

This second story carries the name of my aunts – one on my father's side and the other on my mother's side, both dead. It carries the name of my cousins who have buried both their parents in Swaziland and are world weary beyond their years. This is a story that even folded Nelson Mandela's son into its arm: Makgatho. This is a story that knows the sound of tears, the wailing of old people who never thought they would lose their children, so many children. It has the steely taste of fear; a cold, shiny hard feeling – like metal chairs at an HIV testing centre. This story is our story, the story of what happened to our nation as our leaders debated and dug in their heels. It is the story that can only be told by those of us who were still alive when in 2003, the pills finally came.

This paper tells both stories, and looks particularly at the experiences of women and men who are seeking to shape a new place for themselves in a new nation. AIDS is important in its own right, but also because it has in many ways defined post liberation struggles between the state and civil society, between women and men and in many instances, between former comrades. The paper is divided into three parts. The first section tells the story of the political debates. The second section looks at the personal experiences of women, and the third section looks at what the analysis means in terms of feminist activism and leadership. Critically, the paper grapples with the question of what AIDS mean for a nation beset by poverty, inequality, lost identities and dispossession, a nation struggling to be a democracy not in name only, but in practice.

Part 1: The political drama

Until 1998, South Africa had one of the fastest growing epidemics in the world.² While the rate at which the virus is spreading has slowed considerably in the last eight years, the number of people living with HIV continues to grow.³ The figures are beginning to plateau, but there are still too many new infections. In part this is because the history of HIV prevalence in South Africa mirrors the transition from the

² "Reconciling antenatal clinic-based surveillance and population-based survey estimates of HIV prevalence in sub-Saharan Africa", UNAIDS/WHO, August 2003.

³ UNAIDS/WHO, "2006 Report on the Global AIDS Epidemic." UNAIDS Global Report, 2007 <<http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/Default.asp>>.

apartheid past to the democratic present⁴. As Mandela took up the first presidency of the new South Africa, HIV was rapidly making its way into the population. As the nation celebrated the set up critical institutions to defend and protect the rights of all South Africans, there was a silent epidemic already raging within our blood.

In 1990, when the first antenatal survey was conducted, less than one percent of women attending ANC clinics were HIV infected.⁵ By the following year, the number of diagnosed heterosexually transmitted HIV infections equaled the number transmitted through sex between men. Since this point, heterosexually acquired infections have dominated the epidemic. By 1993, the Department of Health noted that the number of documented HIV infections had increased by 60% in the previous two years and the number was expected to double in 1993. The HIV prevalence rate among pregnant women was already 4.3%.⁶ It is important to note here that the definition of an epidemic in any context, is where more than one percent of the population is When the first democratically elected government took power, it made a number of immediate changes that demonstrated its commitment to improving the health of the majority of South Africans. The first among these was President Mandela's announcement that all pregnant women and children under six would receive free health care at government hospitals and clinics.⁷ The same year then minister of health, Nkosasana Zuma used the National AIDS Convention of South Africa (NACOSA) strategy as the foundation of the Government's AIDS plan. The NACOSA plan had been developed by civil society organizations in the build-up to the democratic transition.⁸ By 1996, HIV prevalence amongst pregnant women had skyrocketed to 12.2%. The following year, 1997, the figure had risen to 17%.⁹

By 1998, it was clear that AIDS was spiraling out of control and that something needed to be done. A review by the Ministry of Health indicated that the leadership within the South African government had been virtually nonexistent¹⁰. Instead of taking decisive action to prevent new infections, the government had dabbled in amateur science – looking for a quick fix to a very complicated problem. Deputy-President Thabo Mbeki and Nkosasana Zuma (then Health Minister) invited cryogenics researcher Olga Visser and two of her associates to a cabinet meeting where they promoted their new drug, Virodene. They requested Cabinet to approve 3.7 million rand to enable them to continue their search for a cure for AIDS. Following the meeting, both Mbeki and Nkosasana-Zuma publicly criticized the Medicine Control Council (MCC) for not supporting the funding of a Visser's potentially life-saving drug. However it quickly became apparent that the so-called wonder drug was simply a chemical solvent used in commercial dry-cleaning

⁴ South Africa, Department of Health, HIV/AIDS/STD Strategic Plan for South Africa: 2000-2005 (International Institute for Educational Planning, 2000) <<http://www.doh.gov.za/aids/docs/aids-plan/>>.

⁵ "Reconciling antenatal clinic-based surveillance and population-based survey estimates of HIV prevalence in sub-Saharan Africa", UNAIDS/WHO, August 2003

⁶ South Africa, <<http://www.doh.gov.za/aids/docs/aids-plan/>>.

⁷ Rajendra Kale. "South Africa's Health: Impressions of Health in the New South Africa: a Period of Convalescence," *BMJ* 29 April 1995, 1119-1122.

⁸ Graham Pembrey, "HIV/AIDS in South Africa," *AVERTing HIV/AIDS AVERT*, April 01, 2008 <<http://www.avert.org/aidsouthafrica.htm>>.

⁹ South Africa, <<http://www.doh.gov.za/aids/docs/aids-plan/>>.

¹⁰ Department of Health, National STD/HIV/AIDS Review Report (Department of Health, Directorate HIV/AIDS and STDs, Pretoria, 1997).

operations, and had no proven effects of the HI-virus.¹¹

The ANC leadership's interest in obscure science and its flirtation with AIDS denialists marked a long and dark period in the fight against AIDS. While activists on the ground were seeing an increasing number of deaths and illnesses, there was clearly a disconnect at the level of the state. The following year, the Treatment Action Campaign (TAC) was founded. The objective of the organization was to advocate for the rights of people living with HIV/AIDS. The group's first priority was the development of a national treatment plan for those who were already infected with HIV. In its first few years of existence, TAC had a cordial relationship with the state. TAC was present when then Deputy-President Thabo Mbeki launched the Partnership Against AIDS, a government-civil society initiative to fight the disease. He noted in his speech at the launch that 1500 South Africans were becoming infected with HIV every day.¹²

Despite the government initiative, HIV prevalence rate among pregnant women continued to climb. By 1999 it was 22.4%.¹³ This was the year in which Mbeki ascended to the Presidency, appointing a new health minister: Manto Tshabalala-Msimang. In the portfolio that she assumed before becoming the Health Minister, Tshabalala-Msimang had been widely respected both within the Cabinet and by women's rights and other civil society groupings. She had been a tough Deputy-Minister of Justice in the Mandela Cabinet. One of the accomplishments of which she had publicly acknowledged that she was most proud, was her success in developing and winning support for the Domestic Violence Act. She had also been a proponent of the Choice on Termination of Pregnancy Act within the ANC Women's Caucus. Whereas he had previously been known as an independent and feisty party member, in her new post, Tshabalala-Msimang seemed to take her cue from her new boss. Rather than providing key advice, as is typical of ministers, Tshabalala-Msimang supported the misguided curiosities of the President.

By 2000, the political crisis vis a vis AIDS had reached its height. President Mbeki addressed the International AIDS conference that was held in Durban. At the time, South Africa had the highest number of people living with HIV in the world – almost five million people. Yet the president's speech avoided any explicit reference to the words HIV and AIDS, focusing instead on poverty. This speech took place against the backdrop of increasing frustration amongst activists. In the years since the Virodene incident, Mbeki had become adamant that there were alternative ways of understanding HIV beyond the conventional. He suggested that asking questions was healthy, and sought to understand why HIV affected Africa disproportionately. The answer, he suggested, was poverty, not a virus that - as some members of Presidential Panel he had constituted indicated - was difficult to locate. Later that year, Mbeki's spokesperson, Parks Mankahlana, died due to what was widely speculated in the media were AIDS-related complications. Cullinan (2001) has noted that the President "appealed to the nation to stop speculating on the cause of Mankahlana's death. In a widely reported address to a memorial meeting in East London, Mbeki said: 'When Nthabiseng says this is what my husband suffered from and this is what killed my husband I would hope, truly hope, that none of us will take

¹¹ Mail & Guardian (Johannesburg) - March 6, 1998, "The real Virodene scandal."

¹² Thabo Mbeki, "Declaration Of Partnership Against Aids," address by Deputy President, 9 October 1998 < <http://www.anc.org.za/ancdocs/history/mbeki/1998/tm1009.htm>>.

¹³ UNAIDS/WHO
<<http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/Default.asp>>.

it upon ourselves to come to a conclusion that we know better than she. Hopefully the matter will be allowed to rest. There's no political gain to be achieved by anybody to engage in something which is very deeply painful to many people very close to Parks.”¹⁴

While the President's statements resonated with many who felt that the media had gone too far, and indeed believed that the right to privacy, even in death was an important component of the right to dignity, others felt that Mbeki's defence of his former employee was self-serving. They argued that the President wanted to be able to continue to deny the extent to which AIDS had made inroads at all levels of society.

By the turn of the century, the HIV prevalence rate among pregnant women had hit almost 24.8%¹⁵. Despite this, there was no clear government strategy regarding how to treat and manage HIV infection. The prevention campaigns developed by various NGOs were among the liveliest, and innovative in the world, but were simply not scaled up enough to gain traction because they did not have the weight of government systems behind them. Many programmes also failed to acknowledge the deeply rooted gender and other power imbalances that underlie HIV infection.

As civil society organizations wondered what had happened to the government of the people, and as the general public grew increasingly confused about the debate about the causes of AIDS, the statistics continued to look grim. A bitter and boisterous court battle began, with the Treatment Action Campaign marshalling broad-based support from communities badly affected by HIV. Their victory in the High court forced the government to make the AIDS drugs AZT and nevirapine (NVP) available to pregnant women. Both substances are antiretroviral drugs that when administered appropriately can significantly reduce the incidence of vertical transmission of HIV during labour and childbirth. The government argued that the treatment had not yet been proven safe and the TAC countered this, embarking on a massive public education drive to demonstrate that the government's concerns were not legitimate.

In 2003, after a protracted and highly public fight, in which civil society organizations conducted 'die-ins' and staged mock arrests of the Minister of Health, charging her with 'murder,' and marched to parliament on numerous occasions, the government approved a plan to make antiretroviral treatment publicly available. By this time the HIV prevalence rate among pregnant women had escalated to 27.9%.

Quite quickly, the rollout of antiretroviral drugs began. Today, South Africa has the biggest ARV programme in the world. Almost 200 000 South Africans are receiving ART, and there is at least one service point for AIDS related care and treatment in all fifty-three health districts¹⁶. With significant support and cooperation from civil society organizations, the government has met many of its own treatment access targets, and in the last year progress has accelerated dramatically¹⁷. Community forums have been established to provide reports to provincial health officials, alerting

¹⁴ Cullinan, Kerry. "The Media and HIV/AIDS. A blessing and a curse," AIDS Bulletin 10 (July, 2001).

¹⁵ UNAIDS/WHO

<<http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/Default.asp>>.

¹⁶ Plusnews interview with Dr Nomonde Xundu, Chief director, National Department of health' HIV/AIDS Unit, 13 April, 2005.

¹⁷ Nhlanhla Ndlovu and Rabelani Daswa., "Monitoring AIDS Treatment Rollout in South Africa: Lessons from the Joint Civil Society Monitoring Forum (JCSMF)," Budget Brief No. 161. AIDS Budget Unit (ABU) – IDASA 13 April 2006 < <http://www.idasa.org.za/>>.

them to bottlenecks, and to clinics where there are problems with service provider capacity, drug shortages and other issues. The South African ARV programme is now larger than Brazil's. Yet, unlike Brazil and Thailand, both of which have launched significant public health programmes to combat HIV, South Africa has yet to witness a significant decline in HIV prevalence. The latest statistics indicate that the HIV prevalence rate among pregnant women is 30.2%.

Part 2: The social drama

The obvious question is why. Why do the HIV prevalence figures remain so high when there has been so much effort over the last few years? Billions of condoms that have been distributed since the early 1990s, and massive public education campaigns are visible on billboards and in various media across the country. Yet the virus remains a significant challenge, with large numbers of new infections on an annual basis. The epidemic may have stabilised in the past few years, but it has done so at extremely high rates, and the global AIDS body UNAIDS indicates that there is no strong evidence yet of declines in HIV prevalence.

Is behaviour-change possible?

There are a number of social and demographic theories that have been put forward to explain why HIV prevalence figures remain high. The first, and most obvious from a public health perspective, suggests that behaviour change is a long, slow process. In the early days of the epidemic in South Africa, there was a belief that once people knew that AIDS was real, and once they were aware of how to protect themselves from infections, they would simply adopt the appropriate behaviours. In these days there was a heavy emphasis on the ABC strategy – Abstain, Be Faithful and Condomise. But as experts now confirm, and as feminists have argued from the beginning, the issues of profound vulnerability and inequality that drive HIV transmission are much more complex than most people initially thought. There have been a number of feminist critiques of the ABC model. Msimang and Ekambaram (2003) argued that without the ability to control their sexual lives women would be in no position to abstain from sex, especially in a country like South Africa where gender-based violence is rife. They also suggested that 'faithfulness' with a partner who has multiple partners has no protective benefits, and women had little use for messages that encouraged them to use condoms if they were unable to convince their partners to actually put the condoms on.¹⁸ The feminist argument has been that none of the existing approaches to HIV prevention have taken women's rights seriously enough. Without shifting deeply gendered dynamics within intimate and familial relationships between women and men, and without addressing the root causes of male entitlement and female subservience, feminists suggested that AIDS strategies were doomed to fail.

The Relationship between HIV Vulnerability and Human Rights

Based on these critiques, as well as epidemiological data about concentrated epidemics amongst prisoners, sex workers, and intravenous drug users, human rights activists have in recent years sought to demonstrate that there is a direct link between broader forms of social marginalisation and vulnerability to HIV infection.¹ In Eastern and Central Europe, intravenous drug users have been virtually ignored by many states, driving HIV prevalence amongst some populations of IDUs to levels of

¹⁸ S. Msimang and S. Ekambaram, "Moving Beyond the Public: The Challenge of Women's Political Organising in the Time of AIDS." *Development Update*, 5(3): 69-92. Dec 2004 <<http://www.ponline.org/docs/1636/290917.html>>.

sixty percent and higher. Indeed the HIV epidemics in Russia and China are the fastest growing in the world, driven largely by intravenous drug use. In East and southern Africa, HIV prevalence amongst sex workers remains unacceptably high in some areas, again because of social neglect. On the contrary, surveys of sex workers in Senegal, where prostitution has been legal since 1970, and sex workers over the age of twenty-one had to enrol in a medical services programme, HIV prevalence rates both have remained relatively low, although in recent years there has been an increase in HIV prevalence amongst sex workers, this is mainly amongst those who are 'unregistered.' The Senegal example illustrates that time and again, the failure of states to provide decent health care, information, education and other basic rights to the most marginalised of their citizens results in predictably high rates of ill-health. Communities that are vulnerable to HIV are driven underground both because of existing stigma against them, as well as because of the stigma associated with HIV infection: a double jeopardy that efficiently identifies and infects the weakest members of society.

Concurrency and Sexual Networks

In the last year, there has been significant interest amongst social scientists in Europe and North America, in the notion of 'concurrent transmission' due to sexual networks. As in many other parts of Africa sexual networks in South Africa tend to spread out horizontally rather than sequentially. This means that although Africans don't have a higher number of lifetime sexual partners than people in other parts of the world, Africans do tend to have a higher number of *concurrent* sexual partners than people in other parts of the world. A number of surveys indicate that both men and women frequently report having two or more concurrent sexual partners.ⁱⁱ This means that if one partner within a sexual network is HIV positive, the chances of that infection spreading are significant. In contrast, in Europe and North America sexual relationships tend to take place one after the other, making people 'serial monogamists,' while in Asia people tend to practice monogamy with occasional one-off sexual liaisons with sex workers. In both the latter, sexual relationships with non-regular partners tend to be perceived as risky and therefore have higher chance of being 'protected' sexual acts.¹⁹ In Africa however, men tend to be in concurrent sexual relationships with many wives and/or long-term girlfriends. Men tend to have intimate emotional relationships with many of their partners. While condom use is fairly high across Africa with non-regular partners, especially with commercial sex workers, trust is a significant factor in deterring couples from condom use.

This theory of sexual networking has been used to mount renewed campaigns across sub-Saharan Africa that focus on partner reduction. The US government in particular has been a strong proponent of the theory. It's ideologically-driven President's Emergency Plan for AIDS Relief (PEPFAR) programme has taken on the theory as evidence that the 'B' in the ABC plan has merit. Yet there has been little debate and discussion of this theory by African activists and academics. While there is little space within this paper to reflect on concurrency and its implications for HIV prevention amongst women, it does present an opportunity craft the beginnings of an analysis that will need to be taken further elsewhere.

While the difference between African concurrency and Western serial monogamy is interesting, it is hardly news to African communities. Indeed since the International Conference on Population and Development (1994) in Cairo and the Fourth World

¹⁹ The International Bank for Reconstruction and Development / The World Bank, [AIDS in South Asia: Understanding and Responding to a Heterogeneous Epidemic](#) (Washington DC: The World Bank, 2006).

Conference on Women (1995) in Beijing, African women have invested significant energy in re-politicising “health, reproduction and sexuality” (Horn, 2003). As African feminists have reclaimed these debates from policy-makers who framed issues in terms of population control and family planning throughout the 1980s, they have helped to develop a discourse that places these concerns in the domain of “social and economic justice, and, ultimately, at the centre of the achievement of democracy.”²⁰ Thus, African women have insisted in recent years that development programmes seeking to address HIV must place women at the centre of their strategies, and must use as their basis, women’s rights to decide on the terms of their sexual expression and engagement.

The attempt by public health specialists to take back the debate by putting it into terms that almost “naturalise” African sexual behaviour, is hardly constructive. Although Epstein points clearly to the behaviour of men, and to culture as the real issues underlying this horizontal form of infection, a number of other authors suggest that extensive partnerships are both a male and a female phenomenon in Africa. The narrow anthropological cum public health argument about concurrency obscures the real issues. The core issue is that if women and men had respectful relationships in which sex could be negotiated, then condom use would be higher, as would be HIV testing. For a large number of people – both male and female – monogamy may not be the ideal solution. The strategy of frowning upon multiple sexual partnerships has already backfired in Swaziland, where a recent campaign focused has angered women’s rights activists. The campaign suggests that women with ‘secret lovers’ are the source of HIV and AIDS, and warns men to be careful in their intimate relationships.²¹ In many ways the argument - as intruiging as it may be - does not address the fact that ways in which women can and must assert power in their relationships, nor does it seek to transform male entitlement. Like many other AIDS campaigns, it simply asks men to change their behaviour based on arguments about ‘safety,’ asking them to demonstrate magnanimity, rather than challenging them to transform on multiple levels.

As part of the larger project of demonstrating that Africans are not a hopeless continent of morally and sexually depraved denizens, it is good to know why so many Africans have contracted HIV. But the fundamental issue is that regardless of how many concurrent or sequential partnerships one had, if women could negotiate the terms of these sexual relationships, the nature of sexual networking would matter that much less.

Gender and HIV

It is now common cause that HIV and AIDS disproportionately affect women. Despite the fact that in the first two decades of its existence the epidemic as male one; affecting men who have sex with men, men who use sex workers and male migrants in significant numbers, women’s rates of infection in Africa have outstripped men’s in the last few years. In her seminal speech on women, sexuality and HIV/AIDS at the International AIDS Conference held in Durban in 2000, Geeta Rao Gupta outlined the complex web of reasons why globally women are more vulnerable to HIV infection than men. Her analysis has been widely shared and disseminated amongst

²⁰ Horn, Jessica. “AMANITARE and African Women’s Sexual and Reproductive Health and Rights.” *Feminist Africa* 2.2 (2003) < <http://www.feministafrica.org/index.php/representing-culture-and-identity-2>>.

²¹ Craig Timberg, “In Swaziland, ‘Secret Lovers’ Confronted in Fight Against AIDS,” *Washington Post Foreign Service* 29 October 2006: A15.

HIV practitioners, but feminist activists in the African context have not yet subjected it to serious scrutiny.

Rao Gupta argues that the culture of silence surrounding sexuality often dictates that “good women are expected to be ignorant about sex and passive in sexual interactions.”²² She argues that this has the effect of discouraging women from talking about, expressing interest in and actively participating in negotiations related to safer sex. Rao Gupta then notes that many societies prefer young women to be virgins when they marry. This norm also operates to make girls vulnerable because questions related to sexuality as above, are assumed to imply that one is engaged in sexual behaviour.

Thus, girls pretend ignorance about sex and sexuality, which can literally cost them their lives. In addition, because motherhood represents an ideal of femininity in many cultures, Rao Gupta notes that the use of barrier methods presents a significant challenge for many women who wish to become pregnant but may not be in a position to ascertain whether their sexual partner is HIV negative. An additional issue Rao Gupta raises is the fact that women’s economic dependence on men often makes it difficult for them to refuse sex, and indeed makes it more likely that many will participate in sex for favours and/or in exchange for other items. Lastly, Rao Gupta notes that violence against women contributes to women’s vulnerability to HIV infection both directly and indirectly. In the first instance, international research indicates that “individuals who have been sexually abused are more likely to engage in unprotected sex, have multiple partners and trade sex for money or drugs.” In addition, the fears of violence and/or abandonment are significant factors that prevent women from using or insisting on condom use.

Rao Gupta also notes that a study in Tanzania carried out in 2000 suggests that “for some women the experience of violence could be a strong predictor of HIV. ... [T] hose who were HIV positive were 2.6 times more likely to have experienced violence in an intimate relationship than those who were HIV negative.”²³ This finding is echoed in the research of the South African Medical Research Council, which published a report on pregnant women attending antenatal clinics in Soweto in 2003. The study indicated that women who have experienced intimate partner violence have a fifty percent higher risk of being infected with HIV than their peers who are not in abusive relationships.²⁴

As Rachel Jewkes, head of the MRC’s gender programme notes, “Whilst it is often said that women who experience violence from their male partner find it harder to negotiate condom use, our findings suggest that this is likely to be just part of the connection between violence and HIV. There is a strong possibility that men who are violent towards women are simply more likely to be infected with HIV because of other aspects of their behaviour - such as having multiple sexual partners.”

Both Rao Gupta and Jewkes’ analyses are strongly grounded in feminist theory. Yet Rao Gupta in particular has rightly been criticised for not taking enough account of women’s agency, particularly in the realm of sexuality. Indeed Rao Gupta is not

²² Geeta Rao Gupta, “Gender, Sexuality, and HIV/AIDS: the What, the Why, and the How,” plenary address, 12 July 2000, XIIIth International AIDS Conference Durban, South Africa.

²³ Gupta 3.

²⁴ Kristin L. Dunkle, et. al. “Gender-Based Violence, Relationship Power, and Risk of HIV Infection in Women Attending Antenatal Clinics in South Africa.” *The Lancet*, Vol. 363, 1 May 2004.

alone in sometimes falling into the trap of 'glossing over' women's agency. Development approaches to women's sexuality have often been too quick to argue that women's only interest in sex is linked to fertility. As Gosine has noted, "[W]e are told that sex between white people is about desire, love, romance and pleasure, and that sex between non-white people is about reproduction, fertility control, stupidity and misery."²⁵ (Gosine 1998:5)

Caribbean feminist Chandra Mohanty refines this point further, suggesting that Western feminists often "colonise[s] the material and historical heterogeneities of the lives of women in the third world" to construct a singular image of 'an "average third world woman"...[who] leads an essentially truncated life based on her feminine gender (read: sexually constrained) and her being "third world" (read: ignorant, poor, uneducated, tradition-bound, domestic, family oriented, victimized etc.), in contrast to the liberated western woman.'²⁶ (Mohanty: 65)

These critiques point to a few important lessons that feminist researchers and activists around the world have pointed to in the last few decades, the most important one being that women are not passive victims of male power. As historian Pule Phoofolo has suggested, it would be erroneous to view "women solely as victims of patriarchal oppression." Phoofolo suggests that it is essential to see "both women and men as implicated, as the subjects of gendered constructs."²⁷ Thus, while gender norms broadly dictate patterns of behaviour for both men and women, in thinking through women's vulnerability to HIV infection, indeed in thinking about the gamut of women's sexual and reproductive rights, it is important to recognise that there exist today, as there have always existed, mechanisms and strategies of resilience and resistance that open up space for women to assert their sexualities. It is only once we accept that women are agents that we can accept that the solutions to the crisis of AIDS do not lie solely in changing the attitudes of men. Furthermore, in acknowledging women's agency, we recognise that the solutions are already in communities, being practiced and demonstrated below the radar, beneath the watchful gaze of policy-makers, academics and even (God-forbid) feminist activists.

Women's strategies for prolonging sex, enjoying sex, avoiding sex, attracting lovers, keeping lovers, for repelling men and for passing information on all of the above to their sisters, daughters and friends are myriad. Some of these methods are formal, through for example, initiation ceremonies that too often focus explicitly on male sexual pleasure. Others are less formal, and take place in women's spaces; markets where 'love' herbs and potions are bought and sold, through traditional healers who dispense advice as well as medicines, from hair dressers whose knowledge goes well beyond braiding and relaxing, and in the kitchens and bedrooms that are considered to be women's domain.

These strategies tend to be hidden within the nuanced, fine-grained analyses of women's sexuality that typically come from women themselves, in conversations with one another, in their approaches and attitudes to difficult situations, in the stories they share about how one *really* copes with and survives the hardest moments in life.

²⁵ Andil Gosine, "Sex for Pleasure, Rights to Participation, and Alternatives to AIDS: Placing Sexual Minorities and/or Dissidents in Development," IDS Working Paper 228 (Institute of Development Studies: Brighton, 2005).

²⁶ Chandra Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses (Bloomington: Indiana University, 1991).

²⁷ Pule Phoofolo, "Female Extramarital Relationships and their Regulation in Early Colonial Thembuland, South Africa, 1875-95," Journal of Family History 30.1 (2005): 3-47.

These analyses of course elude policy makers, government officials, an NGO project staff, yet they are critical to the development of feminist strategies for addressing HIV and AIDS.

Despite the many forms of written information that tell us that women have no power and tend to operate within the strict confines of patriarchy, a cursory glance at history indicates that African women have not always agreed to the sexual strictures of customary African marriage. Within my own family, my grandmother's generation were known as 'wild horses' because of their refusal to remain married to one man, and their breaking of almost all the codes of 'decent' missionary and African behaviour. As Phoofolo's research into the extramarital relationships of women in 19th century Thembuland indicates, there are complex ways in which "ordinary men and women [have always] constructed, negotiated, contested, and narrated intimate, intractable, and often paradoxical dimensions of their lives." (Phoofolo: 2) In case after case that can be found in the records of the colonial South African courts, women in the Thembuland region are found to have been involved in sexual relationships outside their marriages.

Interestingly, the 'fines' for such behaviour are light, indicating a social recognition of multiple partnerships that is often denied today. For example, one wife who was brought to the courthouse stated simply, "Defendant was my lover before I married. During my visit home we renewed our intimacy."²⁸ A case a few years later indicates a similar level of indifference at the social consequences of adultery. "Our intimacy is well known. Defendant visited me at my own hut during my husband's absence. When my husband is at home we meet at the forest and other places."²⁹

The bluntness, with which these women spoke centuries ago, is almost disarming for those of us who believe that gender relations have been improving progressively. Yet their frankness is not surprising given the attitude of many African cultures towards sex and sexuality. In most pre-colonial African societies, sexuality was not hidden, or was sexual intimacy repressed. It was however regulated, so that its expression took place within certain contexts that were often policed by peers rather than by adults. Premarital sex, especially amongst young women, was not allowed in both Zulu and Xhosa custom, but sexual play was encouraged. With the advent of colonialism and the Christianity, rates of premarital pregnancy increased significantly, in large measure because missionaries outlawed the sexual play that had been a socially acceptable outlet of adolescent sexual tension prior to their arrival.

Today there still exist a number of traditional spaces within which to discuss sex and sexuality. Unfortunately, these spaces often privilege male sexual pleasure over women's. However, when the women and men who guard rites of passage into puberty, marriage and other important social and sexual transitions, choose to depart from the patriarchal script (which I would argue is not infrequently) they can also represent spaces where women can be frank about the physicality of sex, about their enjoyment of it, and of ways to challenge the power of men both directly and through other means.

Transforming Relationships

In today's (arguably) more sexually permissive sexual environment it is worth noting that the vast majority of women who are open about their HIV status continue to be those who can state unequivocally that they were infected by a long-term boyfriend

²⁸ 1/UTA 2/1/1/7, Mawa v Pitsana, March 9, 1885. 75, qtd. in Phoofolo.

²⁹ 1/ECO2/1/1/18, Mbejev Nondileki, February 2, 1892, qtd. in Phoofolo.

or partner, usually their first and/or only lover, or those who are infected through rape and/or violent acts. This is undoubtedly the case for many, many women. Yet it is also true that for many other women, HIV is the result of a more complex social mix including the desire to have sex for the sheer emotionality and physicality of ... well, sex. If we can accept that some women become infected because they have had more than one partner with whom they had unprotected sex, not simply because of economic need, but because they may have wished to have sex with each of these partners, then we are required to think of ways to ensure that this sex is safe. If we listen to women who argue that sex without a condom is an indication of emotional closeness and trust, then we must develop ways not to deny that this is true, but to work with the truth of it. If we help women to navigate their sexual and emotional needs so that their sense of self-worth is not tied to superficial displays of men's allegiance to them versus other women, then perhaps we can begin to develop more lasting ways of protecting women's health and rights.

If we also acknowledge that some men are aware of their partners' extramarital sexual relationships then we are also required to recognize that some women can indeed negotiate condom use. If, as in many relationships, the fact that a woman has more than one partner is tacitly accepted although not openly acknowledged within the language available to her and her partner, then strategies for condom use and the prevention of pregnancy must address what women can do in the context of these more 'open' relationships to guarantee their own and their partners' safety, in a manner that draws from lived reality rather than a theoretical model of what African men will or will not accept. Understanding and working with the cultural codes that explicitly and implicitly denote women's sexual freedom within the context of their relationships is an important task that must be taken up by women's movements.

Today, over half of all South Africans live in urban areas. The structure of sexual partnerships has in many of these cases, altered radically in the last few centuries. Amongst younger women, sexual relationships are far less rigid today than they were even fifteen or twenty years ago. Amongst poor, working and middle class women, there are increasing numbers who choose not to be in long-term relationships, or who have a series of sexual relationships both concurrently and sequentially without the fear of social censure that often accompanies sexual relationships in smaller, more rural communities. What is clear is that that the leeway that women have in these more fluid relationships is significant in comparison to static expectations within customary African marriages two or three centuries ago. Furthermore, as Phoofo's research points out, there are serious questions as to whether even at the height of missionary zealotry, the Victorian interpretation of monogamy that was espoused by the colonial state, ever truly penetrated the consciousness of many African societies.

The flexibility of these partnerships – where there is no expectation that either partner is the other's 'one and only,' and the ability of women to move in and out of these arrangements - has yet to be analysed in detail. Yet, this type of analysis is critical for helping to develop new sexual discourses that liberate women from talking about themselves as though they were stereotypes. Without a critical mass of women who are willing to talk about and own their own sexuality, to be willing to talk about their own agency within sexual relationships, conversations about women's vulnerability will remain stuck at the level of caricature. Today many women who are openly living with HIV talk about the fact that the one and only sexual partner they ever infected them. Yet this is not the only story. There are many other stories, of women who were infected in a previous relationship, and who themselves often unwittingly infected their new boyfriends. There are more subversive stories of young women who find out that they are HIV positive and still make firm decisions to continue to have sex, to negotiate condom use, and in many cases, to have children.

Creating a language that truthfully talks about and describes women's sexuality will help many of these women who are trapped in silence to tell their stories proudly, rather than regretfully. Giving voice to these experiences changes the shape and contours of what it means to be a socially acceptable woman in South Africa today.

In recent years, emphasis has been placed on feminist strategies of preventing HIV infection. This interest has of course been inspired, as indicated above, by the high numbers of new infections amongst women and girls. When, in 2002, UNAIDS announced that in some African countries, women and girls aged 15 – 19 were up to six times more likely to be HIV positive than their male peers, the alarm bells rang. The concern was set against the backdrop of the new United States government's global HIV and AIDS policy, called the President's Emergency Plan for AIDS Relief (PEPFAR). The PEPFAR programme focussed on the message of "Abstain, Be faithful and Condomise" that had long been popular in Africa. Yet, the initiative added a new twist: an emphasis on the abstinence only and monogamy elements of the ABC strategy. People who were experienced in AIDS campaigns and messages were up in arms: the PEPFAR approach was overly moralistic, and focused attention on strategies that were not proven to work for everyone. With high sexual activity amongst youth, reducing the number of sexual partners and delaying the age of sexual debut were critical, but they could not happen exclusively. There would be a need to continue to build on the important work of building people's confidence in the efficacy of condoms. The PEPFAR programme did precisely the opposite, putting out guidance notes and coercing its grantees to warn the communities in which they worked that condoms fail up to twenty-five percent of the time.

For women's rights activists, the furore over the PEPFAR programme provided an entry point into larger debates about women's sexual and reproductive health and rights. Many argued that the Bush administration's policy was short-sighted because all three approaches fell short for women. Without the ability to control their sexual lives women would be in no position to abstain, especially in a country like South Africa where gender-based violence is rife. Faithfulness to a partner who has multiple partners is certainly not a winning plan, and similarly condom use can only work if your partner is willing to put it on. Spurred on by these important discussions in the early 2000s, a number of NGO programmes began to pilot programmes that focused on women and girls empowerment, and strategies related to securing sustainable livelihoods for women in order to address their economic vulnerability to HIV infection. These programmes have been scattered and piecemeal, and still have a long way to go before they reach scale. They have been poorly resourced, and are not always well conceptualised, both in terms of their ability to reduce women's risks, and in terms of their ability to build up women's capacities to resist male power in the context of their homes.

While the bulk of efforts related to HIV and AIDS and gender have been poured into prevention work, the reality is that many women are already living with HIV and require medical treatment to manage their illness. Because of the role of TAC, there is often a misconception that the treatment needs of communities have been dealt with. Yet the battle has only begun. The government rollout is an important first step. But as treatment literacy activists have noted, taking ARVs is a lifetime commitment, and the drugs are complex. Being on ARVs is not simply a matter of swallowing a few pills. There are drug interactions, issues with resistance, and the management of opportunistic infections. These require skill and confidence is addressing health workers – two attributes that women, especially in poor communities, often lack. Furthermore, there has yet to be a strong national campaign that examines the treatment needs of women. Given the high incidence of cervical cancer amongst HIV positive women, there is an urgent need for a review of

the cervical cancer policy in South Africa. At the moment the public sector provides women with three pap smears in a lifetime. The implications of this for women with HIV and/or STIs are potentially disastrous. In the US, two pap smears are recommended in the first year of HIV diagnosis, and one a year is indicated after that. In general however, there is still a need for medical research into various aspects of HIV treatment. Large-scale microbicide trials are underway in a number of communities in South Africa, but these focus on prevention rather than treatment options for women already living with the virus. Much more basic education needs to be conducted so that women understand their bodies and what happens to them once they are HIV positive and as they progress to AIDS. Understanding these changes and the implications for childbearing and fertility, as well as a range of other issues is critical.

Furthermore, as others have noted, given the high incidence of gender-based violence, it is essential that health workers are adequately trained in Post Exposure Prophylaxis (PEP) and that that police officials are familiar with PEP guidelines once the Sexual Offences Act comes into effect in early 2007. Voluntary testing and counselling centre staff must also be aware of the links between GBV and HIV, and be able to pick up potential problems related to disclosure when women test positive. They should be well trained and recognise when they will need to refer women to other services, including to maternal health facilities and/or clinics where their pregnancies can be terminated if this is what they choose. Integrating gender-based violence and sexual and reproductive health and rights services remains a critical challenge not only for the state, but also for feminist activists who are developing models for the state to copy.

Lastly, HIV positive women's needs in relation to emotional care and social and financial support must be addressed. This is particularly the case once illness sets in. Yet there is a dual need in this regard: on the one hand women who are sick need support, and on the other, women who care for the sick need to be supported. It has long been known that AIDS makes poor communities even poorer, depleting savings as they spend more and more money on medicines, and as their ability to earn dwindles because either they are sick or someone in their household is sick. The burden of care on women has been widely discussed, and yet it has been an extremely difficult area in which to shift attitudes and practices. Women's involvement in care and support activities both is both formal and informal. Women and girls are carers in the home, but this support often extends beyond the home into the homes of others. The proliferation of home-based care programmes in recent years has seen many women and girls begin to work in the homes of others on a larger scale than ever before, not as domestic workers, but as part of the infrastructure of AIDS service Organisations, cleaning, caring for the sick and taking care of children. In the health sector, women represent the vast majority of nurses, and are thus called upon to work with and care for people living with HIV on a daily basis. The working conditions of nurses in public health facilities rarely come under the spotlight, yet the women who work in hospitals and clinics bear the brunt of the epidemic in the public sector. While doctors perform important duties, nurses are often at the frontline, especially in rural areas where there are shortages in doctors. African feminists have pointed out that women's work subsidises the state, and is tantamount to 'dumping.' Those who represent the interests of people living with HIV and AIDS have urged more sensitivity from women's rights groups, suggesting that they have fought long and hard not to be seen as simply burdens. While the debate has at times been polarised, there is general agreement that men must take equal responsibility for dealing with the fallout from AIDS. At present, where men are involved in home-based care initiatives, they tend to be in supervisory, paid

positions. Where women take the initiative, care tends to be under-valued and taken for granted. Feminist strategies for this have been virtually non-existent.

A comprehensive approach to HIV positive women's rights to health demands a respect for their dignity as women and as people living with HIV. It requires the kind of organised and sustained campaigning that built the women's movement in this country. Those who are most profoundly affected by HIV – whether because of issues related to childcare, social safety nets or bodily integrity – are women. This means that the social activism that has moved the social agenda forward on AIDS has been done primarily by women, or in the name of women. Yet to date, many feminists have complained that the strategies and approaches used for example by the TAC have invoked the images and experiences of women, but have not necessarily harnessed the power of women in a manner that can be described as feminist.

Yet, inevitably, this has begun to change. The TAC and other social movements like the One-in-Nine campaign have begun to confront the state as well as community-level institutions, demanding redress for the exploitation and abuse of women at the hands of men. At the moment, some of the ways in which TAC argues its points are not sufficiently nuanced or complex, and in many instances their points perpetuate rather than challenge the notion that women are victims. We must be careful to ensure that as women within TAC and other mass-based social movements such as the unions increasingly demonstrate their agency on issues of gender-based violence and HIV and AIDS, their activism targets private spaces and uses micro-strategies of change as well as the claiming public space and public discourse.

Public vs. Private

As I have argued elsewhere, the women's movement's emphasis on the state and on policy and law-making processes has meant that in the last twenty years, women's rights groups have either seen women as the subject of laws, or have sought to ensure that women are the beneficiaries of services. Both approaches, while merging from a concern with the practical and strategic interests of women, have relied on developing the skills of a few to serve the many, and on expanding the influence of a small group of well-placed individual women to ensure state compliance with laws and policies." Thus South African feminists, like others on the continent, have sought to fight battles related to sexual and reproductive rights in the public arena. The Choice on Termination of Pregnancy Act, the domestic Violence Act and soon the Sexual Offences Act, are critical pieces of legislation that are essential for creating an environment in which women can access justice. Yet without doing the difficult work at household level, supporting individual women to make better decisions, supporting community processes to make interventions where men are violating women's rights, these efforts will continue to fall short. Women's groups have argued that by using laws and policies to bring the power of the state to bear in private relationships, they are demonstrating the fact that the personal is political, what happens in women's private lives is a public affair. While the principle is one of the fundamental tenets of feminist activism, there has not always been enough thought to what happens to support women while they continue to live in their private spaces. Indeed, the limits of this strategy are painfully visible across the country. Laws provide an essential framework, but they do not in the short term, change attitudes. In fact, in South Africa in many instances, they have had the opposite effect for some, inspiring resentment of women's rights. The lesson that the South African Constitution teaches us is that the personal must also be dealt with personally; within homes, amongst friends, between women and men who are involved in intimate relationships with one another.

These conversations and struggles are often antagonistic, often protracted, and in many instances have cost women their lives. But feminist activists have for too long surrendered the fight for gender transformation to the state, expecting that policies and laws will be sufficient. In part this has been the consequence of a deliberate strategy on the part of women's activists, to join the ranks of the state. Yet the inroads that AIDS has made into women's rights demonstrate that we must adapt to new circumstances. Fighting the multiple layers of stigma and discrimination against women of all identities remains a critical challenge, as does the fight to create a world in which gender does not determine your vulnerability to disease and ill-health.

Recommendations: A Way Forward

This paper has outlined a number of concrete steps that feminist activists should be taking. The following broadly covers them:

1. Understand AIDS, not simply as a progressive chronic illness but as a human right. Many women's rights groups are now beginning to work on HIV and AIDS issues, usually from a sexual and reproductive health perspective. This is important but insufficient. There are also basic issues of discrimination linked to HIV status. Women's rights and feminist groups working with HIV positive women and indeed on HIV prevention, care and support lobbying and advocacy issues must ensure that they do not perpetuate stigma and discrimination against PLWHAs and therefore must learn to use the appropriate language (e.g. not using terms like AIDS victims or patients).
2. HIV positive women have interests and concerns that are specific to having HIV as well as those that are more broadly linked to women's rights issues. Make sure you listen to what women are saying about their sexual experiences, about their partnerships and about their treatment within health and other state systems. Because of the intense stigma linked to HIV, many typically feminist solutions may be difficult for some positive women to accept (e.g. litigation, negotiation with family members, etc.). This is not an indication of an unwillingness to be supported; it is an indication of a broader environment of stigma that needs to be changed.
3. There are many levels at which you can work. If you are doing direct service work and want to reach out to support women affected by HIV, do so through existing structures. Be prepared to battle patriarchal structures and NGOs that are still very gender insensitive despite the fact that most of their clients are women.
4. If you want to work with young women and girls to reduce their vulnerability to HIV infection, make sure that you do so in partnership with existing prevention outreach mechanisms. Small-scale pilot projects are costly and tend to have little impact, whereas latching on to large projects will spread your reach.
5. There is still significant work to be done in terms of movement-building. PLWHA structures tend to be weak, with high turnover due to illness and death. Women tend not to play a role in leadership of PLWHA organizations both at national but also at local levels. Feminist leadership strategies, confidence-building and strategies for developing women's caucuses and/or separate groupings are sorely needed.ⁱⁱⁱ

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Endnotes

ⁱ For an example of these arguments, see: Raf Jurgens and Jonathan Cohen, Human Rights: Now More Than Ever. (Open Society, New York: 2007). The paper provides “ten reasons why human rights should occupy the centre of the global fights against AIDS”. In a particularly compelling point they argue, as have many other rights activists, that “Many of those at highest risk of HIV have one thing in common: their status is effectively criminalized by law. People who use drugs, sex workers and men who have sex with men all face the daily threat of arrest, conviction, and incarceration in many countries.” In terms of women’s rights, they also suggest that “In many countries, national laws restrict women’s ability to own, inherit or dispose of property, leaving them economically dependent on husbands who may be violent or unfaithful.” They further point out that “women face systemic discrimination in access to education, housing, information, and other basic services that would help to empower them against HIV infection.”

ⁱⁱ Helen Epstein argues that “the practice of formal and informal polygamy creates a network of simultaneous or "concurrent" sexual relationships that links sexually active people not only to one another but also to the partners of their partners— and to the partners of those partners, and so on— creating a giant web that can extend across huge regions. If one member contracts HIV, then everyone else in the web may, too. Polygamous men generally seek out young women, even as they themselves age. In this way, formal and informal polygamy pumps the virus from one generation to the next.” See: Helen Epstein, “God and the Fight Against AIDS,” New York Review of Books 28 April 2005: 52.7.

ⁱⁱⁱ For more on this see a recent report commissioned by ActionAid, conducted by Sifiso Chikandi, “Mapping of Communities of Women Living with HIV/AIDS in Southern Africa,” which provides an assessment of the International community of women living with HIV/AIDS.

CUSTOMARY LAW

Sibongile Ndashe
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Summary

The process of developing customary law in a manner consistent with the Constitution requires the intervention of a number of stakeholders. In the South African experience, this has happened with varied levels of awareness from the various stakeholders. The developments have therefore happened at a rapid speed for some but quite slow for others. This has impacted on the failure to start and maintain a coherent debate particularly between the parties that have an interest in the resolution of tension. Different stakeholders have therefore embarked on the task of 'development' with varying degrees of what needed to be done. The mammoth task of reforming customary law particularly with regard to removing aspects that are considered discriminatory towards women has progressed and regressed at the same time. This paper argues that the cause of the problem is a series of failures ranging from misdiagnosis to well-intentioned but misguided interventions. It is argued that the issues to be addressed have not been articulated with sufficient clarity and that this has adversely impacted on the strategies adopted to date. It is argued, further, that the interventions made run the risk of failure because they are superficial and not solutions to the problem they purport to address. It concludes by making a case for a conceptual rethinking of the customary law debate with a view to extending a courteous invitation to some of the stakeholders that have abandoned the process of development and dragging back to the debate those who have shunned their Constitutional obligation to develop customary law.

Introduction

The contestations regarding the status of customary law in a constitutional dispensation came to a head during the process of making and finalizing the South African Constitution¹. The traditional leadership lobby had lobbied for customary law not to be subject to the Constitution². The framers of the Constitution anticipated that the tension between the universality of human rights and cultural relativism was set to continue. The manner in which the right to practice one's culture, customary law and the institution of traditional leadership was asserted was pre-emptive of a potential clash. All the provisions in the Constitution recognising customary laws³, the exercise of the right to culture⁴ and the powers of traditional

leadership⁵ recognize these only to the extent that they are not inconsistent with other rights in the Constitution. No other right is limited in this manner throughout the Constitution. The limitation of these rights, by definition, was deliberate and is indicative of an attempt to eliminate competing interests between the right to culture and other rights in the Constitution. At the first stage of the enquiry, before invoking the limitation inquiry, one would be able to get the right to culture to yield in favour of other rights contained in the Bill of Rights.

The South African Constitution differed radically from other post-independence Constitutions with regard to the manner in which customary law has been recognized. Other Constitutions provide for the right to equality and prohibit discrimination on a number of grounds including sex but then contain a clause that removes personal law matters and customary law from the application of the equality clause⁶. It can be argued that the South African Constitution contains a 'claw-back' in reverse in that it recognizes the right to culture but makes the exercise of this right subject to other rights. The South African Constitution is corrective in nature and aims to address imbalances inflicted by the apartheid past. The status accorded to customary law is not indicative of an intention to restore customary law to its former glory or to undo the distortion that it suffered. The Constitution posited the achievement of equality, freedom and dignity as paramount to the pursuit of an egalitarian society. The African National Congress's (ANC) submissions to the Constitutional Assembly on the status of customary law was a plea for customary law be treated with sensitivity but it did not constitute a call for a return to the past. This is an important factor in the debate on the 'harmonisation' and development of customary law, because the account of what was envisaged about the status of customary law in a new constitutional dispensation is often missing, thus opening up a closed debate regarding what should happen with customary law. After the enactment of the Constitution, the challenge was to 'harmonise' customary law and develop it in a manner consistent with the Constitution. The Constitution empowered the courts to develop customary law and in doing so, courts were mandated to promote the spirit and the purport of the Bill of Rights.⁷

The victories cemented during the Constitution-making process dictated to feminists how they should engage with the developmental process. It was important to identify the law, practices and policies that discriminated against women. The laws relating to marriage and

succession posed the greatest challenges for women in customary law settings. These laws were targeted for repeal and the South African Law Commission (SALC) initiated reform processes. However, reforms did not happen soon enough⁸. The delays are attributable to prevailing contestation regarding how the law reform process should proceed. It has been easy to get concessions that the pre-Constitutional position was unconstitutional and allowing it to continue to exist was not tenable. The problem seemed to be which system should be put in place in order to replace the customary law system. Marriages were notionally easier to deal with because there was a vacuum in that they were not legally recognized. The first step was to confer legal recognition. This, however, also required a fairly comprehensive regulatory scheme than the one that has been provided for. Much more complex was the realization that the space where reformers find themselves required creativity in molding systems that are compatible with the Bill of Rights and can also be called customary law.

The contestations that were present during the Constitution-making process regarding the impact of the Constitution on customary law began to surface. The women's movement took it for granted that a victory had been secured and neglected to contribute to the process of giving content to the constitutional guarantees of equality and dignity for women living under customary law. This has proven to be a very costly mistake in that opponents of women's rights to equality have held the law reform process to ransom by insisting that there has been enough consultation. The institution of traditional leadership is particularly culpable and has thus far been able to derail the law reform process. The absence of feminist voices has made it possible for the debate surrounding the status of customary law to be re-opened, the substance of the constitutional protection to be re-contested and the debate to, once again, proceed as if the Constitution had not been passed.

The historical context

The role of colonialism and apartheid has been documented and it has also been highlighted how an entire body of law, customary law, was systemically distorted and removed of its positive features. Mokgoro J stated that customary law has 'lamentably been marginalized and allowed to degenerate into a vitrified set of norms alienated from its roots and community'⁹. Nhlapho makes the linkage between the distortion of customary law by the colonial legal system, the patriarchal nature of customary law and the consequent erosion

of women's rights.¹⁰ The account of how the collusion between customary law because of its patriarchal features 'colluded' with the formal legal system to further subjugate African women is key to unraveling the multi-layered strands of discrimination that African women were and still are subjected to. Part of the failure to engage with this historical omission has been questioning the utility of delineating the different roles of the victim (customary law) and the villain (the formal legal system). Whilst it has to be conceded that the relationship between customary law and the colonial legal system was by no means symbiotic, together they reinforced the subjugation of African women. The dominant version not only denies us the opportunity to engage with the complicity of customary law in the subjugation of women but it also frustrates the process of 'harmonisation' as the lines between what is customary law and what is the distortion becomes blurred.

The political sphere

The political trends speak to a shift in thought regarding the Constitutional powers allocated to the institution of traditional leadership and the powers that they enjoy courtesy of political deal-making¹¹. However, these deals have not necessarily been accompanied by a clearer position regarding how the contestations between women's human rights and customary law institutions will be reconciled. The Inkatha Freedom Party (IFP) is the only party to have consistently lobbied for the role of traditional leadership and, consequently, customary law. The ANC has not always had a very clear position in relation to customary and traditional leadership. Its pre-Constitutional stance has however shown signs of shifting and this is attributable to the influence of the Congress of Traditional Leaders of South Africa (CONTRALESA) and political deal-making. The shift in thinking has been reflected in the concessions on policies and legislation providing more powers and recognition to traditional leadership and customary law institutions. The enactment of the *Traditional Leadership Governance Framework Act* and the *Communal Land Rights Act* has been viewed as part of the political deal-making.

These concessions have been accompanied by token instructions to the institution of traditional leadership to exercise the newly acquired powers in a manner which is consistent with the Constitution, without necessarily providing guidance regarding the meaning of constitutional consistency in customary law settings. This has been done despite very clear indications that discrimination against women

continues unmitigated under some traditional leadership. However, these new laws can either be a set up for women's human rights or for customary law institutions depending on how the women's movement choose to engage with these new processes.

The institution of traditional leadership

The institution of traditional leadership has spent the formative years focusing on building the institution of traditional leadership. This has meant that its role as the custodian of culture and its constitutional obligation to ensure that customary law is consistent with the Constitution has been developed. They have contributed to the development of the *Traditional Leadership and Governance Framework Act No. 42* of 2003 and the *Communal Land Rights Act No. 11* of 2004. In legislating around the powers of the monarch in KwaZulu Natal, the Nhlapo Commission of Inquiry was set up to investigate various monarchs and dynasties.

This has meant that in the substantive debate on the development of customary law their voices has been absent and only to be heard in cursory one-liners. This has unfortunately denied the women's movement a formidable ally or opponent in the development of customary law and has also not made it possible to get to an understanding of where the traditional leadership's objection lies and more importantly how those tensions can mediated with the application of the Constitution. In the *Bhe* decision,¹² the Constitutional Court laments the missed opportunity by the National House of Traditional Leaders for not responding to an invitation by the Court to make submissions on a constitutional challenge to the customary law rule of primogeniture. Thus far, the responses of the traditional leadership have demonstrated a lack of serious lack of engagement with the development of customary laws, particularly with issues pertaining to gender equality. The approaches have varied from denying the existence of the Constitutional order to the restatement of customary law that is said to have existed in the pre-colonial era or what is believed to be customary law proper. When the Minister of Justice and Constitutional Development introduced the draft bill dealing with the customary law of inheritance, traditional leaders vehemently opposed it and rejected the attempt to 'Westernise' customary law. What is available, though, is the common refrain that constitutes a re-statement of what is believed to have been the position in pre-colonial times. The debate regarding what the Constitution requires is yet to begin and the position can be understood as an insistence on the return to "the way we were"

despite what the Constitution provides for. This approach represents a missed opportunity for the institution of traditional leadership to be an integral part of the process regarding how customary law needs to develop.

The custodians of culture, on those rare occasions when they contribute to the debate on development on customary law, have assumed two forms, namely CONTRALESA and the National House of Traditional leaders. These two institutions do not speak in the same voice nor do they articulate a similar view on how to contribute in the process of 'harmonisation'. The National House of Traditional Leaders was led by Inkosi Impiyezintombi Mzimela who was seen as articulating an IFP position in contra-distinction to CONTRALESA which is seen to be aligned with the ANC. As far as women's rights are concerned, CONTRALESA has spoken in two voices. There has been Phathekile Holomisa whose starting point has been to concede the supremacy of the Constitution. His diagnosis of the problem has been that of 'misrepresentation by human rights activists'. He argues against what he refers to as a tendency by a number of human rights activists to regard African culture as being inherently undemocratic, oppressive and discriminatory against women and children.¹³ He further argues, skeptically, that the culture of individual human rights will not on its own promote gender rights and justice. It needs to be complemented by the promotion of humane and communal values inherent in African cultures and customs'. On the other hand there is Mwelo Nonkonyana, who is the Secretary General and whose sexism predates the Constitutional order¹⁴. Despite his unrepentant ways and utter refusal to embrace the Constitutional precepts of gender equality he is the Secretary General of CONTRALESA. He argues that the Constitution does not have royal assent and therefore is of no consequence to the institution and traditional leadership. He argues that there may well be a place for horizontal application of the Bill of Rights, but he does not agree with the vertical application of the Bill of Rights as his wives will never be equal to him¹⁵. These are the indications that the institution of traditional leadership does not regard the achievement of gender equality as a serious matter.

The adoption of the patronising stance that some traditional leaders do not understand what is contained in the Constitution, although partly correct, has removed the focus from those who do understand the Constitution but do not want to be bound by it. A report based on community consultations held by the Department of Justice and Constitutional Development's gender directorate with traditional

leaders, among other stakeholders, found that some traditional leaders were not aware of the *Recognition of Customary Marriages Act No. 120* of 1998. Some believed that the community consultations were a consultative process part of the law making process. There were others, however, who stated that they knew about the law but that they would not comply with the legislation. In the Eastern Cape there were some who insisted that they will continue to dissolve customary marriages despite the legislative prohibition against this practice. Tsikata¹⁶ makes the point that the position that public education will address resistance is at best hopeful. It is therefore important to identify areas where resistance to change is located. She further argues that it (the role of education) stems from a certain belief that discriminatory rules, decisions and practices in access to resources are because of ignorance. Research suggests that there are struggles over power and resources behind seemingly commonsensical ideologies about safeguarding clan land, which are really not questions of ignorance or lack of awareness. Coming up with interventions designed to counter resistance is key to protecting women's human rights in customary law settings. Although some commentators believe that resistance and rejection are simply based on the form and substance of the new laws, a significant amount of it, is an utter refusal to accept gender equality particularly in spaces that are viewed as 'private'.

Women's land rights under customary law

These contradictions on the communal tenure systems are of particular importance when it comes to women's human rights under customary law. In setting out how discrimination against women arises, a typical concern has been the lack of secure property rights for women. The dominant premise has been that because land is primarily transferred through family networks by succession and has happened along patrilineal lines, women were excluded from getting land in this manner. Land allocation practices also discriminated against women in that women were excluded from land administration and ownership.¹⁷ There has always been a danger in dominant articulations of culture that were overemphasized by patriarchs in order to deny women rights that they held under customary law. This view was also perpetuated by the colonial reformers and advocates for women's rights in attempts to highlight the hardships under customary law systems. The danger posed by the reconstruction of the nature of land rights that overemphasizes the protections that women held under customary tenure is that it is

romanticist and denies the legitimacy of the hardships and vulnerability that women faced despite the existence of the protections and relegates those experiences as having been a result of distortion.

Whilst there are traditional leadership institutions that have begun to allocate land based on 'need' as opposed to gender, the documented experience has been that of women who are unable to access land on the same basis as men. They acquired land through men and in relation to the relationships that they had with men, as wives, mothers and sisters. There is a view that the strength of rights that individuals held under customary law is only an issue when one interrogates it using the Western prism of tenure, for example ownership, lease, servitude. The argument proceeds that the moment one tries to interpret the customary law systems outside the customary law framework the process is set to ensue. That is exactly the nature of the challenge faced by all customary law systems, including communal land tenure: to be understood within the Constitutional framework. In instances where one is not pleased with the outcome of a dispute relating to land rights that dispute will invariably have to be heard in a court. This will require the ascertainment of customary law rules but it will also require that the customary law, if found wanting, will have to be developed in a manner consistent with the Constitution. The Constitution requires that all tenure that is legally insecure must be secured. The question whether the *Communal Land Rights Act* secures tenure in the manner envisaged in the Constitution is a separate issue. What is important is that regardless of the tenure that the state opts for during processes of tenure reform, the historical and prevailing tenure for a majority of women is legally insecure and this does not necessarily mean that formalization of land rights will of necessity make that tenure more secure or less secure but rather an acknowledgement that an overemphasis on the content of the land rights held by women does little to serve the cause of women's property rights under customary law systems. In instances where women held land the interests that they held were less strong and consequently less secure than those held by men. What is required is to strike a balance in recognizing that there is truth in the version that women were allocated land and held land under customary tenure but also in recognizing that the interests that women held were not as strong as they are now made out to have been. Vulnerability to evictions and other forms of social ills that are related to lack of secure property rights have been largely gendered and biased against women. This insistence that multiple interests

are allowed to co-exist in property under communal tenure remains a valid assertion. The argument that the ability of different interests to co-exist lends itself to protection of vulnerable parties is also a valid assertion. What these assertions omit to interrogate is the content and the nature of the protection that is given to vulnerable groups. It also fails to consider the implications of asserting these protections as a universal experience in a country that has practices in relation to the application of customary law that are as diverse as ours.

This view risks locking up women into a paradigm of returning to 'the way they were' and giving them the onus of investigating with a view to re-activating the protections that women once held under customary law. The danger posed by this approach of navigation without a trajectory is that it poses a trap for women who are unable to ascertain or find the protections that were provided to women under various systems.

How did the judiciary respond to the challenge of developing customary in a manner consistent with the Constitution?

The women's movement and feminist legal scholars in particular have now adequately recovered from the initial setbacks felt in the *Mthembu v Letsela*¹⁸ decision. Mpati AJA refused to acknowledge that there was discrimination against children in primogeniture. He relied on the in-built protections that are said to exist under customary law that could be invoked in order to protect vulnerable groups. In *obiter*, he refused to accept the developmental role conferred on the courts to develop customary law consistently with the Constitution. He opined that the engine for law reform was the legislature and that courts were ill-equipped to engage in this task. The courts have however not recovered, as the manner in which they have taken on this task of 'developing' customary law speaks to more than just start up shocks. The distinction between living customary law and official customary law has been drawn for good measure but the problems of proving living customary law remain unresolved. Bennett describes the approach adopted by the courts as being "confused and contradictory" and that they continued to apply official customary law and in instances where "they consciously turned their minds to proving living law, they paid scant attention to the rules of proof."¹⁹

Most of the cases dealing with customary law that were litigated directly and indirectly raised issues of gender equality. In *Zondi v President of the Republic of South Africa & Others*,²⁰ Regulation 2 of

the *Regulations for the Administration and Distribution of Estates of Deceased Blacks* was challenged on the basis that it offends against the equality provisions of section 9 of the Constitution. The challenge related to the fact that children, both legitimate and extra-marital, of a deceased African person married by antenuptial contract or in community of property would qualify to inherit intestate. However, extra-marital children of persons whose estates fell to be distributed in terms of the provisions of Regulation 2(e) would not qualify. The Court held that this amounted to gross discrimination against the latter children. Regulation 2 was accordingly held to be inconsistent with the Constitution to the extent that it distinguished for the purpose of intestate succession between the estates of Black persons who were, at the time of their death or had been at some stage prior to their death, partners in marriages which, in terms of s. 22(6) of the *Black Administration Act* 38 of 1927, were not marriages in community of property, on the one hand, and the estates of Black persons who, at the time of their death or at some stage prior to their death, had been partners in marriages under ante-nuptial contracts or marriages in community of property, on the other hand. The Regulation was held to be inconsistent with the Constitution and accordingly invalid. What is troubling with this case however is Levensohn J's *obiter* remarks that this case was not a challenge to the Constitutionality of the customary law of succession and then proceeded to point out that 'plainly in terms of our new Constitution, the various systems of indigenous law fall to be recognised and respected (see section 211 of the Constitution). It has been pointed out, for example, that customary law has its own built-in family support systems. Thus it is that illegitimate children would be supported by the mother's side of the family, not being entitled to any support from the father's side.' This was a refusal to interrogate the discrimination against extra-marital children under the customary law setting and refusing to make the best interest of the child paramount.

In *Thembisile and Another v Thembisile and Another*²¹, the dispute centred on the right to bury the deceased. The first applicant was married by valid customary marriage to deceased. The first applicant and her eldest son sought a declaratory order that they were entitled to bury the deceased at his ancestral home. The first respondent, the deceased's second wife, opposed the application alleging that the deceased had divorced the first applicant, had married her in turn by civil and customary rights and that she had to decide where the deceased was to be buried. The Court held that the first respondent bore the *onus* to persuade Court that the union between the first

applicant and deceased had been dissolved and held, on the evidence tendered by the first respondent that she had failed to establish the dissolution. Therefore, the customary marriage between the deceased and the first applicant had not been dissolved. The alleged civil marriage between the deceased and the first respondent was a nullity. Then Bertelsman J once again in an *obiter* remark stated that even if the deceased had entered into a customary union with first respondent, which was not conclusively proved, the first applicant's right as first wife and her son's right as first born male heir to bury the deceased was stronger than the claim of first respondent. The Court once again resolved a factual dispute regarding the existence of a customary marriage that was regulated by statutory law but in its opinion of the customary law system, if it were to be found to apply, there is an unwillingness to interrogate the first born male heir's strong rights to bury the deceased.

In *Bangindawo and Others v The Head of the Nyanda Regional Court and Others*²², although the case did not deal with issues of gender, it raised issues that are important for access to justice particularly when citizens appear before the traditional courts and the weight that has to be given to the Constitution in that setting. The matters were pegged on a number of Constitutional challenges including the right to equality before the law, the right to fair trial, and the right of access to the courts among others. The applicants also raised a challenge to the independence of the Traditional Courts, in particular that the courts were not independent in the sense contemplated by the Constitution. Madlanga J describes the independence of the judiciary in the Constitution as follows.²³ 'Insofar as this approach relates to courts and tribunals which are traditionally of, for lack for a better word, 'Western' origin (sic), I am in full agreement therewith. However, the position is different when it comes to the African customary law setting. There is a danger in a wholesale transplant of a concept suited to one legal system onto another legal system.' ... African customary law knows of no distinction between the executive, the judicial and the legislative arms of government. ... Although Prof Kerr refers to the position in 'old customary law', the judicial, executive and law-making powers in modern African customary law continue to vest in the chiefs and so-called paramount chiefs (the correct appellation being kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western legal systems, or not exposed to or sufficiently exposed to African customary law, or not believing in African customary law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It

continues to thrive and is believed in and accepted by the vast majority of those subject to kings and chiefs and who continue to adhere to African customary law. Although not in possession of any statistics, I venture to say that such adherents of African customary law constitute a relatively substantial percentage of the South African population. This fusion of functions in one individual has, at varying times, received statutory recognition. In the circumstances, if one were to follow, even with regard to the African customary legal system, the *dicta* contained in *R v Valente*²⁴ (on which applicants strongly rely) questions would arise as to, *inter alia*:

- (a) who the 'reasonable and right-minded persons' are? Is it those schooled in the Western legal system and/or not believing in or sufficiently exposed to African customary law, or is it those who are not only subject to but are believers in African Customary Law?;
- (b) who an 'informed person' is?; and
- (c) what such 'informed person' is informed about or in relation to?

Surely, the views and outlook of believers in and adherents of African customary law to the question of independence and impartiality of the judiciary would not be the same as those of non-believers and non-adherents. That being so, there seems, in my view, to be no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to 'public policy'. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the Africans and, for that matter, the public policy of the rest of the South African people who were not in power. The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof.' This decision raises the concern that the doctrine of separation of powers and consequently independence of the judiciary was found not to have been violated in this case, and also, the utter refusal of the judge to interrogate how this doctrine can be developed in customary courts simultaneously dismissing it as a theory that is not workable and therefore irrelevant.

*Mabena v Letsoalo*²⁵ was celebrated because it was one of the first cases where the courts took into account living customary law in

order to uphold the development of customary law in a manner that was consistent with gender equality. The matter centred on a dispute regarding the validity of a customary marriage which was disputed, on among other grounds, on the basis that the mother of the bride had been present during the *lobola* negotiations. Therefore her guardian was not a male person as was required under customary law. The court held that although, according to customary law, it was impossible for the mother of the bride to be her daughter's guardian, there were instances in practice where mothers negotiated and received *lobolo* and consented to the marriage of their daughters. That a woman who was the head of her family could negotiate for and receive *lobolo* was thus not repugnant to the customary law of marriage as actually practised. The court held further, that such a principle of living and actually observed law (as opposed to the 'official version' as documented by writers) had to be recognised by the Court as it would constitute a development in accordance with the 'spirit, purport and objects' of Chapter 2 of the Constitution.

*Mabuza v Mbatha*²⁶ concerned a divorce case in which the husband denied that there was a valid customary marriage because an essential requirement to the conclusion of a customary marriage in siSwati custom, *ukumekeza*, had not been complied with. The wife's case was that the custom had been waived by consent of both parties. Hlophe JP held that whether or not African Customary Law is repugnant to the principles of public policy or natural justice in any given case, the starting point is to accept the supremacy of the Constitution, and that law and/or conduct inconsistent with it is invalid. Should the Court in any given case come to the conclusion that the customary practice or conduct in question cannot withstand Constitutional scrutiny, an appropriate order in that regard would be made. The former approach, which recognises African Customary Law only to the extent that it is not repugnant to the principles of public policy or natural justice, is flawed. It is unconstitutional. Because the dispute arose in the determination of whether the marriage was valid or not the court did not proceed to interrogate the practice of *ukumekeza*. The expert on siSwati custom had stated that custom was essential in integrating the wife into the husband's family. Shongwe explained the rituals that a custom would entail in any given situation. 'He said a woman cannot refuse to undergo *ukumekeza* as this was a surprise ritual. A woman's consent was not sought; it was irrelevant. Mr Shongwe's evidence was clearly that the bride would have no say whatsoever in the *ukumekeza* custom, and that she was expected to cry when the custom took place as an

indication that she was prepared to sever her links with her own family and be formally integrated into the family of her husband. If the woman refused to cry, she could be physically assaulted until she cried, which would be an indication that she was indeed accepting her husband's family as her own. A woman would also have to appear semi-naked in front of her prospective husband's family when *ukumekeza* custom was being practised.²⁷

The Constitutional Court finally spoke in *Bhe v Magistrate Khayelitsha and Others*.²⁸ In this matter, the court had to grapple, not with primogeniture, but with expert evidence. The court accepted that official customary law as it exists in writing is a distortion and recognized the existence of living customary law with the qualification that these rules as adapted to fit in with changed circumstances rendered it *ad hoc* and not uniform. The court conceded to another difficulty that the problem was not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.²⁹

Litigating customary law issues will therefore have to take a form of quasi-law making. As opposed to simply stating that a particular rule is discriminatory one will have to be able to show that the practice exists and how wide spread it is. In litigating for other fundamental rights one has to show the adverse impact of a rule or practice without necessarily having to take the entire system to court. The court having recognised that there is such a thing as living customary law and its hesitation to develop it due to inadequate information may speak to a continuing marginalization in the form of remedies. If the court finds that customary law is unconstitutional it declares it as such and makes an order of invalidity. The courts have not showed much creativity in the development process but have rather tended to look for suitable replacements in the common law or statutory law.

The courts have now underscored the problem of viewing customary law through the prism of common law and how this has led to the distortion of customary law. The Constitution, however, invites the viewing of common law through another prism – that of the constitutional lens. The purpose of the former was to be racist and ill-intentioned and consequently unjust. The latter, however, has a developmental aspect to it and is therefore just. A concession needs to be made here. Even with the application of the Constitution the

substance of customary law will inevitably have to change. The changes could even be more drastic than with the *ad hoc* interference occasioned by common law. Brutally stated, the Constitutional project neither envisages a renaissance of customary law nor is it fascinated with restoring customary law to its former glory. The Constitution does not give a space to customary law to find itself; it imposes a trajectory and lets it be known that customary law will be recognised if it is constitutionally tenable. This fact has not been stated with sufficient clarity.

The Legislature's response to the challenge of developing customary law in a manner consistent with the Constitution

The challenges faced by the Legislature although similar in some respects to the courts were much greater because the task of making law rightfully belongs to the Legislature. The SALC framed the problem in Project 90 as a choice of law issue. The project committee focused its attention thus: 'a new enactment devoted exclusively to the application of customary law is needed in order to disentangle choice of law rules from the two statutes currently.' After it had become clear that the racist provisions that underpin the application of customary law would no longer be able to hold there was a need to find another basis for the application of customary law.

Sachs,³⁰ responding to the framing of the problem as choice of law question, explained that the problem is much more complex than what the commission was enquiring into. He stated that the starting point should be Constitution. Enhancement of the status of customary law is subject to the Constitution and he disagreed with the view that harmonisation of laws can be achieved by a choice of law approach. He argued that the approach was likely to entrench the archaic and technical view that customary law is a given body of rules inherited from the past. He suggested that we rather strive to blend South Africa's legal traditions in new laws that will reflect the Constitutional principles of equality and unity. This is the hard decision that law reformers have been grappling with. Law reform attempts continue to reflect this dichotomy by straddling the divide between harmonization and 'choice of law'.

'Harmonisation' is not a Constitutional essential and could even be the opposite of that which the Constitution mandates. The process of sanitizing customary law from the contamination it suffered as a result of the exposure to the common law is an exercise that has not

been undertaken. The need to try and marry common law and customary law with a view to harmonizing them has led to a process of assimilating customary law with common law and existing statutory frameworks. There has been criticism on the part of the reformers for failing to think beyond the common law and statutory law paradigm. This, however, needs to be distinguished from the more general critique of introducing 'foreign' law in a customary law setting.

Part of the complication and contestation related to legislating on customary law is that customary law is largely oral and acquires its dynamism and flexibility from being fluid enough to adapt and provide a solution. Therefore, it is argued, the mere fact of legislating for it thereby reducing it into writing through legislation constitutes a corruption of its essence. The attempts to legislate it are therefore seen as a distortion because one is introducing a framework based on rules, precedents and principles which are foreign to customary law. Legislating is therefore compared to codification where a significant amount of the distortion of customary law is said to have taken place. What is important to note is that the law reform process differs quite significantly from codification in that it seeks to create a new brand of customary law through legislation and it is challenged to find a brand that will be accepted by the intended beneficiaries.

In the reform process I have no doubt that there will be instances where foreign concepts will be introduced in developing customary law to be consistent with the Constitution. Of key concern about the manner in which the law reform process has progressed is the utter refusal to make the necessary hard decisions and the attempts to simplify varied and complex issues. These shortcomings risk frustrating the realization of the provisions contained in the very legislation that is intended to provide for the development of customary law.

The *Recognition of Customary Marriages Act* will be used to highlight some of the shortcomings of the law reform process. In instances like marriage, the SALC has rightfully conceded that case law indicates that the issues are too complex to permit legislative solutions. The resolution of these complexities will invariably require the application of customary law.

The Recognition of Customary Marriages Act

The *Recognition of Customary Marriages Act* was passed in 1998. The aim was intended to provide for legal recognition of customary marriages that were previously not recognized in many parts of the country with the exception of the former KwaZulu and Transkei. The devastating impact of the failure to recognize customary marriages and confer legal protection particularly at the dissolution of marriages whether by death or divorce has been detailed elsewhere.

Section 2 of the *Act* seeks to provide for the recognition of customary marriages. Section 2(1) retrospectively recognizes all marriages that were valid under custom when the legislation entered into force. The *Act* confers recognition and also provides for the regulation of all those marriages that will be entered into after the enactment of the legislation. At the time when the legislation was passed the status of customary marriages was as varied as it was complex. The plight of discarded wives was documented and highlighted.³¹ However, the *Act*, ostensibly advanced as a corrective measure to undo deeply imbedded, multiple forms of discrimination directed at black women, is silent on this issue. These women constitute a significant proportion of the population married under customary law and are not warranted legislative mention. This section of the legislation has created uncertainty as feminist legal scholars ponder whether the omission was deliberate or an oversight. Similarly, it is unclear what the legislation means when it refers to recognition of marriages that 'were valid under custom'. Does this mean that although the formal legal system had purported to dissolve the customary marriages they nevertheless remained valid under custom? What is however clear in the vague terms in which the recognition has been provided for is the utter refusal to 'disturb' marriages entered into in terms of the *Marriage Act* by recognizing customary marriages that carried the possibility of competing with marriages entered into in accordance with the *Marriage Act*.

In section 1, the legislation sought to provide for a definition of a customary marriage and in section 3 it made provision for the requirements for a valid customary marriage. A contentious issue in this regard was the giving of *lobola* because of its uncertain status in the equality question. As a means of balancing the tension between those who wanted *lobola* retained and those who did not want it included in the legislation, the legislature's attitude was to be silent on the issue. In the definition's section *lobola* is defined and throughout the *Act* it is absent until it resurfaces in the Regulations dealing with the registration of customary marriages with the

demand to know how much *lobola* was given. In the requirements for a valid customary marriage, the requirement of *lobola* is once again conspicuously silent. In the definition of customary marriage, however, the definition insists that a customary marriage is a marriage entered into in accordance with a valid customary practice. Having initiated the reform process, the Legislature falls back on what it terms 'valid customary practice'. At present there is no customary practice that does not regard *lobola* as central to entering into a customary marriage. However, the requirements listed in the legislation do not cite *lobola*. Can one, according to the *Act*, enter into a customary marriage without *lobola*? Once again, the legislation is unclear.

Section 4 seeks to provide for the registration of such customary marriages. In this section, time frames are set out for the registration of the marriages. The legislation, recognizing the problems inherent in retrospectively recognizing customary marriages, provides that either party to a marriage can register a customary marriage. It pre-empted that timeous compliance with the registration requirement may be a problem and then proceeded to provide that a failure to register a marriage within the stated timeframe will not invalidate the marriage. Further, it provided that 'the Minister' may extend the registration period. When the legislation entered into force, it purported to recognize all existing customary marriages. Technically, all customary marriages entered as of 15 November 2000 are 'recognised'. The next step to be complied with is to present to the Department of Home Affairs in order to 'register' the marriage. An understanding of the distinction between 'recognition' and 'registration' would reduce registration to a mere administrative step that does not have consequences for the party registering the marriage. This, however, is not the case. A registering officer can only register a marriage if convinced that a customary marriage exists. The registering officer can decline to register a customary marriage if not satisfied that a valid customary marriage was entered into. Notwithstanding all the attendant problems of requiring registering officers to decide whether a marriage is indeed valid or not, technically there a person or parties can have a 'recognized' customary marriage 'exist' until such a stage that the marriage officer declines to 'register' it.

Polygamy was also a contested area during the law making process. The need to protect parties, particularly women who are or will be parties to polygamous marriages, prevailed against the need to abolish this form of marriage. It should have been clear during the

legislative making process that a wholesale approach was not desirable as polygamy in the former Transkei was permitted in marriages that were out of community of property³². The legislature then embarked on a novel and yet complicated scheme to regulate polygamous customary marriages. The first was to require parties entering into polygamous marriages to apply to court and enter into contracts with their respective spouses to regulate the proprietary consequences of the marriages, notwithstanding the problems with regard to access to judicial institutions because those are not insurmountable. When it came to the actual content of the contract the law reformers were silent to the extent that they failed to even provide for a *pro forma* contract in the regulations. It is still not clear what the status of this contract in relation to third parties, such as creditors, will be. The courts have not been provided with specific guidelines to consider when approving these contracts. Customary law provides for a framework, albeit limited, for the regulation and protection of wives in polygamous marriages. This is a missed opportunity to develop those customary law rules and make them compatible with the Constitution. Instead, once again borrowing and assimilating, the law reformers opted for a choice that resembled the ante-nuptial system and imposed it on polygamous marriages.

After the *Bhe* decision, the legislative basis for the application of black law and custom in intestate succession has fallen away. Legislation providing for the customary law of succession will have to provide a basis for the application of the new law. It cannot be based on race because that is racist. It can no longer be based on marital status because that is arbitrary. Once the issue regarding application has been resolved the substantive issues need to be revisited. Are the reformers able to think beyond the box that is the *Intestate Succession Act*³³? Are they willing to engage in a creative process of salvaging customary law by looking at living customary law and crafting legislation that is capable of being implemented?

The trajectory for the development of customary law: who sets it?

The development of customary law to be consistent with the Constitution is an exercise that is not only legally complex but its theoretical basis has also not been developed to the extent that one understands how the process will unfold. At the first level a person presenting with a dispute would ask that the dispute be resolved with the application of customary law. There will be a need to ascertain what the various customary law rules are and then there will be an

attempt to resolve the dispute by the application of the rules. In the development process it is envisaged that even at that stage the Constitution would take centre stage regardless of what the forum is. Ascertainment however does not end the dispute. It is only sought to prove what the real custom is. If, after ascertainment, the court is of the view that the custom complained of is indeed discriminatory then the court would have to exercise the powers conferred to it in terms of section 172 of the Constitution to declare the law, conduct or practice unconstitutional to the extent of its inconsistency.

There is an incentive for the development of customary law institutions by themselves because the courts do not have to make orders of general application declaring a particular rule invalid particularly for communities that have begun to show signs of development. The court in *Bhe*, in rejecting the expert evidence on living customary law, raised a concern about uniformity in the observance of living customary law. Although the evidence was showing how some communities were not applying primogeniture and were allowing other members of the family to be the heirs, the Court still felt it necessary to declare the entire system invalid in order to provide for legal certainty and a refusal to deal with customary law of succession on a case by case. This approach poses a danger in that it begins to homogenize traditional communities in the name of universality of human rights. This, once again, detracts from the dynamism alluded to in customary law institutions. It could also be an indication that the courts are expressing doubt on systems of customary law's understanding of the Constitutional imperatives.

Customary law institutions have been set up to let themselves down. They have not been provided with adequate tools for developing customary law to be consistent with the Constitution. Whilst on the one hand there is a pre-occupation with ascertaining the content of customary law with a view to protecting and enforcing it, there is on the other hand another competing interest of developing customary law to be consistent with the Constitution. Although key to the implementation of thereof, ascertainment of customary law, has acquired an added requirement of development. By the time a rule is challenged in the courts and an expert is called in to prove a particular custom it is possible that its relevance might not be in keeping with changed circumstances. What is clear though is that if a particular rule of custom is under constitutional attack, the parties relying on it or seeking to enforce it would have to do more than just prove that it exists. It is therefore crucial that in the process of

preserving the rule, one should be able to demonstrate to a court how the particular rule can exist within a Constitutional order.

How should the women's movement respond to the development question?

There is an inherent trap for the women's movement in the calls that seek to ask women to re-activate the protections that exists for them under customary law and in the process expecting women to exercise agency by displacing the dominant discourse on gender hierarchy. The danger is that the protections are framed as a basis for her claim. She is entitled to be treated equally because that is a fundamental right that belongs to her, not because at a point in history she was once accorded a particular right. One can see the value of this exercise in settings where the Constitutional provisions are ambiguous, offers less protection to women, or are unclear on women's rights in traditional communities. In those settings, the only hope for protecting women is to correct the distortion and to fight against the legitimised gender hierarchy that could have been as a result of the distortion of customary laws by those with vested interests. With the South African Constitution however firmly and clearly in support of women's human rights then the question should be posed on those seeking to enforce discriminatory practices to prove that those practices are protected and sanctioned by the Constitution. This is, in any event, the test required in the equality inquiry. If discrimination is *prima facie* shown to be based on a prohibited ground, the *onus* of proof shifts to the person who persists in the discrimination. This is one of those rare occasions where the women's movement can afford to assert the Constitutional high ground.

The protections for women that exist or existed should also not be discarded simply because they have been conferred under customary law. The utility of those institutions will invariably be tested by their consistency with the Constitution. In the event that they are found wanting they will have to be abandoned or developed. In *Bhe*, after the court had decided that primogeniture was unconstitutional because it violated the right to equality, it proceeded to look at the manner in which the violation of the right to dignity arises in the application of the rule. The Court held that by denying women the right to participate in the process of administration of estates the rule says that there is something inherent in women that make them incapable of this task and it therefore has to be found to be unconstitutional on the basis that it violates the right to dignity.

There is another call for women to exercise their agency again by striving to live in a positive cultural context. This will entail women coining positive cultural practices or developing customary law to be consistent with the Constitution. There have been instances where this has been recognized by courts and in other instances where women have begun to make changes within the personal spaces. In *Mabena v Letsoalo*, the act of a mother negotiating *lobola* for her daughter was such a development.

The rules of customary law will have to be re-examined and interrogated to see whether they'll be able to meet Constitutional scrutiny. This is a task where vigilance from the feminist movement will be required. Identification of issues where women's human rights are violated and recommendations on how customary law should be developed need to be a pre-occupation of the women's movement. In *Gcwabe*³⁴, a matter which was prematurely ended by the death of one of the litigants, the matter centered on a claim for the return of *lobola* at the dissolution of the marriage by divorce instituted by the former husband against the wife's father. He argued that the wife had deserted him and therefore at customary law he was entitled to claim for the *lobola* back. One of the reasons advanced by the wife for leaving the marriage was her inability to tolerate domestic violence. There are defences that are available at customary law to the claim of asking for *lobola* back. Case law from the Commissioner of Native Appeals³⁵ provides that in instances where the beating exceeded moderate chastisement, that can count against the abuser in that it could reduce the number of cows or amount of *lobola* to be returned. It would also count in her favour if she had borne children in the marriage in that depending on the number of children that she had borne this fact would also be used to determine the number of cows that she should retain and the amount to be retained.

The proceedings in the magistrate's courts were stayed and the matter was referred to the High Court to enable the parties to raise Constitutional issues. Although she was not a party to the proceedings in the Magistrates Court as the *lobola* was not claimed back from her, in the High Court she was the main applicant as the issues in matter centred around her and she therefore had an interest in the matter. Her arguments were essentially that the practice allowing for the return of *lobola* violated a number of her constitutional rights. It violated her right to bodily integrity and the right to be free from violence in that it required her to establish whether the beatings exceeded moderate chastisement. She also did

not wish to avail herself of the defences that were available to her under customary law in that they violated her right to reproductive autonomy. She had two children from the marriage but argued that this defence served to apportion blame for a marriage not producing children to women in that a woman who has had children is 'rewarded' at the dissolution of marriage. Her family is entitled to keep a number of cows or a portion of the amount of *lobola* given because she had been a 'good' wife. The remedy that was sought on the development of customary law was that the court needed to develop the rule relating to the return of *lobola* to provide that in instances where there has been domestic violence the abuser should forfeit the *lobola*. This would cure the rule of the violation of the right to be free from violence and the indignity of needing to put up with some measure of violence until the violence has exceeded moderate chastisement. In turn the respondent argued that customary law was protected by the Constitution. Of strategic importance in this case is that a decision was made not to challenge the constitutionality of the entire practice of *lobola*, but to focus on the legal consequences that have an adverse impact on women's human rights.

There are some aspects of customary law which on the face of it appear to be discriminatory but in their application, the discrimination may not be of a nature prohibited by the Constitution. Those are the practices where the attendant discriminatory legal consequences will be removed and all that remains of the institution will be a symbol thus enabling women to give content to the practices exercising their agency. Romantics insist on defining *lobola* with reference to those aspects that are positive, such as the establishment of a relationship between two families that extends beyond the parties to the marriage. The negative aspects were the socio-legal consequences that flowed such as when *lobola* had been paid the children belonged to the husband's side of the family. There were obligations on the bride that attached to the giving of *lobola* and this varied from one community to the other. What the law did was to remove the legal consequences. In the *Recognition of Customary Marriages Act*,³⁶ for example, at divorce it is immaterial whether *lobola* had been given or not. The best interests of the child determine which parent should have custody of the children. A number of African women embrace the concept because of the centrality and symbolic value that it has in their lives. The challenge, however, is to retain it whilst slowly removing aspects that are not compatible with the Constitution.

To date, the criticism that the law reform adopted has been largely centred around the replacement of customary law with the civil law system³⁷ in that that would constitute a violation of the right of South Africans to the enjoyment and practice of culture. The problem for feminists will, however, have to be the recognition that the continued labeling of the Constitution as 'Western' is a widespread phenomenon as it is not suggestive of an endorsement of the Constitution. This is problematic because the Constitution is a document that constitutes and embodies the aspirations of all South Africans and is a roadmap for the attainment of an egalitarian society that feminists want. The concept of 'Western' laws is not objectionable and the labeling as such, if anything, is true because that is where human rights, as we know them, originated. The danger however is that the labeling is there to emphasise the 'foreign' and 'invasive' nature of human rights standards in traditional communities. Does it have any utility in the South African Constitutional framework? If the Constitution is 'Western', and human rights are accepted as such, does this mean that the Constitution has suddenly become a bad thing when one speaks of human rights in relation to customary law? This form of labeling is another way of marginalising customary law by relegating it to a system that is fundamentally incompatible with universal human rights and which needs to be shielded from the test on whether indeed it does or does not meet Constitutional muster. The 'undesirability' of 'Western laws' is not taken to its logical conclusion. The division and regulation of labour has changed drastically from the way in which it was done customarily, owing to the influence of international human rights standards particularly labour laws. The organisation of wealth has also been influenced to a greater extent by 'Western norms' and these norms and values have not always operated to the clear detriment of poor people. Similarly, criminal laws have also been changed in order to comply with international standards regulating the right to fair trial and regardless of where people come from they have all been subject to the courts. The prediction that the use of 'Western' laws will alienate subjects of customary law is an attempt to draw and entrench a false dichotomy between the private and public space. In the public sphere 'people' have to be governed by laws of general application but in the public sphere an artificial barrier has to be placed because people are somehow more customarily inclined in their 'private' spaces.

A criticism of feminist ideals and the rights-based approach is that the rights-based approach is an end in itself and may therefore not have tangible benefits for women who reside in traditional

communities. The desirability of the rights-based approach is contrasted with research indicating that there are traditional institutions that have and are providing protections to women. Those protections have been on the basis of 'need' and also based on notions of 'justice' and 'fairness' as it is understood in those communities. These 'protections' have however not been grounded on the rights-based approach. The protections have not been accorded to women as 'entitlements' but rather as measures to protect a vulnerable group. Should it really matter what the protection is based on if in the final analysis one is able to get protection? Indeed it does since it is only when she understands the content of the right that she is entitled to that she can claim it. Paying token attention to the intersection between class, gender and race is a problem. If the reality is that people who are governed by customary law are largely rural, impoverished and female with no access to resources, it constitutes an incomplete adherence to the rights based approach to fail to pre-empt the factors that are likely to adversely impact on the realisation of the newly acquired right and failing to adequately provide for measures to address the potential problems. That is a failing of the state's obligation to protect fundamental rights because those rights are rendered worthless. That is, however, not a failing of the rights based approach. It is a failing of the state in its obligation to protect, promote, respect and fulfill rights.

Conclusion

Another invitation needs to be sent to the custodians of culture to return to this debate and assume their rightful place in developing customary law to be consistent with the Constitution. The institution of the traditional leadership has to come to terms with what is contained in the Constitution particularly the manner in which the right to culture is provided for. In turn, the state has to invest in institutions that will assist in the development of customary law to meet the Constitutional prescripts. The Legislature has the greatest of everyone's challenges when legislating to ensure that the laws that they enact are capable of being implemented particularly by the intended beneficiaries. Human rights in public and private spaces is all that is asked for. After all if the argument is that the cornerstone of any system is the subjugation of its women and if the sexist features are removed it risks falling apart, whose system is it and who needs it?

¹ In the case concerning the certification of the text of the Final Constitution, *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Constitution of the Republic of South Africa, there was an objection to the manner in which the status of the monarch was provided for. The objection was that the Constitution only gives effect to the recognition of the Constitution-making power required but it does not give effect to the requirement of protection. As a result, and because of this the provisions in a provincial Constitution dealing with traditional monarchs are rendered vulnerable to being overridden by national legislation. The court held that the Constitution does not require the relevant provisions of a provincial Constitution to be given a position of supremacy in the national Constitution, allowing them to prevail over all other protected interests. What is required is that the institution of the monarchy should be given the recognition and protection that it needs to enable it to carry out its traditional role and to maintain its status and authority, consistent with the constraints inherent in a republican and wholly democratic Constitutional order. Albertyn provides an account on how the tensions were mediated during the Constitution making process.

² Chaskalson *et al*, p 36-20.

³ S (15) Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(3) (a) This section does not prevent legislation recognising-

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) **must be consistent with this section and the other provisions of the Constitution.** (Emphasis added).

⁴ Section 30

Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but **no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.** (Emphasis added).

Section 31

Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) **may not be exercised in a manner inconsistent with any provision of the Bill of Rights.** (Emphasis added).

⁵ 211

Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, **subject to the Constitution.** (Emphasis added).

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

⁶ Zambia, Kenya and Zimbabwe contain such clauses which are often referred to as claw-back clauses.

⁷ Section 39(2) of the Constitution

⁸ The Recognition of Customary Marriages Act was passed in 1998 and only entered into force on 15 November 2000. The Customary Law of Succession legislation is yet to enter into force.

⁹ Du Plessis v De Klerk 1996 (3) SA 850 (CC). In Chaskalson *et al* ... it is described as an enfeebled body of customary law that has been alienated from its roots and is little more than invented tradition.

¹⁰ 'Although African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. . . . Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became "outlaws".' Nhlapo 'African Customary Law in the Interim Constitution' in Liebenberg (ed) The Constitution of South Africa from a Gender Perspective (Community Law Centre, University of the Western Cape in association with David Philip, Cape Town, 1995) at 162. as quoted in the Bhe decision

¹¹ incomplete

¹² Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC), para 4 'Because of the nature of the issues to be canvassed, the Chief Justice directed the Registrar of this Court to deliver copies of the directions and the two applications for confirmation 6 to the Chairperson of the National House of Traditional Leaders. The provisions of Rule 9 of the Rules of the Constitutional Court that were in force at the time were also drawn to his attention. No submissions were, however, received from the House of Traditional Leaders.

¹³ A traditional leadership perspective of gender, rights, culture and the law

¹⁴ incomplete

¹⁵ Views he expressed at the Ethical Leadership Project conference held at the University of Cape Town on 12-13 September as part of the moral regeneration campaign hosted by the Premier of the Western Cape as a panelist on the role of culture in gender relations. In relaying experiences that are seen by others as promoting gender equality but have no support under customary law. He mentioned a scene in hospital when a father was present during childbirth as a scene that made him unhappy as a traditional leader. He lamented husbands who enter the kitchen to 'crowd their wives' and proceeded to warn those men who dare to do

that. Other men should not be blamed when they start talking to those wives who had to leave the kitchen because they had been 'crowded' by their husbands.

¹⁶ incomplete

¹⁷ incomplete

¹⁸ 2000 (3) SA 867 (SCA)

¹⁹ incomplete

²⁰ 2000 (2) SA 49 (N).

²¹ 2002 (2) SA 209 (T).

²² 1998 (3) SA 262 (Tk).

²³ At 271 – 273.

²⁴ (1986) 19 CRR 354 (SC).

²⁵ 1998 (2) SA 1068 (T).

²⁶ 2003 (4) SA 218 (C).

²⁷ At para 22

²⁸ 2005 1 SA 580 CC.

²⁹ At para 109.

³⁰ incomplete

³¹ incomplete

³² In *Makholiso and others v Makholiso* the matter dealt with validity of polygamous marriage. W having entered into a customary marriage with D in terms of s 3(1)(a) of Marriage Act 21 of 1978 (Tk) during subsistence of civil marriage in community of property with another woman, F. Polygamy was prohibited in Transkei prior to promulgation of Marriage Act. The Common law was however unambiguously altered by s 3(1)(a) of Marriage Act to effect that man already married out of community of property could enter into customary marriage. No mention was however made in s 3(1)(a) of marriage in community of property. The court held that the Legislature's silence in s 3(1) as to right of man married in community of property to contract polygamous marriage clearly warranted an inference that the intention was that polygamy in such cases was to remain prohibited. Because W and F married in community of property, subsequent purported marriage between W and D during subsistence of civil marriage null and void *ab initio*. The court however found that the marriage between W and D was a putative customary marriage as the pre-marital formalities had been complied with, the marriage was duly registered in terms of the Act and W and D *bona fide* believing that entitled to contract marriage.

³³ Act No. 81 of 1987.

³⁴ incomplete

³⁵ incomplete

³⁷ Andrew Kult argues that, through the review of customary law, the "right to culture" is eroded into mere lip service, "the Government claims to celebrate diversity among its many indigenous groups, and seemingly protects their customary practices," it simultaneously "scrutinizes those practices to determine whether or not they are consistent with the 'Westernised' version of the Bill of Rights." He argues that while traditional rules have perhaps become more flexible in living customary law, they have "by no means disappeared," and in fact, some have taken advantage of increased flexibility to the further deprive African women of rights (for example by denying the existence of a customary marriage). Thus, Kult argues that, with respect to intestate succession, the right to culture has become largely meaningless, as the "Promotion of Equality and Prevention of Unfair Discrimination Act, the Recognition of Customary Marriages Act, and the Draft Bill for the Amendment of the Customary Law of Succession have all served to create a situation in which indigenous people will now be regulated by a 'Westernised' system of intestate succession." Chuma Himonga expresses a concern that is similar to Kult's that customary law is in the process of being replaced by non-discriminatory Western laws. Rather than assuming the Westernisation of women's rights, she argues that Western versions of women's rights have been grafted onto customary law because "Parliament used existing law to solve the problem of inequitable family relationships under customary law similar to those problems that existed under common law." As a result, the rights of women are considerably advanced, but the new customary marriage is "almost completely alien to black South Africans living under customary law" and instead resembles common law marriages in the areas of minors' marriages, status of spouses, proprietary consequences, and divorce. This is problematic not only in denying South Africans' "right to culture"; it may also lead to implementation problems, both because traditional leaders will either ignore or actively undermine the new 'foreign' marriages, and because the complex legal system required to enter into such a marriage will remain inaccessible to many rural South Africans.

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Mabuza v Mbatha 2003 (4) SA 218 (C)

'THE KING'S RULE IS CONSIDERED SUPREME'¹:
THE IMPACT OF RELIGION AND CULTURE ON GENDER EQUALITY

Gertrude Fester

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Barbara Rass' Christianity, church, and church community were very important to her. Although both she and her husband attended church diligently, her husband was abusive and beat her regularly. After enduring this for a number of years, she decided to divorce him. However this was not accepted by the church. She was threatened with excommunication if she did not remarry him again. Because of her faith, church, and the church community were part of her identity as a person and she needed the acceptance and blessings of her church, she remarried her former husband. However, the beatings continued and she divorced again, this time accepting the alienation of church and family. "If my congregation and church allows me to be beaten, I can do without them," she said. Today, Barbara runs a Women's Shelter in Atlantis, a working class area outside Cape Town. Barbara still sees herself as a believer and her faith in God is very strong. She prays regularly but without the institution of a church which sanctions that it is alright for her husband to beat her.

(Interviewed 12 October 2004)

...Shah Bano (is) a Muslim woman who had applied for the right to maintenance from her ex-husband under criminal law proceedings (Mukhopadhy 1998; Menon 1998). This was a right which had been quietly accessed by Muslim women prior to the case. However, the decision of the Supreme Court to publicly uphold this right... made the case a matter of intense public controversy. For many Muslims, the Court's decision appeared to violate Shari'a Law and undermine the only legal recognition of their separate identity they had been granted as Indian citizens. For many feminists, it was a vindication of a woman's right as a citizen in a democratic state to have a uniform civil code. For Hindu militants, it was a judgment about the backwardness of women's position in Islam... For Sano Bano herself, the decision appeared to pose the different aspects of her identity – as a woman, a Muslim, and as an Indian – as standing in contradiction to each other. She publicly rescinded her right to maintenance and declared her loyalty as a Muslim.²

Nomaindia shares her concern about the power of tradition and uses the example of the premier of the Eastern Cape. Nosimo Balindlela is the first citizen and most important decision-maker in the province and yet she is enshrouded by traditions:

¹ 'The Constitution is only a government document- the king's rule is considered supreme' Nonhlanhla Mkize, manager of Durban Lesbian and Gay Community and Health Centre, quoted in *Mail and Guardian*, Oct 13 to 19 2006, p 8. The 'King' can also refer to the 'God' of the monotheistic religions. The God/King is always male and his words are all interpreted by male clerics and not always positive towards women, but they are 'God's words and hence the 'truth'.

² Cindy Clark et al, "Living Rights: Reflections from Women's Movements About Gender and Rights in Practice", *IDS Bulletin*, 36(1) Jan. 2005.

Look at Nosimo³ (when) she became premier. Her husband's family slaughtered a cow and then publicly gave her permission to use their surname.'

(Nomaindia Mfeketo interviewed August 2004).

In the above extracts we have examples of the ambivalence of faiths and culture and how these impact on women's lives and choices. In the first two cases both women's positions and their human rights are compromised. In both cases the women, despite experience the complexities of their identities and they have to make choices. However in the case of Barbara, her negative experience was turned into a positive in her helping other abused women after she divorced for the second time.

In the new South Africa ("SA"), are equal in terms of the constitution. This means that women are citizens. But this citizenship, as in the case of the Eastern Cape Premier, women in the new SA have ambivalent positions: no matter what the position, Premier, Member of Parliament or Minister, women are still subject to traditional and religious customs. Women in various roles have contributed to so many changes in South Africa, yet they do not enjoy full and comprehensive citizenship.

With the new SA and the progressive constitution and new laws, women now have many rights. But how are these rights realized? As we see from the above extracts, religion and culture have a major impact on women's lives. However, we need to distinguish between the institutions of faith and what the faiths profess; what the central messages of the faiths are and what are the traditions, rituals and various interpretations; and to what extent do these interpretations reinforce gender stereotypes and perpetuate the oppression of women? There are many positive aspects to religion, even revolutionary⁴ in some cases but these aspects of religions are mostly ignored by male clerics.

Lavona George, a feminist active in feminist theology shared the common response the church has to women's problems:

³ Nosimo Balindlela is one of the four women premiers out of nine nationally: "Xhosa women are not permitted to enter the male dominated 'kraal' but last year the family elders showed their appreciation of all Balindlela had done for the family by awarding her an 'honorary doctorate', a blanket and permission to enter the kraal and use the family name in public. It was the elders' way of showing that I am a pillar of strength in the family, the mother of the family,' she said." (*Barefoot Premier gets down to earth*, Lauren Cohen, *Weekend Argus*, January 22, 2005 page 19). It seems as if Balindlela is uncritical of the fact that she is treated as an 'honorary man'. Even though she is the Premier, she is still 'the mother of the family'.

⁴ Christ speaking to a Samaritan woman, being friends with other women like Mary and Martha and having a close relationship with Mary Magdalene, former sex worker were all tabooed in Jewish society. This was revolutionary for his time.

'Wees tevrede met jou lot, al is dit baie vrot (Be satisfied with your lot/fate even if it is very bad/negative for you). This is the central message the church seems to have for women who are beaten by their partners/husbands' according to Lavona George, Christian gender activist. (Interviewed, 28 October 2006).

What we also see is that to these women (Barbara and Shah Bano) their faiths are closely linked to their concept of themselves, their identities, as is Premier Balindlela's culture. Given this complex relationship between identity and self and the South African project of equality in the light of the progressive constitution, how have the equality project of the new SA affected South African women?

In this paper I explore from a feminist perspective, the current strategies used by women in SA and explore why women have not achieved their demands 12 years after democracy. I argue that many women's lives have not changed because of the profound impact that religion and culture have on women, despite the constitution and progressive legislation. The average women's life is closer to her religion or culture than the constitution. Some questions considered are: What are the opportunities and political spaces for feminists? How do feminists use the positive space created by the African National Congress (ANC) policy and which alliances /coalition or partnerships should be formed to realise women's rights and gender equality? How do we reconcile aspects of the diverse South African cultures and religions with the human rights culture propounded by the Constitution (Act 108 of 1996) and the impressive legislation?

By using the *Women's Charter for Effective Equality* as a guide, I explore very briefly, the demands that women have still not achieved. Many White women, because of past privileges and the new Black elite- politicians and top management of private corporations, have attained some aspects of citizenship. They too, however are subjects of religion and culture. I argue that the rights based approach ("RBA") is not sufficient to radically transform women's subject status to that of citizen. However, the RBA should be one of many strategies which feminists should engage depending on the specific juncture or historic moment. I propose that this comprehensive strategy should include strategic partnerships, including the state, men's groups and other stakeholders. Furthermore, I briefly sketch the current context including some reflection on my positionality (Part 1), and the current strategies and opportunities and strengths on which to build (Part 2). In Part 3, I assess the RBA and limitations of the current discourses; while part 4 briefly explores some aspects of religion and culture and their impact on women. Part 5 looks at possible future strategies, gaps and opportunities with specific reference to interventions within the Christian faith. Lastly, my conclusions will form Part 6.

PART 1

It is well known because of the quota and various progressive policies the number of women in decision-making positions has increased. However, I want to reiterate what I have stated earlier: that the majority of women in SA have not benefited from the new progressive policies and constitution. Some gains were achieved, especially cases taken to the constitutional court. While women have gained public and formal equality, their private lives remain the same. Some of their problems women experience are violence against women, no control over their bodies or no decision-making powers in their homes and often in their places of work are but a few.

We need to critically examine the context within which debates on women's rights are 'framed and fought for.'⁵ It is crucial to be aware of whether women's rights and gender equality are demanded within the present economic context or whether there is an expectation or desire for radical transformation which would effect a change in gender power relations. As a result of the Beijing Conference (1995), and numerous international and regional instruments, the discourse around women's rights has proliferated. But Ramya Subramanian reminds us that: "While rights may have proliferated, the conditions under which women are exercising these rights are not necessarily improving."⁶ South African feminists have also echoed this. Pregs Govender has referred to the increasingly misogynistic and Sheila Meintjes to the androcentric atmosphere.⁷

There have been so many international instruments ratified including the Convention on the Elimination of All forms of Discrimination against Women, ("CEDAW") and the Beijing Platform for Action. But there has been no attempt to popularize the content, nor do the average person know they exist. Other concerns are that (there has not been sufficient critique of the applicability or suitability of these international instruments to local conditions and the actual implementation thereof. Often these conflict with local customs. What would this mean for women's activism?

The neo liberal economic context and the increasing religious right of all faiths have also negatively impacted on the improvement of women's lives. Impressive policies are made but are not translated into rights for women internationally and nationally because of the USA/Vatican/Islamist⁸ context.

⁵ M. Molyneux, *The Chimera of Success*, *IDS Bulletin* 35(4), (2004). p.115.

⁶ R. Subrahmanian, Making sense of gender in shifting institutional contexts: some reflections on gender mainstreaming. *IDS Bulletin* 35(4), (2004). p.94.

⁷ Key note speech by Govender, Women's Day Speech, 9 Aug, 2006, Community House .Cape Town. Meintjes on Ethical Leadership at the Moral and Regeneration Movement Conference, UCT, 13 September 2006

⁸ Molyneux, at 114.

Mama refers to this as the 'Alliance of fundamentalisms.'⁹ Many men, traditional and religious leaders and some women (because of the internalization of oppression) are either threatened or disagree with women's rights and hence women's citizenship. Mukhopadhyay effectively summarises that: "The language of rights is deeply disturbing because it involves separating out the identity of women as citizens from their identity as daughters, wives and mothers, the subject of social relations"¹⁰ In SA these are paralleled by the GEAR policies and the increasing power of traditional chiefs and religious leaders.

Another major concern about national and international linkages is the fact that many gender related projects are externally funded and may have particular demands/ preconditions that may not gel with the local reality. Even though many government policies, including South Africa's, are explicitly gender sensitive, most gender projects have been funded by donors. When the funding cycle ceases, the project ceases¹¹ A striking example is the South African Women's Budget Initiative which ended when the Commonwealth funding ceased.

In terms of my own location many new questions about identity have become popular and I have not been unaffected by them. The constant question since the University of Natal 1990s¹² Women and Gender conference 'Who writes about whom?' still plagues us today. At the Gender, Culture and Rights conference¹³ Rashida Manjoo summarises broad issues raised by many of the participants; one of them being:

The persistent objectification of African women and culture through research by outsiders, and the consequent distorted images and solutions proposed for identified problems¹⁴

⁹ Amina Mama, "Editorial: Women Mobilised," *Feminist Africa: Women Mobilized*, Issue no 4, 2005.

¹⁰ M. Mukhopadhyay, Mainstreaming gender or 'streaming' gender away: Feminists marooned in the development business. *IDS Bulletin* 35(4), 2004. p.,97.

¹¹ Anne Marie Goetz, 'The politics of integrating gender to state development processes: Trends, opportunities and constraints in Bangladesh, Chile, Jamaica, Mali, Morocco and Uganda'. *UNRISD, Occasional Paper* 2. Geneva, UNRISD, 1995.; H. Standing, 'Gender, Myth and Fable: The perils of mainstreaming in sector bureaucracies'. *IDS Bulletin* 3(4), 82-88..

¹² Nkululeko Daba (1987) questioned to what extent the oppressors had a right to write on behalf of the oppressed.

¹³ National Workshop on Gender, Culture and Rights, (Johannesburg 1-3 February 2005) hosted by the Human Science Research Council in collaboration with the Commission on gender Equality, Engender Health, and the Population Council.

¹⁴ Rashida Manjoo, "Gender Rights Within the Framework of Traditional or Group Cultural Norms and Rights," *Agenda, Special Focus Gender, Culture and Rights*, 2005 p. 83.

This has given me food for thought. Throughout the 1980s I was part of the women's movements. Yes, we acknowledged the 'triple oppression' but our strategy was to unite against apartheid, thus blurring the diverse identity issues. But in the 1990s it was time to self reflect. Given the context of identities and the question above – outsiders writing about others problems; I had to ask: Who am I? I see myself as a Black feminist; I acknowledge my slave and KhoiSan ancestry as an integral part of my identity. But what shapes my everyday 'do's and don't' most profoundly is my Christianity. Christianity forms a core part of my identity. It is for this reason that I need to reflect on this - what has my contribution been as a feminist Christian human rights activist?

I may have politically influenced (and this has been confirmed in diverse ways) many young women and some men in my 30 odd years as political activist, or professionally as a lecturer in Education for 21 years. But what have I contributed to the consciousness of my fellow church members, both women and men to whom I have been in close proximity for my entire life? I have personally achieved to a certain extent (being the first woman chairperson of a Dutch Reformed Church council), but how have I contributed to 'women's consciousnesses?' What type of 'sister' have I been? If I am honest I have not done as much as I could have. I too should not separate my public activist life from my private religious life.

PART 2:

There are many strengths on which to build. The most important is the constitution and the progressive legislation. The fact that the environment is an enabling one and that the infra structure of the national gender machinery exists are but two of the very crucial issues with respect to government. But this needs evaluation. Goetz argues that NGM has not really worked anywhere in the world.¹⁵ How do feminists make intervention?

In terms of the non-governmental organizations many strong feminist organizations exist which have both international and national influence. There are a few feminist academics and if the energies of these formidable persons¹⁶

¹⁵ Anne Marie Goetz, "The Politics of Integrating Gender to State Development Processes: Trends, Opportunities and Constraints in Bangladesh, Chile, Jamaica, Mali, Morocco and Uganda." *UNRISD, Occasional Paper 2*. Geneva, UNRISD. 1995; Anne Marie Goetz, and Shireen Hassim, "Introduction: Women in Power in Uganda and South Africa," *No Shortcuts to Power: African Women in Politics and Policy Making*, ed. Anne Marie Goetz and Hassim, Shireen (London & New York, Zed Books & David Philip, 2003).

¹⁶ At the Gender Summit in 2001, Zanele Mbeki challenged the 'powerhouse of women' and asked why more was not being done for women. The same question can be asked today? Mbeki the South African Women in Dialogue (SAWID). Many feminists (Adomako Amopfo 2004 and Mama, 2005) question the role of the First Ladies Syndrome in Africa.

could be harnessed, many of the current challenges confronted by feminists and gender activists and the millions of poor and abused could be overcome.

However, South African female politicians are realistic about the various barriers they face as numbers were not enough.¹⁷ ANC (What does ANC stand for?) MP's Mavivi Manzini and Nozizwe Madladla-Routledge stress the difficulties. With a full parliamentary programme there was no time for a women's caucus. These had to be repeatedly cancelled¹⁸ Minerals and Energy Minister Phumzile Mlambo-Ngcuka, (now Deputy President) emphasises how the women make time to support another in cabinet and "We are always looking for something to collaborate on."¹⁹

PART 3: IMPERATIVES TO CONSIDER:

There are numerous policy lessons, nationally and internationally, which, if applied, could contribute to improve gender relations, women's lives and their citizenship. I will sketch the over-reliance on the rights-based approach; the limitations of policies; and what I perceive to be the core omissions.

There is an over-dependence of the Rights Based Approach or Human Rights discourse and this is very controversial.²⁰ Whereas Clark and Mwasaru see the potential of human rights discourse if dealt with critically and pragmatically, Tzikata is particularly sceptical and argues that the language of RBA has been appropriated and not much change has occurred.²¹ There is also not one RBA, rather many RBA's emphasizing greater participation, accountability, people-centredness and non-discrimination of groups at risk. The impressive constitution and many progressive laws have not made much impact on ordinary women's lives. My data especially of women in the rural area supports this. Vasu Reddy too emphasises this:

Rights are wonderful; we have a wonderful jurisprudence and legal protection, but these amount to nothing if they don't come to justice'

(Vasu Reddy, quoted in 'Being Gay and Zulu by Niren Tolsi, *Mail & Guardian*, October 13 to 19 2006)

¹⁷ T. E. Mtintso, The contribution of Women Parliamentarians to Gender Inequality. Unpublished MA thesis, University of the Witwatersrand. (1999A); T. E. Mtintso "Women in Politics: a Conceptual Framework," Commission on Gender Equality Redefining Politics: South African Women and Democracy. (CGE, Johannesburg 1999B),

¹⁸ Colleen Lowe Morna, "Ringling up the Changes," Gender Links, (Johannesburg, 2004). p. 211.

¹⁹ Lowe Morna, at p. 113.

²⁰ Dzodzi Tsikata, "The Rights-based approach to development: Potential for change or more of the same?" IDS Bulletin 35(4), 2004.; Mwambi Mwasaru, "Beyond Approaches and Models, Reflections on Rights and the Social Movements in Kenya, Haiti and Philippines," IDS Bulletin, 36(1) Jan. 2005.; Clark, 2005.

²¹ Tsikata, at p. 113.

Others argue for legal literacy but this also had different effects, positive and empowering for women in Latin America and South Asia²² (Miller needs a full citation) but no discernible difference for African women²³ with very few women using the courts and law for their rights. In SA, mainly middle class women benefited from legal literacy and took their cases to the Constitutional court.²⁴ Desiree Lewis lauds the achievements of the constitutional court judgments but interrogates “what does this mean for the majority of lesbian or gay people... (who)... often have neither the material resources nor the supportive networks that many white lesbians, white gay men and black gay men have.”²⁵ I argue that various approaches should be used, including the constitutional court. The top down approach, imposing rights and laws onto people without their participation has not resulted in social transformation²⁶. The situation in South Africa is that impressive legislation like ‘Promotion of Equality and Prevention of Discrimination Act of 2000 is unknown to most and there is no ‘buy-in’ into it. In the rural areas, all power still belongs to the chiefs and the tribal courts oversee problems. Positive court judgements like the Bhe case (in which primogeniture was ruled unconstitutional) still do not affect the average rural women, nor are there are legal resources available.

The Beijing Platform for Action promotes national gender machinery (“NGM”) which is a vehicle to promote gender equality and women’s rights, monitors the effectiveness of structures and adherence to laws. The NGM and the concomitant gender mainstreaming and gender tools are increasingly being ‘technized’ and becoming more professional, resulting in an obsession with structures and not so much about content. As more ‘tools’ are developed, gender mainstreaming ‘becomes a hollow term’²⁷ and the central matter of transformation is marginalised or forgotten. In fact many argue that these various technicalities and ‘state machineries’ have depoliticised and deradicalized the feminist project.²⁸ Mukhopadhyay refers to the ‘ahistorical, apolitical, de-contextualized and technical’ projects of development projects at the ‘level of discourse and material practice.’²⁹ Clark, Miller, and Tsikata all argue convincingly that bureaucracy cannot be a transformation agent. Not only is there

²² Miller et al, 2005A:56.

²³ Tsikata, at 131.

²⁴ G. Fester, “Reconciling Multiculturalism for Democracy: Challenges for the new South Africa” Sexual Justice/Social Justice, ed. Monique Deveaux *et al*, (London: Routledge, 2006B).

²⁵ Lewis, at 5.

²⁶ Clark et al, 2005,; Miller et al, 2005A:56.; James Blackburn et al, “Operationalising the Rights Agenda: Participatory Rights Assessment in Peru and Malawi,” IDS Bulletin, 36,(1), 2005, pp 91-99.

²⁷ R. Subrahmanian, “Making Sense of Gender in Shifting Institutional Contexts: Some Reflections on Gender Mainstreaming.” IDS Bulletin 35(4), 2004. p. 90.

²⁸ Hassim, 2004; Goetz, 2004; M. Molyneux, M, “The Chimera of Success”, IDS Bulletin 35(4), 2004.; Patricia McFadden, “Intellectual Politics and Radical Feminists Praxis” Feminist African Intellectual Politics. (1) 2003.

²⁹ M. Mukhopadhyay, “Mainstreaming Gender or ‘Streaming’ Gender Away: Feminists Marooned in the Development Business.” IDS Bulletin 35(4), 2004. p.97.

often confusion about what gender equality is, in most cases it is just ‘an add on’ and many are not committed to it.

There is a major schism between policy and implementation and there has been very little evaluation and recognition given to this problematic area. Hilary Standing refers to the ‘naïve notions (that) policy (is) a route to transformation.’³⁰ She refers to various forms in which this is found. Firstly she refers to the absence of political input. Transformation cannot just be placed ‘on the statute book and a directive to the bureaucracy to carry them out... It cannot substitute the work of politics.’³¹

In terms of my analysis that women are ‘subjects to tradition, religion and culture’ it is essential to analyse power in order to develop strategies to enhance women’s citizenship. Clark’s distinction between various aspects of power is very useful.³² She refers to three aspects of power: firstly, public realm of power – in jobs, public life, legal rights, etc; secondly, private refers to relations and roles within families, friends and sexual partners; and thirdly, intimate power refers to one’s sense of self, personal confidence, psychology relationship to body and health. I argue that women too can internalise oppression and oppress other women. Women’s intimate power and their self concept can lead to their oppressing other women (by internalizing patriarchal ideology). Women may have public power (being a member of parliament) but in their personal and private lives and their own self –images, they may believe that they alone should be responsible for the care work and/ or their male partners should initiate sexual encounters. As Clark provides; “the experience of power may be contradictory in these different realms of life.”³³ It is interesting to note that many lesbian couples emulate these butch/femmes roles.³⁴ Nomaindia referred to the woman Premier (first citizen) of the Eastern Cape but she had to get permission from her husband’s clan to use the family name for her public office. I agree with Clark, that if strategies do not address all these aspects, there will not be holistic transformation. But because of the diversity of women and their various needs one has to take into cognisance the various identities.

Since different identities are fluid, relational and based on our gender, class, location, ethnicity, religion, etc; different strategies for different groups exist, along with a caution about imposing rights on women. Miller and Clark stress the importance of identities and how this affects rights. Feminists should work in such a way that women realise the manipulation and internalization of various roles and identities that may contest and contradict one another.

³⁰ Hilary Standing, “Gender, Myth and Fable: The perils of mainstreaming in sector bureaucracies.” *IDS Bulletin* 35(4), 2004. p.85.

³¹ *Ibid.*

³² Clark, at p. 77.

³³ *Ibid.*

³⁴ Ruth Morgan, and Saskia Wieringa, *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same-Sex Practices in Africa*, Jacana, Johannesburg. 2005,

Beall and Todes' research indicates starkly that it is not always gender policies *per se* that have transformative results but rather that gender issues were enhanced precisely because there was a politicized group of women involved.³⁵ The successful lobbying and partnership between women from the rural areas, women academics and politicians worked effectively on the Recognition of Customary Marriages Act precisely because the women from the Rural Women's Movement (part of the Transvaal Rural Action Committee) had a strong history of political activism. The member of Parliament and former organiser, Lydia Kompe, played a pivotal role in it.

As per the South African Beijing + 10 Report from 2005,³⁶ there is a great demand for more gender skills and adequate budget but Serote³⁷ challenges gender activists and bureaucrats/femocrats to state which skills are referred to and how much budget. Apart from the above limitations, the core issues of patriarchy and power are not sufficiently addressed and the atmosphere remains hostile to these rights. In relation to the aforementioned, there has not been enough critique and reflection on current context nor has there been enough theorization of the relationship between theory, policy and practice. From the above it is clear that transformation will take place through politics and that unless institutes and the context are changed; there will be minimal transformation of gender.

PART 4:

THE IMAGE OF WOMEN AND RELIGION:

In this section I will limit my examples mostly to that of African women as they have radically transformed the notion of the Christian mission church and 'indigenised' structures that have given them a unique status with the church.

The concern about religious texts, e.g. the Talmud and Bible were written during a period in which women, together with slaves and children, were considered 'secondary' citizens. Hence I completely agree with Dorr's comment: 'So we can truthfully say that the Bible is a book that was written by men, for men and about men.'³⁸ The central message is that the Bible was inspired by God. However, because it is written by men it reflects their human fallible nature, their

³⁵ J. Beall and A. Todes, "Headlines and Head-space: Challenging Gender Planning Orthodoxy in Area-based Urban Development." *IDS Bulletin* 35(4), 2004.

³⁶ South African Beijing +10 Report. The Presidency, Pretoria, 2005.

³⁷ Pethu Serote, "South African Country Report for the Southern African Development Community (SADC)" Needs Assessment for the Capacity Building for National Gender Machineries in SADC Member, 2004.

³⁸ Jaqueline Dorr, Women Seeking Justice, (Nairobi,: Pauline's Publications, 2002). p. 13.

prejudice, weaknesses, ignorance and limitations.³⁹ Most religious texts are male defined and androcentric with a powerful male God. This does not affirm women even though they, according to Christian scriptures, 'are made in the image of God'.

Maggie Humm, as part of her feminist literary criticism, quotes Jane Rule's work as an example of Lesbian feminist criticism. She quotes Rule who states that "religion is a sexist and partial net of meanings."⁴⁰ Jane Rule in *Lesbian Images*(1975) also observes that religion, and especially Judaism and Christianity, perpetuates symbol systems and concepts that are all masculine. This is also noted by feminist theologians like Dorr and Wilma Jakobson⁴¹. They also note that the images emphasised by male clerics to illustrate God are masculine: Warrior, Avenger, Conqueror, Lord, Defender, Punisher of Evil and Almighty. Very seldom are the positive God-Mother images, like those found in both the old and new testament, for example, Mother, Life-Giver, Nurturer, Midwife, Comforter, Gentle, and Forgiver, used in institutions. What message does this patriarchal and androcentric message mean to women?

Dorr, like Mary Daly⁴² questions the language, symbols and concepts of Christian myths and argues that they are all masculine. Daly adds that this applies to all world religions. At a panel discussion on religion and the role it plays in perpetuating gender oppression and women from many faiths confined that their religions reinforced sexism.⁴³ The research findings of Angie Danylut⁴⁴ of the Tibetan Buddhists communities living in Toronto, Canada is quite revealing. Contrary to the general impression that Buddhism promotes and supports gender egalitarianism, she found that there existed no formal roles for women in Tibetan Buddhism nor was there any evidence of full women's ordinance. She quotes the work of Gross who has found that many exemplary women were used by the more anti-feminist and conservative element in Buddhism as a means for maintaining institutionalised sexist practices.⁴⁵

The central message of most religions is that women must be passive. It reinforces gender stereotypes and rigid gender hierarchical roles in the family. This is reinforced by the examples in the scripture. Jaqueline Dorr comments on the invisibility and silence of women in the bible:

³⁹ *Ibid.*;

Cecile, Cilliers, *Begenadigde Vroue*, Christelike Uitgewersmaatskappy Vereeniging, (2001). p.7

⁴⁰ Maggie Humm, *Contemporary Feminist Literary Criticism*, (Harvester/Wheatsheaf, Hertfordshire, 1994). p. 232.

⁴¹ One of the first woman Anglican priests to be ordained in Cape Town. During the early 1990s, Wilkinson promoted these ideas during her work at St George's Cathedral, Cape Town.

⁴² Humm, at 232.

⁴³ CGE workshop, Cape Town, 2002.

⁴⁴ Angie Danyluk, "Gendered Practice and Gendered Roles, Redefining Women in Tibetan Buddhism," *Feminist Utopias*, ed. M Eichler, J.Larkin and S. Neysmith, (Toronto: Inanna Publications and Education Inc, (2002). p. 143, 148.

⁴⁵ Danylut, at 148.

(Mostly) the women we find are ...silent, shadowy figures, dominated and overpowered in biblical writings by masculine heroes and patriarchal systems.⁴⁶

In the religious texts, the rituals and the fact that many cases women cannot become religious leaders, all reinforce the secondary and subservient role of women.

Similar to other fields like medicine and history, women researchers have for the past few decades discovered and exposed aspects of 'herstory' which for centuries were ignored or even suppressed by male researchers.

'They are at last bringing our shadowy sisters in from the margins and setting them centre stage.'⁴⁷

This, together with the development of a human rights and women's rights culture, resulted in more women asserting their positions in institutions of faith as both clergy and lay people.⁴⁸

There are, however, a few male clerics who are gender sensitive and critique the patriarchal practices of the church. Outspoken male leaders are the Anglicans archbishops Tutu and Ndungane. Others like Desmond Lesejane, director of the ecumenical Service for Socio-Economic Transformation have been vociferous about the negative messages of the church. According to men, men continue to dominate the task of mediating and interpreting the message of faith. Churches continue to play a role in the negative socialization of men and hence men 'continue to visit injustices upon women and resist gender equality.'⁴⁹ Further entrenched is the notion that men are superior to women and their leaders are the 'core teachers of the faith, thus sustains patriarchy'⁵⁰ In formulating strategies for future, feminists need to for, alliances with gender sensitive men. (I do not understand what this sentence is trying to say, please re-word)

In terms of understanding the evolution of the role of women in the church, it is important to look at it in its historical perspective. Meintjes explores how the values of Christian womanhood were imposed upon South African women. Bozzoli (1983:165) asserts that 'the *manyono* women seek to conserve and consolidate the family and the women's position within it'. As much as this may be true in many circumstances, I believe that the reality is much more complex and that the situation needs to be assessed within the historical demands and forces of the time. Given the existing power relations of the period there may be

⁴⁶ Dorr, at 8.

⁴⁷ *Ibid.*

⁴⁸ Women are also public criticising and seeking to transform institutions like the Catholic Church, conservative Islamic and Orthodox Judaism.

⁴⁹ Desmond Lesejane, 'Through men, by men, for men: Christianity and the Quest for Gender Equality'" Agenda, Special Focus on Gender, Culture and Rights, 2005. p. 79.

⁵⁰ *Ibid.*

many reasons other than women's complacency. Gaitskell quotes Cott who sees the parallels between women in the USA and SA Like in the 19th century USA, *manyanos* were grassroots women's responses to the contemporary culture and religious elevation of the mother's role.⁵¹ Motherhood is a deeply complex and nuanced concept in South Africa and as I argued elsewhere,⁵² motherhood must not be seen in a narrow nuclear family domesticated concept but rather a community militant motherhood through which women actively transformed society and contributed to the new South Africa.

I want to argue that the elevation of women's role as wife, mother and nurturer of children and the family took place within the context of colonization, apartheid and the enormous social, political and economic upheaval of the enforced transition from a rural, pastoral society to and apartheid capitalism serving the dictates of the capitalist exploitative mining industry. Walker eloquently refers to how Africans were 'conquered, Christianised, proletarianised and urbanized.'⁵³ The colonial powers, camouflaged by benevolence, tinged with missionary zeal, forcibly transformed African patriarchy to suit colonial capitalist patriarchy. Walker refers to this as the 'Victorian Christianity which offered a contradictory package to African women'.⁵⁴ This process had a profound effect on the gender relations within traditional African society but which falls outside the scope of this study. Suffice it is to say that missionary education emphasised the role of women as child-bearers and home makers. In some cases this overlapped with aspects of traditional culture. Church groups 'transferred, elevated and entrenched the important role of marriage, wifehood and motherhood for women.'⁵⁵

But how did women respond to this? Women did not only internalise this message and propagate it. On the one hand if there was a 'conservation and consolidation of the family 'as Bozzoli (1983:165) states; then one needs to this as a response to the apartheid regime and their migrant labour policies. This created the deliberate destruction of African families by allowing men to migrate to urban areas and not women and children.

Contrary to the idea that women were victims and subjects to Christianity; there are many examples of women's agency and how they used the new religion to transform their lives and they, in turn, transformed aspects of the religion as well. In many cases the new religion gave women some freedom from males and from the mission structures as they created their own structures and women's solidarity. The formation of the *manyanos*, was a vehicle of 'female spiritual leadership and church expansion; it did not force women into

⁵¹ Deborah Gaitskell, "Devout Domesticity? A Century of African Women's Christianity in South Africa' in *Gender in Africa* edited by Andrea (Cornwall, Indiana University Press, Bloomington & Indianapolis, 2005). p. 185.

⁵² Fester 2005.

⁵³ Cherryl Walker, Women and Gender in Southern Africa to 1945. 1990. p. 4.

⁵⁴ *Ibid.*

⁵⁵ Gaitskell, 185.

stereotypical moulds.⁵⁶ With their fervent prayer meetings, uniforms and independent structures, one could say that as much as Christianity imposed a western religion and values on African women, it was also an opportunity for them to deprive women of their independence. Through their organization the *manyanos* became and still are a formidable presence in South Africa. Gaitskell quotes extensive statistics of the huge membership (the highest in Africa) of the Anglican and Methodist churches as well as the impressive fund raising⁵⁷. More research on how these structures affected power relations and transformed gender relations within the families and the church both historically and currently as a whole is required.

PART 5: SOME THOUGHTS/QUESTIONS ON STRATEGIES TOWARDS FUTURE ALLIANCES:

INTERGENERATIONAL MOVEMENTS:

Young feminists have been very vocal and articulate the importance of an intergenerational women's movement.⁵⁸ Sanpath, for example raises the issue of environmental activism and this could be a very viable and dynamic movement given the urgency of the issue. How precisely this will unfold depends on which focus is most relevant for women's lives. Accessible and safe transport could be an avenue given the comprehensiveness of it. Transport is definitely an environmental issue, a working class issue affecting the majority of the people and also a women's issue given the sexual abuse and brutality which take place especially on trains. Indian and Australian feminists have worked around this and for the past decade there are 'women's only carriages' and reliable public transport in these countries, unlike the situation in SA.

I would like to focus on an area which I believe requires major intervention, that is, the African National Congress Youth League ("ANCYL"). Not only is this male led body politically very influential, but the concern is the inevitability of the future core of national leaders will be coming from this body. Jacob Zuma, in a recent speech proposed that this body be the determining voice in the election of the new president as it has done in the past.⁵⁹

Research has shown that the issue of feminists aligning with a political party is very ambivalent:

⁵⁶ Gaitskell, at 185.

⁵⁷ In St Stephen's DR Church (Cape Town), like many other churches, the Mothers' Union is the most active structure and has the most money. In the early 1990s there were major tensions between the church council and the Mothers' Union as the council wanted the Union to close its account and place it within the general church account.

⁵⁸ Shamillah Wilson, "Moving forward as a multi-generational movement," *Agenda*, No 69, 2006.; Arthi Sanpath, "Africa Youth Environmental Network Conference: Increasing Young Women's Participation in Environmental Activism," *Agenda*, No 69, 2006.

⁵⁹ *The Cape Times*, 30 October 2006.

Autonomy versus integration: Should women's movements work with the new institutions and parties and risk being co-opted and losing autonomy, or should they remain outside, preserving their independence but risking marginalisation and loss of influence as power shifts toward the political parties? No definitive answer has emerged.⁶⁰

There is no one position for feminists. According to Hassim in the post liberation period there are very few options for women's movements. 'Rarely,' she says, 'have women activists or oppositional social movements in general been able to build a successful movement outside the party, and where they do it is against enormous resistance from the party.'⁶¹ Hope Chigudu and Wilfred Tichagwa write about the dilemma for women in Zimbabwe. They assess to what extent women can have a power base outside the mainstream political parties:

Do (women) have an alternative power base (to the party)? Would they survive if they relied solely on the alternative power base? To both questions the answer is probably no!⁶²

Therefore, given the leading role that the ANC will be playing for the next few years at least, I am proposing that younger feminists infiltrate the ANC YL and many older feminists who have ceased being active in the ANC Women's League (ANCWL) should revive their participation. The ANC Women's League has historically had a good relationship with the ANC YL. The fact that the ANCWL launched the Progressive Women's Movement which has a definite feminist agenda (patriarchy is challenged in the *Founding Document* 2006) indicates the hiatus for firm feminist action. The ANC is the most viable party for intervention. The ANC WL with the ANC YL could be a strategic intergenerational alliance, given the powerful roles these two structures have. I assume that this could be the proposal for any political party and its Women's and Youth Leagues and should be explored. The reason why I am highlighting the ANC structures is because of the powerful role it has played in the past and can play in the future. There should also be some intervention into the Congress of South African Trade Unions (COSATU), the South African Communist Party (SACP) and the Young Communist League (YCL), all important opinion makers but with male only leadership.

WORKING WITH FEMINIST MEN:

This term, feminist men, is very controversial as some feminists feel that men cannot be feminists but that they rather are supporters of women and gender equality. New men's organisations have emerged with which feminists can build alliances, for example, Men as Partners and the Men's Forum. What

⁶⁰ Georgina Waylen, "Women and Democratisation: Conceptualising Gender Relations in Transition Politics." *World Politics* (46), 1994. p. 339-340.

⁶¹ S. Hassim, S. "Identities, Interests and Constituencies: The Politics of the Women's Movement in South Africa, 1980-1999." Unpublished PhD thesis, (Ontario: York University, 2002). P. 379.

⁶² Hope Chigudu, and Wilfred Tichagwa, "Participation of women in party politics". *Zimbabwe Women's Resource Centre and Network, Discussion Paper 9*, (Harare, 1995). p.2.

has emerged out of discussions and forums with gender-sensitive men is that women should remain in the forefront of these alliances as stated by Khumalo:

The issue of leadership in this struggle for gender equality is not in dispute: this role should continue to be played by women'⁶³

Khumalo also questions the double standards of the society in which we live. He refers specifically to an incident that took place in the Vhembe District in Limpopo. He related the story of a 79 year old 'respected community leader', who had repeatedly raped a 9 year old girl. The community only exposed this when the 9 year old, as a result of the brutality of the 'community leader', died as a result of her injuries. It then also emerged that the wife of this 'leader' had been regularly abused by her husband. Khumalo states that the 'label of 'respected community leader' is right at the core of the challenge that confronts us'⁶⁴ The role of communities in maintaining the status quo needs to be interrogated. Apart from exploring how feminists will work in the partnership with men, my first proposal is that these very 'feminist' men should regularly be speaking at various men's forums, in the religious institutions, sport clubs and places where men regularly meet.

LINKING ACADEMIA AND WOMEN'S/FEMINIST ACTIVISM

One of the negative developments for feminism over the past decades is the schism between activism and academy has increased or is even non-existent. Pat McFadden reminds us about the artificial divisions between theory and practice.⁶⁵ She further on states that theory /intellectual engagement has to be linked to the practicalities of life⁶⁶

There has also been a change in the curriculum of Women's Studies. It was stated at one university that the name 'Feminist Studies' could not be used as the department had to attract men and therefore the less radical and more pragmatic Gender Studies had to be used. Committed feminists, because of economic pressure, thus have to promote a feminist theory devoid of activism. They become what Sylvia Tamale refers to as 'half-baked and truncated feminists.'⁶⁷ Adomako Ampofo states that the major challenge to women's and gender studies research is the revival of its feminist activist variants instead of deradicalised studies of women and gender, as presented in the research,

⁶³ Bafana Khumalo, "The Role of Men in the Struggle for Gender Equality: Possibilities for Positive Engagement" Agenda, Special Focus on Gender, Culture and Rights, 2005. p.89.

⁶⁴ Khumalo, at 89.

⁶⁵ Patricia McFadden, "Intellectual Politics and Radical Feminists Praxis" Feminist African Intellectual Politics, (1) 2002. p 87.

⁶⁶ McFadden, at 89.

⁶⁷ Shamilah Wilson, at 11.

training and social policy in the academic institutions.⁶⁸ Because of the restructuring of universities to economically viable entities in keeping with the neo-liberal agenda, Women and Gender studies are constantly under threat if they are not increasing their numbers of enrolled students. Staff battle to keep the units open. Adomako Ampofo challenges feminists to “rebuild the close synergy between research and activism... and remain sensitive to the social contexts and complexities of women’s and men’s lives and link this to action to promote gender equity and social change”⁶⁹

Not only do we have to link it, but we need to ensure the intellectual and academic excellence and relevance of what we’re doing. Mary Maynard reminds us:

Feminists’ work needs to be rigorous if it is to be regarded as intellectually compelling, politically persuasive, policy-relevant and meaningful to anyone other than feminists themselves.⁷⁰

The role of Centre for Applied Legal Studies (“CALs”) has been central in many pieces of legislation like the Recognition of Customary Marriages Act (“RCMA”). Can this be increased? How does one engage other tertiary institutions? The African Gender Institute (“AGI”) with the publication of *Feminist Africa* made major strides in improving debates and intellectual enquiry into feminist issues on the continent. What is the impact outside of academic circles and is this an avenue for exploration as a potential ally?

What relationships exist within departments in close geographic proximity, like Universities of Johannesburg, Wits and Tshwane? Maybe institutional relationships between the African Gender Institute (UCT), Women and Gender Studies, Gender Equity Unit (University of the Western Cape, UWC) and the Women’s Studies at the University of Stellenbosch (US) could be a catalyst for positive feminist action. What other potential partnerships could be amongst institutions in close proximity but what does this mean for universities that are situated far from urban areas like the University of Transkei?

CALS current role within this conference, as the host, is one example of how academic institutions can promote the feminist agenda. By ensuring that the academic work their students are doing is linked to ‘the social contexts and complexities of women’s and men’s lives’⁷¹ could be done through introducing a

⁶⁸ Akosua Adomako Ampofo, et al. “Women’s and Gender Studies in English-Speaking Sub-Saharan Africa: a Review of Research in the Social Science,” *Gender & Society*, 18 (6) dec, 2004.

⁶⁹ Adomako Ampofo, at 704, 705.

⁷⁰ M. Maynard, and J. Purvis, J. *Researching Women’s Lives from a Feminist Perspective*, (London: Taylor and Francis, 1994). p. 24.

⁷¹ Adomako Ampofo, at 704, 705.

'fieldwork' component. Many institutions have already done this whereby students work with an NGO or a particular community around an issue.

POPULARISATION OF THE FEMINIST AGENDA:

Jennifer Radloff challenges feminists to use available technology. She outlines various positive examples of how globally women have used ICT's as a mobilising tool.⁷² Other electronic media like radio and television should also be explored. It may be relatively easy to access community radio and even national radio. It is the SABCTV which is the most challenging. A current affairs talk programme like *Interface*, though there are female presenters, have mostly male panellists. Some advocacy work could be done by perhaps writing and/or challenging the SABC board.

In terms of best practice and learning from feminist strategies globally, the Latin American based *Feminist International Radio Endeavour* (FIRE) has really made major interventions throughout Latin America for at least a decade. They for example, will be webcasting live from Managua on November 5, 2006 with a woman's perspective on the Nicaraguan elections. Just like WomensNet has made major inroads, a feminist radio station could make major interventions, especially in the rural areas.

Feminists need to be more visible, vocal and do advocacy and lobbying. How do feminists become part of the opinion-makers and influential speakers like Tim Modise? Opportunities like free media coverage like 'Letters to the Editor' need to be explored. But all of us are mostly overworked and crises-managed. Unless structures or a definite plan is put in place, this conference will remain a 'talk shop'. Some 'glossy magazines' have been featuring more 'feminist' articles recently but the majority still focus on fashion, make up, etc. Is this an area that should be explored or is it not worth it?

The most important and in long term most worthwhile project to embark on is a partnership with the Education department⁷³, the Teachers' Unions like South African Democratic Teachers' Union⁷⁴ and maybe key women politicians. Individuals should be identified and approached. How should this proceed if there is agreement that this should be a strategic area of working? Is the most strategic step to have a meeting with the minister, top officials or the gender focal person? How do we draw in women who have made their mark as feminists and could/should be drawn into this 'circle of concerned feminists'? (An example that

⁷² Jennifer Radloff, "Claiming Cyberspace: Communication and Networking for Social Change and Women's Empowerment." *Feminist Africa Women Mobilised*, (4), 2005 p.85, 88.

⁷³ It needs to be borne in mind that the education dept has impressive resources, but many of the resources (like *Issues on Gender in Schools, an introduction for teachers*), are not distributed at many schools.

⁷⁴ One has to bear in mind the increasing abuse and sexual harassment of learners by educators (SA Human Rights Report 2006). Maybe a relationship could be positive

comes to mind is Pregs Govender). There should be more exploration of the use of the creative Arts. Should more women write, and produce films, in order for feminists to make input into the creative genre?

EXPLORING OPENINGS FOR INTERVENTIONS IN INSTITUTIONS OF FAITH:

How do feminists make intervention into these patriarchal spaces? I will limit my input to that of Christianity it is an area which I feel, as a practicing Christian, I should explore as a site of struggle. The major current challenge is the proliferation of new charismatic movements, which are extremely conservative. It is rumoured that these 'warehouse' churches⁷⁵ are funded by conservative churches in United States. These 'warehouse' churches are extremely wealthy, have started various community projects and are particularly mushrooming in both middle and working class areas. Their biblical interpretations are very narrow and they see current social problems caused by women who no longer are accepting their roles as carers and keepers of the household but are seeking careers outside of the home to the detriment of their families. Some public actions undertaken by the 'Marriage Alliance'⁷⁶ are marches and petitions to parliament against the Choice on Termination of Pregnancy Act and Civil Unions Bill. What we can learn from these churches is that they have managed to popularise their 'narrow message of salvation' by having community radios, for example, Radio Tygerberg.⁷⁷

There are some openings and these need to be explored. Archbishop Ndungane (from the Anglican Church) at a recent synod challenged the church to explore new ways of working. He admitted that the church had perpetuated patriarchy⁷⁸ and remained silent against abuses committed against women in the name of culture. There may be other cases of sympathetic church leaders who could be identified. A 'feminist forum on faith' could be established and identify strategies of intervention within the church.

The Circle of African Women Theologians⁷⁹ and similar bodies could be catalysts for working within the Christian Institutions. The Circle focuses mainly on research and publication and not advocacy. Like many women/feminists in various fields the challenge is time and it is unrealistic to attempt to do too much.

⁷⁵ Mark Lottering, a popular Cape Flats comedian, made references to these new churches which are as big as warehouses (some seating 5000), in his play, 'Hallelujah!' Baxter, August 2006.

⁷⁶ An amalgamation of charismatic churches particularly vocal against same sex unions.

⁷⁷ There are also 2 Muslim radio stations, Voice of the Cape and Radio 789. Many Christian stations exist.

⁷⁸ Interview Rev Michelle Walker (September 2006). She is the previous gender coordinator of the Anglican Church. She is also the writer of a workshop aid/booklet on how to raise issues around gender equality in the church.

⁷⁹ Cape Town chapter is based at Stellenbosch University and incorporates feminist theologians from the Universities of Cape Town and Western Cape. The circle was recently relaunched (July 2006) at the University of Western Cape.

How then, do feminists with meagre resources, time and energy, make any impact when globally misogynistic and androcentric messages abound?

In terms of strategy it would be pragmatic to not speak about rights of women but rather that 'women like men were made in the divine image of the Creator.' This could be a common strategy for all religions. The central rallying point would be promoting the dignity and integrity of all the creations of God.

CONCLUSIONS:

There is no consensus on the most strategic route for women/feminists to pursue. I argue that the context and demands of the particular political moment will determine the strategy and indicate what is most pragmatic. I concur with Kawamara-Mishambi and Ovonji-Odida who emphasise that when women should use various strategies at different moments, intervention will be ensured.⁸⁰

I want to stress that the partnership of working with and supporting women in government and positions of power is key. There needs to be lobbied for the legislation of 50/50 participation for all political parties. President Mbeki has alluded to this in the past. Of course it needs to be remembered that not all women will promote a feminist agenda and hence work has to be done in this regard. By having a critical mass of women in government, women do not have to be forced to *assimilate*, rather can *infiltrate*⁸¹ and make definite feminists' intervention.

The other strategies like gender mainstreaming (national gender machinery, representation, etc) should continue but there should be regular evaluation of these strategies.⁸² Lowe Morna identifies how feminist projects like mainstreaming can become co-opted into the 'male' stream – hence evaluation is critical.

Women in these positions need support and there should be coordination of what happens within government and the independent feminists. With women as 'descriptive representation' the status quo in parliament remains the same. Goetz and Hassim argue that the distinction is misleading as it may overemphasize women's role as a political agent, focusing on women's failure to influence and impact on policy. I find the distinction useful as it is clear that many women in government and gender bureaucrats do not make the transformation of

⁸⁰ Sheila Kawamar-Mishambi, and Irene Ovonji-odida, "The 'Lost Clause': The Campaign to Advance Women's Property Rights in the Uganda 1998 Land Act," No Shortcuts to Power: African Women in Politics and Policy Making eds. Anne Marie Goetz and Shireen Hassim. (London & New York , Zed Books & David Philip, 2003), p. 184, 185.

⁸¹ Goetz (2004) distinguishes between infiltrating whereby feminist intervention is taken and assimilating where women follow the party agenda and not promote women's /feminist issues.

⁸² The Gender Summit (2001) is an example of an evaluation of the NGM with many important resolutions.

the lives of ordinary women a priority and are just 'gender divas' as Pat McFadden calls them, carving out careers for themselves on the 'gender ticket'. Goetz and Hassim's proposal however, is a crucial one to consider. The culture and context of institutions may be so patriarchal that they hamper women's strategic presence and limit women's participation to merely descriptive. By segregating descriptive from substantive, they (Goetz and Hassim) argue that it detracts from the political institutions in which women find themselves and state:

"That the design of political institutions and the culture of competition over ideas and principles in civil society, politics and the state profoundly shape the perceived legitimacy of women politicians and of gender equality concerns, and hence the effectiveness of feminists in advancing gender equality policy. The second reason that the 'descriptive' versus 'substantive' contrast may be overstated is that ... 'descriptive' representation may be the necessary first step that is required if 'substantive' representation is to be achieved"⁸³

I agree with the above in that the substantive incorporation of women into parliament is a process and that the performance of women cannot be isolated from the context of the cultures of the institutions. With the exception of a few changes (introduction of crèches, washroom facilities and hours of meetings brought about by women themselves), the culture and atmosphere of the South African National Assembly has not changed.⁸⁴ For many it is 'business as usual'. Mtintso, in writing about the Parliament echoes this:

'Because parliament is so patriarchal and the power so obvious, women are in danger of being swallowed by its culture, its ethos, values and priorities. They get afraid of moving against the mainstream and in that way find themselves compromising and promoting the very patriarchal agenda.'⁸⁵

The main challenge, however, is to coordinate the various fragmented feminist organisations and structures. Others speak about the resurgence of the independent progressive women's movement. Whatever the structures, the intent of making feminist interventions should be paramount in order to radicalize these structures or even just to make them more effective. Mohanty argues that because of the vagueness of 'insisterhood' broad solidarity with other marginalised groups should be built. I too support this and argue for a pro-poor or social justice coalition.

Challenging the existing power relations is crucial for the change in gender hierarchical relations. It is not enough to challenge only public power. Private and especially intimate power and women's self image will not change unless culture, tradition and the various faiths become more equalitarian and human. The

⁸³ Goetz, and Hassim, at 5, 6.

⁸⁴ Hassim, 2002; at 100.

⁸⁵ T.E. Mtintso, The contribution of Women Parliamentarians to Gender Inequality. Unpublished MA thesis (University of the Witwatersrand, 1999A), p.39.

power of the media cannot be undermined in its contribution to the construction of one's self image.

The global context by which South Africa is governed (it is claimed that South Africa, by implementing GEAR, has self imposed structural adjustment) is negative for the enhancement of women's citizenship. Simultaneously it would be meaningless to create comprehensive citizenship for women and other marginalised groupings if the 'darkening international political climate'⁸⁶ of neoliberalism and the US/Vatican/Islamist coalition are not challenged by strategic international progressive and feminist lobbies. Feminists and social justice activists should in solidarity establish global movements in which strategically various tasks are done, for example in relation to the World Trade Organization, the World Bank, the International Monetary Fund, trafficking and violence against women. Feminists/Women and concerned persons should explore how to 'infiltrate', for example, the bastions of faiths, education and media and traditional institutions as well as these Bretton Woods institutions. How to build an effective progressive 'pro-poor lobby' could be a strategy but major challenges exist. Mohanty speaks about the 'politics of solidarity'⁸⁷. In the interim the idea of a comprehensive citizenship for all must be disseminated at different levels.

Lois Wilson argues that if one has a positive vision, 'an act of subversive imagination'⁸⁸ this can be transformed into a feminist utopia. Believing that another world, one of justice and equality and mutual respect is possible is a good start. Just like Mohammed Yunus, founder and initially sole implementer of micro credits to poor people and 2006 Noble Peace Prize winner, believed in a world in which there would be no poor people. He believed that poor people, if given sufficient funds, would work themselves out of poverty. The Grameen Bank has reached more than 100 million people world wide.⁸⁹ The starting point is that he believed it was possible. Maybe this is the core of our work: we should believe that a world without violence against women is possible, that a world of equality is possible: that is the starting point.

In conclusion I support Mohanty's call for a transnational feminism; which can challenge the normalization of masculinist/patriarchal and racist values and feminists should use the opportunities opened up by globalization. Globalization need not just be a negative:

⁸⁶ Molyneux, at 114.

⁸⁷ Chandra Talpade Mohanty, Feminism without Borders, decolonizing Theory, Practicing Solidarity, (Durham and London: Duke University Press. 2003). p. 4.

⁸⁸ Lois Wilson, "Rockers of the Cradle, Rockers of the Boat: Feminist Utopias" Feminist Utopias ed. M Eichler, J.Larkin and S. Neysmith, (Toronto: Inanna Publications and Education Inc, 2002). p. 77.

⁸⁹ 'The banker who saved the world', Sunday Argus, Oct 15 2006, p 21.

A transnational feminist practice depends on building feminist solidarities across the division of place, identity, class, work, belief, and so on. In these very fragmented times it is both very difficult to build these alliances and also never more important to do so. Global capitalism both destroys the possibilities and also offers up new ones.

Feminist activist teachers must struggle with themselves and each other to open the world with all its complexity to their students. Given the new multi-ethnic racial student bodies, teachers must also learn from their students. The differences and borders of each of our identities connect to each other, more than they sever. So the enterprise here is to forge informed, self-reflexive solidarities amongst ourselves.⁹⁰

⁹⁰ Mohanty, at 250, 251.

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Women, land and power: the impact of the Communal Land Rights Act

Aninka Claassens and Sizani Ngubane

INTRODUCTION

This chapter examines the likely impact of the Communal Land Rights Act 11 of 2004 on rural women in South Africa. It is based on research undertaken in the context of the legal challenge to the Act.¹ The Act deals with the content and vesting of land rights as well as the powers and functions of the structures that will administer 'communal' land. The chapter looks at the interplay between land rights and power over land.

The discussion begins with a description of some of the problems facing rural women in the former homeland areas covered by the Act. It then describes issues raised by women's organisations in late 2003 during the parliamentary process leading to the passing of the Communal Land Rights Bill. There were two main objections to the Bill. The first was that entrenching the power of traditional leaders over land was likely to reinforce patriarchal power relations and harden the terrain within which women struggle to access and retain land. The second was that the Bill would entrench past discrimination against women by upgrading and formalising 'old order'² rights held exclusively by men.

¹ Claassens co-ordinated research for litigation challenging the constitutionality of the Act on behalf of the Legal Resources Centre (LRC). She has worked with rural communities in South Africa for more than 20 years. Ngubane, an expert witness in the litigation, is Director of the Rural Women's Movement (RWM) in KwaZulu-Natal. She has spent more than 20 years working with rural women, mainly in KwaZulu-Natal but also in the rest of South Africa. During 2003, Ngubane and Claassens worked together on a consultative project with rural women on problems concerning land rights and the draft Communal Land Rights Bill.

² The Act defines old order rights in communal land to include rights that are formal or informal, registered or unregistered and derive from law, including customary law, practice or usage.

In response to strong lobbying from women's organisations, the provisions dealing with the vesting of 'old order' rights were amended when the Act was adopted by Parliament in early 2004 and various provisions pertaining to equality for women were added. However, the provisions dealing with the powers of traditional councils were not materially changed. This chapter discusses the amendments made during the parliamentary process and asks whether these adequately address the problems facing rural women.

Single women are in a particularly vulnerable position when it comes to land tenure. This chapter focuses on their situation given that the Act is likely to exacerbate their insecurity, and that the wording of the amendments may undermine hard-fought struggles by single mothers to be allocated residential sites. It is therefore argued here that the Act conflicts with the constitutional imperative to secure the land rights of people whose current vulnerability arises from past discrimination. It is also argued that the impact of the Act on single women is inconsistent with the right to equality—in particular because it discriminates on the basis of marital status.

It is suggested that many of the problems created for women stem from the failure of drafters of the law to engage with the prevalence of family-based systems of land rights, the overlapping and nested nature of such rights, and critical issues pertaining to the status and content of women's rights in family-held land.

The chapter then discusses the impact of patriarchal power relations on women's land rights. It describes how decision-making forums that deal with land allocation and dispute resolution have a material impact on women's capacity to access and retain land in the context of competing claims and family disputes. It argues that the 30 per cent women's quota introduced by the 2004 Act and its sister Act, the Traditional Leadership and Governance Framework Act 41 of 2003, will not be sufficient to offset the consequences for women of entrenching and expanding the power of institutions that have systematically discriminated against them in the past.

The chapter goes on to situate the discussion of the Communal Land Rights Act in the context of broader debates about approaches to tenure reform and the impact of these

on women. It argues that if reforms—of whatever nature—are not informed by an accurate understanding of current systems of land rights and power dynamics, they are likely to have unintended consequences which may exacerbate women’s vulnerability. It is argued that existing inequalities in property relations between men and women already have serious consequences in terms of evictions and domestic violence. It is suggested that unequal property relations have contributed to declining rates of marriage and the increasing number of children born to single mothers. The chapter argues that the challenge of improving—rather than undermining—women’s bargaining position within the family in relation to land and property rights is critical not only for women’s security, but also because of the societal consequences when unequal property relations contribute to the breakdown of family structures.

Property relations are created through processes of human interaction at the local level and are not established by the introduction of laws (Hann, 1998; Lund, 2002). While law *per se* cannot create new property relations (and is likely to have unintended consequences when applied beyond its limits), it is a critical factor in establishing the balance of power within which people interact to create property relations. National laws and institutions have a major impact as important reference points for action, in bolstering the power of certain groups and in providing possible avenues for legitimising property and authority (Lund, 2002: 32).

This chapter argues that while the 2004 Act contains provisions that provide for formal equality between men and women, it falls short in terms of substantive equality, and will in fact undermine the land rights and security of tenure of single women. While it has important potential advantages for married women, many of its provisions cannot be implemented at scale. Moreover, strengthening the powers of traditional councils in relation to land exacerbates the unequal power relations within which women struggle to access and retain land rights, and is likely to further undermine the bargaining position of most women, and single women in particular.

This chapter ends by putting forward some alternative approaches to advancing rural women’s interests through law and tenure reform.

PROBLEMS FACING RURAL WOMEN

Community consultation workshops were held in five provinces during 2002 and 2003³ to inform people about the 2002 version of the Communal Land Rights Bill and to discuss the tenure problems faced by rural communities. In these workshops, a range of problems were raised in relation to women and land rights. These problems were similar to those raised in many RWM workshops and surface time and again in accounts by other authors writing about the position of women in rural areas (Cross & Friedman, 1997; Mann, 2000; Meer, 1997; Small, 1997; Thorp, 1997):

- Women are often evicted when their marriages break down or end. In particular, widows are often evicted from their married homes by their husbands' families.
- Divorced or widowed women who return to their natal home when their marriages end are often made unwelcome and are evicted by their brothers.
- Unmarried sisters are often evicted from their natal homes by their married brothers after their parents die. This occurs because sons assert that they alone inherit the land, even where the father may have chosen his daughter to be responsible for the family home.
- Married women are not treated as people who have rights in the land. The land is treated as the property of the husband and his natal family. Wives are often not consulted in relation to decisions about the land—whether these are about how to use the land or about transactions in the land. Women are treated as minors, both within the family and the community.
- Women, particularly single women, struggle to access residential land because traditional leaders generally refuse to allocate land to women.
- Women are often excluded from traditional institutions such as tribal and village council meetings where key decisions about land rights are taken. The problems cited include women not being represented in tribal councils and courts, not

³ The meetings took place under the aegis of a project co-hosted by the Programme for Land and Agrarian Studies (Plaas) and the National Land Committee, and aimed at extending civil society participation in the legislative process around the draft Bill. A total of 700 people attended the meetings, representing 75 rural communities from five provinces. For more detail on the problems raised in relation to women and land rights, see Claassens (2003).

being allowed to address meetings, and being denigrated or ignored when they try to speak.

- Tribal courts that decide family and land disputes are generally dominated by elderly men and are perceived to favour men over women. This has serious consequences because disputes may result in women being evicted from their homes, and women being denied redress when they complain that their land rights have been abrogated.

A series of follow-up workshops was held with women's groups in KwaZulu–Natal and the Eastern Cape in late 2003. Women recounted their personal histories at these gatherings. One of the factors motivating the workshops was a statement made by the Deputy Minister of Land Affairs, Dirk du Toit, to a delegation of rural women in July 2003⁴ stating that they could not expect tenure reform law to address or solve their 'personal family problems'. The women's accounts were collected to illustrate the impact of tribal authority structures and existing land laws on the unequal power relations that give rise to the evictions characterised by the deputy minister as 'personal family problems'.

The stories of four women are included here because they illustrate some of the problems already listed. Several other accounts described physical assault and sexual abuse of children. Women said they had no option but to put up with abuse, whether from their husbands or male relatives after the death of their husbands, because otherwise they would lose everything and be left homeless. The last two stories are unusual in that the women 'won'. The stories are included because they were celebrated by the women at the workshops as proof that positive change is possible.

Thandiwe Zondi: a widow spurned

Thandiwe Zondi⁵ is a widow with six daughters. She was pregnant with her last child when her husband Siphwe died in 1990. He was a traditional leader and a member of

⁴ This meeting was also attended by the authors.

⁵ Zondi participated in a series of consultations organised by the RWM in KwaZulu–Natal. This account is based on her statement to an attorney at the Durban LRC. Because the eviction took place before the new Constitution was enacted in 1996, she was advised that it was not possible to legally challenge the eviction and apply for reinstatement in the house.

the KwaZulu Legislative Assembly. During their marriage they built a family home in Inadi.

After Sipiwe's death, his nephew Sondelani Zondi was appointed chief. In 1992 a member of the Zondi family who is a policeman took Thandiwe to the local station commander who told her that she must leave her house at Inadi and return to her father's house because her marital home now belonged to the new chief, Sondelani. She refused to relinquish the house despite this as well as a message from the tribal council saying she should leave. In 1993, when she was away, the house was ransacked and most of the contents stolen. The stolen goods were found at Sondelani's house. In the subsequent criminal case another person was found guilty of the damage and theft. Thandiwe's stolen furniture was held by the police during the criminal case and she went to live at her parents' home until the case was concluded.

On her return, she found that a fence had been erected and that the house was guarded. Her request for police assistance to gain access to the house was denied so she approached the magistrate in KwaVulindlela. He said he could not get involved in family disputes and advised her to sort the matter out with the Zondi family. Her father approached a chief, also a Zondi, from a neighbouring area to intervene with the family. He refused to do so.

In 1998 Thandiwe was approached by two *indunas* (headmen) from the tribal council and told to pay a R30 levy towards Sondelani's marriage to his second wife. The levy was broken down as R10 towards *lobola* (brideprice), R10 towards the wedding and R10 towards the renovation of a house. Fearing that the proposed renovations were of her house, to which she had not had access for years, she suggested that the Zondi family buy the house from her or build her a similar one in another location—or at least allow her to demolish it so that she could use the building materials. There was no response to this proposal, and repeated requests via councillors for a meeting with Sondelani were turned down. The *indunas* she approached mocked her for showing her desperation. In 1999 Sondelani occupied the house and has done so ever since.

In 2000 Thandiwe attended a public meeting where Sondelani insulted her and accused her of having slept with Nelson Mandela—a provocative statement since the area is a

stronghold of the Inkatha Freedom Party. At subsequent community meetings, Sondelani said she was lucky he had restrained people from killing her.

Thandiwe has been living at her parent's home. They have both died. Since her father's death her brother has been pressurising her to leave. He says that Thandiwe, her six daughters and her grandchildren take up too much room. The family homestead has five buildings: Thandiwe and her family live in two while her brother and his family live in the other three. He threatened her with a spear in 2000, and in 2002 he assaulted her daughter Gugu. This was in the context of again telling them to leave. Thandiwe and Gugu obtained a protection order against the brother from the court in Pietermaritzburg.

The local *induna* and two male cousins support the brother, saying that as the only son he is the rightful heir to the property. However, a senior male relative supports Thandiwe, saying she has the right to remain at home and that it is her brother's duty to accommodate her, especially as the property is big enough for both of them.

When the brother is drunk he attempts to assault Thandiwe, her children and grandchildren. For this reason, since 2002 she has been trying to find another site on which to establish an independent home for herself and her daughters. She has approached the tribal authority in two areas but both have refused to allocate her land on the basis that she is a woman and has no sons.

In 2002 she approached Induna Makhaye of Mpumaza in the Vulindlela District and asked for an allocation of land. She was introduced by a teacher who vouched for her. The *induna* showed them a notebook with records of land allocations he had made. It contained the names of about ten people and recorded that they had each paid him R500. It also recorded that people had contributed a rooster, a case of beer, a bottle of alcohol, meat and home-brewed beer.

The *induna* refused to allocate her land on the basis that she had no son. He said that had she never married he could have allocated the land in the name of her brother. However, because she was a widow he could allocate her land only in the name of a male relative of her husband. Because her husband's family had evicted her she knew

they would not vouch for her. She also felt she would not be secure on land allocated in their name.

Thandiwe then applied for a site in KwaNyavu near Manqongqo. The *induna* she approached referred her to a meeting of the tribal council where seven other people had applied for sites. The other six applications were approved but she was told that because her husband had been a traditional leader, her application must be considered by the traditional leader, Skosiphi Mdluli. She was then asked for a referral letter (*trekpas*) from the tribal authority in her husband's area. After initial difficulties, she managed to obtain the referral letter as a personal favour from the tribal secretary. Notwithstanding this, the tribal office at KwaNyavu informed her that her application had been turned down because she had no son.

The Zondi family is now claiming that the *lobola* being offered to Thandiwe by Gugu's fiancé must be paid to them, and that because she is of royal blood only a high amount is acceptable.

Nosibonile Jibha: a 'family problem'

Nosibonile Jibha⁶ is a young widow with four children. She was married according to customary law and comes from Engcobo in the Eastern Cape. She was 18 years old at the time of her marriage and her husband was 65. She did not know him before she married him. The union was arranged by her parents and future husband who said he needed another wife because his first wife had only one child and his second wife had left him.

Nevertheless, Nosibonile says they were happy and had four children. After her husband's death in 2001 her life changed dramatically. She was insulted by her in-laws and made to feel unwelcome. When she objected to the family cattle being used to pay the *lobola* of the first wife's grandson she was threatened. In despair, she fled with her children to her parents' home. After two weeks they said she must return to her married home. On her return she was assaulted by two of her husband's male relatives who said

⁶ This account was recorded by the Transkei Land Services Organisation (Tralso), a non-governmental land organisation with its headquarters in Umtata.

they would kill her if she ever tried to come back again. She tried to insist that this was her children's home and that they were entitled to live there, but the men only laughed at her. She asked to be allowed to collect her bride's clothes and the furniture she had brought to the marriage but they refused.

She reported the assault and loss of her possessions to the local *induna* who called a family meeting and tried to intervene on her behalf with her husband's brothers. However, they refused to accept his advice so the *induna* suggested she report the assault and eviction to the local magistrate. At the magistrate's office she was told that hers was a 'family problem' and was advised to call a family meeting to resolve the matter.

She says she is too scared to go back to her marital home. She and her children do not receive any support from her husband's estate. She lives with relatives and her children do not go to school.

Nomvuyo Vuvu Daka: a court victory

Nomvuyo Vuvu Daka⁷ is a teacher from Qhumanco location in the Engcobo district. She has always lived in her parents' house. However, when her father died her brother demolished part of the house, took the building materials away and told her to vacate the house. He said that he, as the son, had inherited the house. Yet her father had appointed her to take over responsibility for the house and family on his death because of the role she had long played in supporting her parents and in light of the extensive renovations she had undertaken. Her brother, on the other hand, had moved away, built elsewhere and had not assisted his parents.

When she refused to vacate the house, her brother charged her with illegal occupation. She was arrested at the school where she taught and pushed into the back of a police van in front of the pupils. She spent some time in jail awaiting trial. Ultimately, the magistrate held that she could not be evicted since her brother had another house and her father had appointed her to be responsible for the family home.

⁷ Account recorded by Tralso.

Nonkosinam Kula: standing her ground

Nonkosinam Kula⁸ lives in Ntshethu in the district of Mqanduli. She married her husband in community of property and they have five children. When he decided to take a second wife she was devastated. She thought that because they had had a 'white wedding' with a marriage certificate, he could not take a second wife. However, his parents supported his decision and he went ahead. He brought his new wife to live in the homestead that Nonkosinam had built during the years he was away working for Iscor in Johannesburg. She begged him to at least establish a separate homestead for the new wife. Instead, he took some of the cows they had received for their daughter's *lobola* to pay that of his new wife.

One day Nonkosinam came home to find many of her possessions outside in the rain. When she asked why, her husband accused her of stirring up trouble and assaulted her. She put her possessions back inside the house. The situation became very tense and a family meeting was called to 'discipline' her. The meeting was held in her house. She insisted that she could not be interrogated in her own home, and that according to custom the family must find an alternative venue for such a meeting.

Because she stood her ground so fiercely and steadfastly, her husband and his new wife failed to evict her and had to move into a new house. However, he took the family cattle to the new abode and refused to bring the oxen back so that she could use them when it was time to plough. He even refused her sons permission to handle the cattle. This meant she could not plough to produce food for her children. At this point she made a case in the magistrate's court in Mqanduli, and ultimately her husband was ordered to return the cattle and leave her in peace with the house and fields so that she could feed the children.

She is still struggling because he provides no financial support for her or the children. Moreover, even though the cattle have been returned and he lives separately, he continues to sell the family livestock without consulting her. People arrive demanding that she hand over the cattle and sheep that he has sold to them. She is challenging the validity of the sales.

⁸ Account recorded by Tralso.

Rural women's response

At a meeting in 2003, Nonkosinam's victory in retaining her house and fields as well as getting the livestock back was celebrated by the other women present.⁹ Her story stood in stark contrast to most of the other accounts which ended with women being evicted and forced to rely on the increasingly reluctant charity of others, or move to shacks near towns. Nonkosinam advised women to stand their ground and refuse to be intimidated by their husbands' families. She said she had 'used custom to fight their arguments and for that reason they couldn't answer'. She also attributed her success to having a marriage certificate, being married in community of property and being able to prove this in court.

During discussion, women said many of their problems arose from the terms of customary marriages and that these days land was regarded as the property of the husband and allocated only to men. They said that because wives arrived as outsiders, they had to pay allegiance to the rules and customs of their husbands' families. They said traditional authorities were reluctant to allocate land to women because they knew that 'outsider' husbands would never be as compliant as wives in having to obey the rules of the place. They said this was partly because of the way in which *lobola* worked, and also because the husband's family controlled the land. The women said that while *lobola* was useful and important because it bound two families together, it needed to be reinterpreted to protect the dignity of women. Some women said their grandmothers had told them that the situation had not always been this bad and that in the past women had not been evicted so often.

WOMEN'S AGENCY AND THE CHANGING COMPOSITION OF THE FAMILY

Advocacy for independent rights for women is often counterpoised with approaches that focus on improving the position of women within existing or customary institutions, including the family. The choice between titling on the one hand, and focusing on existing socially embedded institutions on the other, raises questions concerning whether, and to what extent, it is possible to bring new property relations into existence

⁹ The meeting took place on 27 August 2003 in Umtata. It was attended by 43 women from different areas in the Eastern Cape. Both authors participated in the meeting.

simply by enacting laws. These questions are especially relevant in contexts where the state has a limited capacity to implement reforms, or where laws are drafted without regard to the practical constraints of implementation.

The limits of the law in practice often mean that there is no real (as opposed to ideological) alternative to beginning with power relations in existing institutions (Nyamu-Musembi 2002:143-145). This does not imply that new laws are irrelevant and unnecessary—far from it. But it suggests that close attention should be paid to the nature of rights and claims as they are asserted, used and contested in practice when the laws are formulated. It also suggests that new laws should be informed by the dynamics of current practice rather than the versions of the ‘customary’ advanced by male elders (ibid: 144). In particular, new laws should articulate with the forms of struggle that women are engaged in on the ground.

Women have had no choice over the decades but to engage with the issue of unequal property relations. We suggest, on the basis of anecdotal accounts by many rural women, that a significant number of women now choose not to marry, and instead to have children on their own, because they regard marriage as an institution that is dangerous to their long-term security. Women in different contexts told us that they had decided never to marry after seeing female relatives evicted with nothing from the married homes they had built up over decades. Time and again we were told that married women had no option but to put up with violence and abuse because they would lose everything if their marriages ended. Some women told us that whereas during their mothers’ generation there was a social stigma to having children without a husband, now their mothers advised them never to marry. These women said that nowadays women were respected for having the strength and capacity to look after their children independently.

There are, no doubt, a range of other factors that contribute to the declining rates of marriage among African women in South Africa. It seems to us, however, that women’s agency in response to dysfunctionally unequal property relations should be taken into account as a factor alongside others.

As already described, single mothers are challenging tribal authority structures to allocate them land so they can establish independent households. Gradual, uneven processes of change in land allocation practice are under way. In our experience, women use a range of arguments to advance their claims. Many are couched in terms of 'customary' values. For example, that all members of the community are entitled (by birthright) to land to fulfil their basic needs and support their children; and that men are entitled to land only when they marry and establish families. Now that the structure of the family is changing and women are fulfilling the role of providing for the family, they are entitled to be allocated land on an equal basis to men with families.

Often the principle of equality is asserted, and women refer to the Constitution and new government. They say that the times and the laws have changed, and that discrimination is now illegal. In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.

Highlighting women's agency should not downplay the difficulties inherent in the path of going it alone. Many women do not succeed in being allocated land despite their repeated efforts. They, like Thandiwe Zondi, remain locked in family situations where they are vulnerable to the abusive behaviour of relatives who deny their land rights. Moreover, bringing up children alone, for whatever reason, in the context of the endemic poverty in former homeland areas constitutes a tough and precarious existence. Children then have only the mother and her family to turn to for support and in times of crisis. This increases their susceptibility to risk and destitution, especially in the context of the HIV/Aids epidemic.

Another form of agency is that of women living on family land who resist eviction and assert that they have specific entitlements to fields and to be accommodated within the family homestead. Often they, too, rely on arguments that combine both custom and equality. We met women who had successfully challenged their brothers' attempts to evict them on the basis that as family members they had a 'birthright' to belong. We also met widows and divorcees who had managed to hold on to their married homes despite attempts to evict them. We came across women whose parents had bequeathed them

(not their brothers) control of the family home and land in recognition of the role they had long played in supporting their parents and in balancing the interests and needs of other family members¹⁰. Many women, however, are not so successful and continue to live in precarious and contested arrangements on family land.

ALTERNATIVE APPROACHES TO SECURING WOMEN'S LAND RIGHTS

We have argued that unequal property relations make women vulnerable to eviction and domestic violence. For these reasons alone, interventions to assert women's right to land are urgently needed. We suggest, furthermore, that the denial of women's land rights is a contributing factor in the changing composition of the African family and that this has far-reaching societal consequences, especially for children. In this context, the challenge of providing substantive equality in property relations for rural women is an urgent societal imperative that must be tackled seriously, not by last-minute amendments providing for formal equality.

As discussed, tenure reform laws often fail to meet their objectives and instead have unintended consequences, especially for women. New property relations do not spring to life with the enactment of new laws. Instead, property relations come into being by ongoing processes of human interaction taking place within the context of broader power relations that favour some and disadvantage others. While law cannot create new property relations in and of itself, it has a far-reaching impact on the power relations within which women struggle for land (Berry, 1993, 2001; Lund, 2002; Moore, 1978). We suggest that the goal of substantive equality is best served by laws and other interventions that acknowledge the context of unequal power and property relations, and seek to increase the bargaining position of women in this terrain.

We have described how colonial and apartheid laws hardened the already unequal terrain within which rural women operate. Registering PTO certificates exclusively in the male household head and giving men sole legal status undermined women's position within the family. Women's specific rights to parts of the family land were ignored and

¹⁰ Bikaako and Ssenkumba also note the increasing incidence of the responsibility for family land being bequeathed to daughters rather than sons in rural Uganda. They attribute this to the perception of daughters having taken more responsibility for care of family members than their brothers (Bikaako and Ssenkumba 2003; 249- 251)

made subservient to those of men. Simultaneously, the routes by which women, including single women, had been able to acquire land, were outlawed.

In a parallel process, apartheid laws skewed the balance of power between traditional structures on the one hand, and families and user groups on the other. Indigenous accountability mechanisms were undermined and power over land was redirected as flowing downwards from the state via native commissioners and tribal authorities. Land rights vesting in families were not recognised in law, and were instead framed as 'permits' registered in the name of individual men. Women's land rights were made invisible relative to those of men, and especially relative to those of traditional leaders. One has only to look at the tone of the arguments by traditional leaders in response to the new Constitution and the women's quota in the Traditional Leadership and Governance Framework Bill to see how the construct of exclusive male ownership dovetails neatly with patriarchal norms. Inkosi Mpiyezintombi Mzimela (2003), Chairperson of the National House of Traditional Leaders, said of the controversy pertaining to women's land rights in the Communal Land Rights Bill:

'A male member of a community is expected to care not only for his own wife or wives and their children, but also for the families of deceased male members of his family, and they honour that obligation. There are no such obligations in western culture and traditions. Understandably, then, the male will have the dominant property right to go with his greater responsibility.'

At the same time, and in response to much pressure and pain, customary systems have shown some flexibility in adapting to the increasing numbers of families headed by single women. Moreover, despite apartheid laws, systems of family-based rights remain prevalent and some women do manage to assert and secure their land rights within these. It is important to pay attention to the dynamics and terms of women's claims and struggles so that women can be supported at the intersection of unequal property relations.

Strengthening use rights

If government had chosen to place its emphasis on strengthening use rights as opposed to old order rights, it could have bolstered women's land rights and created conditions

more conducive to users being able to hold family and community structures accountable. A law that defines and secures use rights would strengthen the position of women within the family and within broader community structures. This is not an argument in favour of the individualisation of land rights or exclusive ownership (although individual ownership by women is important in a range of situations). Rather, in the context of rural areas where there are a myriad of overlapping and nested rights, it seeks to balance group and individual rights within a framework that provides special protections for the rights of women—both because women are the primary users of rural land, and in order to address the consequences of past discrimination against them. This would also be more consistent with pre-colonial systems of land rights that recognised the strong rights of women to arable land and to ‘house’ property within the extended family.

For use rights to be able to hold their own against PTO certificates and allocations endorsed by tribal authorities, it is necessary that the law define and protect them explicitly.¹¹ Moreover, the protection should not come into being only on registration because registration is generally a slow and contested process, and often captured by elite interests. Instead, existing use rights would have to be protected by statute on a blanket basis.

While securing use rights is unlikely to be sufficient in some contexts and in the long term, it is a critical starting point for asserting and protecting women’s land rights during processes of formalisation and change. Use rights, however, do not solve the problem of access for those who do not yet have land. Other measures are necessary to support women in their struggles to be allocated land. Such measures need to address, rather than entrench, the power dynamics that currently work to belittle and exclude the claims made by women.

¹¹ The Communal Land Rights Act refers to ‘usage’ in the definition of ‘old order rights’. Some people have interpreted this to mean that current use rights are protected by the Act. Claassens (2005) has argued that in the context of the Act, ‘usage’ means customary practice as opposed to use. This is made clear by the way the word is used in s 4 of the Act. Moreover, the Act provides no definition of use rights, nor mechanisms to assert them against written and witnessed old order rights.

Oversight and support

Because of unequal power relations and the difficulties poor rural women have in accessing courts, rights set out in statutes are effective only if they are complemented by measures that assist women to assert their rights. The 1999 draft Land Rights Bill that was rejected in favour of the Communal Land Rights Bill, provided for locally based land rights officers with the authority to intervene where decisions about land abrogated rights protected by statute. The Bill provided that transactions in family land were valid only if the majority of family members agreed and the benefits were distributed fairly. Family members who were cut out of the process could call on the officer to review the validity of the transaction. Similarly, decisions about land allocation (by whatever structure) were required to treat men and women equally, and women could appeal to the land rights officer to review the validity of the decision if it abrogated the law.

CONCLUSION

When Thoko Didiza took over the Land Affairs portfolio in May 1999, she rejected the draft Land Rights Bill as an embodiment of the 'nanny state'.¹² She said women with problems could litigate and use the equality provisions in the Constitution.

Many of the rural people who engaged in the non-governmental consultation process about the Communal Land Rights Bill in 2003 interpreted the Bill as an expression of government's intention to dump its responsibility towards rural people. They said that transferring the title of contested and poverty-stricken areas to rural owners was a way of backing out of government's responsibility to sort out the mess and provide services to rural people. They pointed to the problems of service delivery and infrastructure development on privately owned land and said that, faced with a choice between title deeds and development, they would rather have development.

It is beyond the mandate of the courts to intervene in policy decisions such as the nature of the state's responsibility to people living in former homeland areas. However, the Act does more than withdraw from an unequal terrain. It reinforces the power of one side against the other, and introduces measures that are likely to make categories of people,

¹² Ministry of Land Affairs meeting attended by Claassens in mid-1999.

such as single women, more vulnerable. Because tenure security is guaranteed by the Constitution and the courts have interpreted equality to encompass substantive equality, these particular choices have legal as well as political ramifications.

Laws are powerful at a symbolic level, regardless of whether they are implemented or not. People act within the constraints of local power relations, which are in turn significantly affected by the stance of government. A key concern raised during the hearings of the Land Affairs portfolio committee was that the new laws would harden the terrain within which rural women struggle for change, and that whereas traditional leaders had been relatively receptive to pressure while their status was unclear, now they would revert to the arrogance and abuses of the apartheid era when they had been sure of government support. Rather than being a serious attempt to support women in the struggle for substantive equality, the Act is the expression of a pre-election deal between traditional leaders and government that reinforces versions of custom and chiefly authority that are dangerous to the interests and struggles of rural women. The hard-fought battle by the women's lobby resulted in an amendment that will assist married women, but the wording does not deal with the underlying reality of family-based rights. Nor does it solve the problems faced by single women.

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**Turning gender rights into entitlements:
Women and welfare provision in post-apartheid South Africa**

Shireen Hassim¹

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Introduction

Social rights and gender equality have both been conceived as integral to citizenship in democratic South Africa. The Constitution imposes particular responsibilities on government to address socio-economic inequalities as part of a progressive realization of human rights and in ways that erode inequalities of gender in addition to inequalities of race.² The constitutional obligations are enacted by the creation of an institutional framework (the national machinery for women³) to ensure the inclusion of gender equality concerns in policy formulation. For women, the emphasis on citizenship in the transition to democracy was significant in creating a framework for women to articulate claims on the state on the basis of their individual entitlements rather than on the basis of their status as mothers or tribal subjects. Since 1994, South Africa has consistently been among the highest performers in the world in terms of the numbers of women elected to political office.

This new framework created the expectation that the expansion of citizenship rights to include social rights and the increased participation of women in political decision-making would result in greater attention to gender inequalities. However, South Africa has performed significantly better in improving women's political position than it has in improving women's economic position in the ten years since the inception of democracy. On the Gender and Development Index of the United Nations, South Africa ranks 90th out of 144 countries. Clearly, political presence does not necessarily that poor women's interests will be adequately addressed in economic and social policy.

Poor women are in many respects the most vulnerable citizens in South Africa. Statistics South Africa's labour force study in 2003 showed that women on the whole had lower incomes, higher employment rates and less access to assets than men.⁴ African women make up 42% of the workforce but only 30% of the employed population. Young African women are even worse off, with African women under the age of 30 facing an unemployment rate of 75%. Those women who are employed find themselves in the worst paid sectors of the labour market, notably in domestic and retail work. In 2003, 96% of domestic workers were black (i.e. African, Indian and Coloured) women and 93% of these

workers earned under R1000 (approximately USD180) per month.⁵ African rural women are the poorest category of citizens: in 1997 65% of African female-headed households in rural areas were poor compared to 54% of male-headed households.⁶ At 29.4%, the mortality rate among African women was more than twice that of white women in 1994 (11.5%).⁷ It has been estimated that 53% of South Africans, including 60% of the country's children, live in households with the lowest per capita consumption.⁸ On the United Nations' Gender and Development Index, even though women and men had comparable school enrollment and adult literacy ratios, men earned more than twice women's earnings.⁹

These gender vulnerabilities are compounded by the HIV/AIDS pandemic. African women are most vulnerable to HIV infection, more women than men are HIV positive and women are likely to become more infected at a younger age than men (Albertyn, 2003). The pandemic imposes additional burdens on women in their roles as primary carers of family members who are HIV positive. These caring tasks, moreover, have to be performed in the context of poor basic services such as the availability of clean water, electricity and modern sanitation.¹⁰ Women have borne the brunt of the labour associated with the tasks of fetching water and maintaining hygiene.¹¹ A Kaiser Family Foundation study of households affected by the HIV/AIDS epidemic found that 68% of the caregivers in the households surveyed were female, 7% younger than 18 years and 23% older than 60 years.¹² The epidemic is also likely to have long-term impacts on areas where South Africa performs relatively well currently such as school enrolment of young girls. The Kaiser Family Foundation study found that almost 10% of girls were out of school, compared to 5% of boys in similar situations.¹³ Although this is not solely attributable to the pressures of caring for sick family members (other reasons included lack of money for uniforms, books and school fees and pregnancy), the expectation that girls and women should be the primary carers is likely to affect the Gender and Development Index measures for South Africa even more negatively over time.

Given these gendered social and economic patterns, to what extent is the democratic state directing public resources in ways that advance gender equality? In this article I explore extent to which one key area of policymaking, social welfare, has attempted to integrate gender rights into the allocation of resources. I focus on the elaboration of a social policy framework – the groundwork for what could perhaps be called Africa's first welfare state.¹⁴ Social welfare is a useful lens to through which to refract the different expectations that different social groups have of the state and to examine the ways in which different needs have been interpreted by the state and other social actors as legitimate bases for

entitlements. I argue that while women have made enormous strides in gaining recognition for their particular political disadvantages, there has been slower translation of political rights into social rights. The welfare system remains constrained by narrow conceptions of the state and by distrust of rights-based demands on state resources. These have impacted on the extent to which social inequalities of gender are eroded by the democratic state.

Democratizing social welfare

The democratic government inherited a state that from a social policy perspective was unique in Africa. Social assistance was already inscribed as state responsibility, albeit in a racially discriminatory form, prior to the creation of apartheid. Indeed, most South Africans achieved a level of social citizenship *before* being formally recognized as citizens, *contra* Marshall. State pensions, the major area of government spending on welfare, have always been a non-contributory form of social assistance and although means-tested were awarded regardless of work status and with no reciprocal obligations on recipients. They were supplemented by a range of other social assistance mechanisms that are non-contributory (also means-tested). In general, as Lund has characterized it, the South African system is a 'strange combination of mainly British welfare tradition and apartheid policy'¹⁵ where the distinction between the 'deserving' and the 'undeserving' poor is marked by race.¹⁶ Race was regarded as shaping lifestyle patterns as well as entitlements. African exclusion from welfare was justified on the grounds that 'people accustomed to modern lifestyles and consumption patterns had greater need of social protection than those in rural subsistence agriculture, who were not proletarianised and were thus presumed to be better placed to meet traditional subsistence needs.'¹⁷

The provision of pensions and other grants (primarily child maintenance and disability) expanded in the period between the two world wars response to unionized white working class struggles and as a mechanism for reducing the 'poor white' problem. Inclusion of poor whites (mainly Afrikaners) was a cornerstone of the Afrikaner nationalist movement and legitimated ideological processes of building a racially exclusive state system. Africans – even those who were workers in the urban formal economy – were excluded from welfare provisions on the grounds that the burdens of social reproduction would be carried by extended families. Indians were regarded as temporary residents in South Africa; a repatriation policy was still adhered to formally.¹⁸ On the basis of recommendations of the Carnegie Commission of Enquiry, which sat in 1929, a state welfare department was established for the first time in 1937.

In subsequent years, pension benefits were extended to African and Indian people (men and women). Others grants, for example for the blind and disabled, were also non-racial in coverage, although benefits were pegged at different levels on the basis of racist assumptions about the basic needs of different groups. African pensions were set at one-tenth the amount for whites and the means-test employed for Africans was far more stringent.¹⁹ Nevertheless, the acceptance of the idea that all groups were entitled to some benefits is startling given the denial of political and civil rights to all but whites. Notably, however, family allowances for large low-income families, instituted in 1947, did not include Africans. During the apartheid period, the racial spread of welfare benefits was retained but the gap in the levels of benefits between whites and Africans widened considerably. Apartheid also began to be inscribed not just in the ideological premises of policy but also into the ways in which services were delivered to citizens. Administratively, there was a shift in the 1950s from a single Welfare Department in government for the whole population to separate departments for different race groups, although all departments were governed by the same welfare legislation.²⁰ Lund points out that the apartheid government also forced private voluntary agencies to stop offering services on a racially inclusive basis, nor could voluntary welfare bodies have racially mixed committees. State subsidies to private welfare agencies stipulated racially discriminatory salaries for social workers.²¹

The 1950s were also a period of heightened political mobilization against the unfolding of the apartheid state, with women being among the most vociferous critics of attempts to control the movement of African people and to limit African women's access to the labour market through the imposition of pass controls. An independent, non-racial national women's movement, the Federation of South African Women (FSAW) emerged that aligned itself with the ANC and linked women's struggles for emancipation with those of the national liberation movement. The FSAW played a central role in redefining women's political roles away from being 'the tea ladies of the struggle' to articulating concrete political demands, within a radical motherist frame.²² The ideology of motherhood and the political language of 'motherism' became firmly anchored in both the women's movement and the national liberation movement, a defining trope in nationalist discourses on gender.

Motherism had a powerful impact on the language of social policy in South Africa. This is not an unusual phenomenon; as Koven and Michel have pointed out, maternalist discourses in welfare states 'transformed motherhood from women's primary *private* responsibility into

public policy...female reformers, individually and through organizations, exerted a powerful influence in defining the needs of mothers and children and designing institutions and programs to address them.²³ In 1954, the FSAW developed a Women's Charter of Demands, a document that showed the radical potential of this form of politics. The Charter demanded that the state provide four months maternity leave on full pay for working mothers, maternity homes, antenatal clinics, child welfare centres, crèches, nursery schools and birth control clinics. Its list of radical demands included subsidized housing and food and provision of a range of basic services, a minimum wage and the banning of nuclear and atomic bombs. These very concrete demands went beyond a general political demand for the extension of political citizenship²⁴ and reflected the importance placed by women on the creation of an inclusive welfare state. The Charter's demands were incorporated into the Freedom Charter, the manifesto of the ANC, in very generalised formulations about the need for a national health service and a welfare state.

As apartheid became more systematic, the state paradoxically began to reduce inter-racial differentials in benefits, particularly increasing the real value of African pensions, with parity being achieved in 1993 'at a remarkable generous level.'²⁵ This development has to be understood in the context of 'the peculiar nature of political patronage in apartheid society'.²⁶ The elaboration of Bantustan (homeland) policy required that the Bantustan governments be given some means of gaining political legitimacy; hence social assistance funds flowed rapidly from the central state to the homelands. Although there was still an assumption that the Bantustans would bear the costs of social reproduction, by 1993 there were twice as many African pensioners inside the Bantustans as outside them. Similarly, Indians and coloureds benefited from the state's attempts to draw them into an alliance with whites by giving them some stake in the political system. Not surprisingly, in the period 1991-1995 the social security budget was the second fastest growing budget item.²⁷ It bears noting however that apart from pensions 'the majority of the black labour force who [were] either unemployed or in jobs not covered by social retirement insurance, remain[ed] outside the security net.'²⁸ The trade union movement which grew rapidly in the 1970s focused its demands on wages and political rights with little attention to social insurance or social assistance.

Under apartheid, the main grant for child and family care was the state-maintenance grant (made up of a parent allowance and a child support grant), which was awarded on a means-tested basis to certain categories of women. The grant was awarded on a racially differentiated basis with whites receiving the highest amount followed by Indian and coloured

people at the same level, followed by African people at the lowest end of the scale. It was also unevenly administered under the racially and homeland-segregated welfare delivery system: some administrations did not award the grant and some awarded only the child support part of the grant. Although African families constituted the majority of poor households most African families did not benefit from the grant (only 2 per 1000 African children received the grant); they were largely excluded through a range of administrative measures. For example, the homelands and 'independent' states such as the Transkei did not administer the grant rendering vast swathes of the African population without access to social welfare. The application of a means test resulted in many white people being filtered out of the system due to their higher overall income. By contrast, grants to Indians and coloureds increased dramatically in the 1970s and 1980s as the state embarked on a reform programme that would offer limited citizenship rights to these groups. The majority of the beneficiaries were coloured and Indian families – 48 per 1000 children and 40 per 1000 children respectively.

In the mid 1980s, welfare policy was revised, with one of the central concerns being the 'welfare statism' that was seen to have permeated policy. The Department of Constitutional Planning's Directorate of Social Planning (an interesting location for welfare policy that reflected the increasing links between meeting social welfare needs and the political and military objectives of the government²⁹) issued a report recommending further racial segregation of welfare, the privatization of welfare provision ('the state would act as a safety net only where individuals, communities and the private sector were unable to take on new roles and responsibilities')³⁰ and the devolution of welfare provision to provincial and local authorities. These recommendations reflected important new thinking about the role of the state in welfare provision, and devolution and the entrenchment of apartheid in welfare were pursued in policy throughout the 1980s despite the reform measures in political representation and in the labour market. Lund's study of welfare financing found that despite the deracialisation of pension benefits, by 1990 the government was 'attempting to arrest if not scale down the extent of its commitment to social welfare.'³¹ By contrast, areas where there had been enormous social mobilization – housing, health and education – had their budgets increased. Patel offers a useful table of state expenditure on welfare for the different population groups that captures these inequalities.

Table 1: Welfare expenditure for the different population groups

<i>Population group</i>	1950	1976	1990
Whites	61%	56%	23%
Africans	25%	28%	52%
Coloureds/Indians	14%	16%	24%

Source: Adapted from Patel, 1992, p. 44.

The provision of welfare was not only inflected with assumptions about race but also with very fixed, Eurocentric views about gender roles. Throughout the apartheid era the welfare system retained the view that 'people would live in two-generational nuclear families with a male head of household; that there would be full employment in the formal waged economy and that women would be at home.'³² The reality was that while unemployment was virtually non-existent for whites due to preferential access to the labour market, it was highly prevalent among Africans, with the result that whites could access a range of supplementary economic benefits in the private sphere (for example, medical and unemployment insurance, workers' compensation and retirement provisions) that were unavailable to Africans. Furthermore, influx controls and migrancy resulted in urban workers (both female and male), having attachments and responsibilities to more than one household. In part because of high levels of unemployment, pensions came to assume significant importance in poor households as a source of household security.³³ Although pensions are allocated to individuals, they are consumed as a household asset thus having redistributive implications. Case and Deaton found that pensions reached almost three times as many women as men.³⁴ Their study found that 23.7% of African households received an old age pension and that 66.4% of pensions go to households in rural areas, the location of the poorest households.³⁵ Women draw a pension at age 60, men at age 65; this has added to the evidence that pensions are a gender-sensitive mechanism of redistribution.³⁶ However, as I will argue below, there are systemic barriers to women's ability to access social assistance that may limit the gender sensitivity of all grants.

In the late 1980s, the government adopted the principle of welfare privatization. The National Party government argued that welfare had to be understood as a partnership between the state, the private business sector and voluntary religious and community associations. It therefore encouraged 'community and individual responsibility for meeting needs through market mechanisms, emphasizing volunteerism, mutual aid, reciprocity between providers and consumers, fees for service and private practice in welfare provision.'³⁷ In the process,

no doubt the government hoped to deflect political opposition to the racialised allocation of public resources. However, among the highly mobilized communities in African townships, as well as Indian and Coloured women who were the major recipients of welfare, the idea of privatization of welfare was anathema. Similarly, cash-strapped and overburdened providers of social services were assuming that the advent of democracy would result in an expansion rather than contraction of state responsibilities. Leila Patel's survey among non-state, grassroots providers of social services in the early 1990s found that 75% opposed privatisation of social welfare and the expansion of state responsibility in financing social services.³⁸

Despite considerable discussion in anti-apartheid organizations during the late 1980s about policy alternatives that would be democratic and redistributive, and despite the social development initiatives of grassroots organizations such as the civics movement that dealt with problems of crime, alcoholism and social conflict in street committees and 'people's courts',³⁹ there seems to have been little discussion about what role welfare specifically would play in meeting basic needs and redistributing resources. Francie Lund was a lone voice on the left throughout this period, her work emphasizing the broader significance of welfare but with little uptake in democratic debates. Other notable work was, as Lund bemoaned, either not published or poorly circulated.⁴⁰ Discussions of the relationship between gender equality and social policy were even more rare, as feminists were generally marginal to political and policy debates. Discussions of economic policy occurred in isolation from debates about social policy,⁴¹ even though as late as 1990 Lund was raising the question of the affordability of the general British model of the welfare state in South Africa and calling for a holistic discussion of social policy. It is therefore not surprising that the period since 1994 has not been characterized by a clear policy redistributive vision for social welfare. Lund et al, for example, use the phrase 'stealthy erosion of welfare provision' to describe the post-1994 period. Rather than locating social policy strongly and unambiguously within a redistributive framework, in the democratic period the bulk of government efforts have been to link welfare to a policy of developmentalism. In the next section I examine the gendered assumptions behind this approach, examining the implications of the developmental approach for the ability of women to access their citizenship entitlements.

The notion of developmental social welfare

The concept of developmental social welfare was first outlined in the Reconstruction and Development Programme in 1994 and is embedded in the White Paper on Social Welfare, gazetted in February 1996 and adopted in 1997. The approach is defined in the White Paper as being to create a welfare system 'which facilitates the development of human capacity and self-reliance within a caring and enabling socio-economic environment.'⁴² Recognising that economic growth in itself will not enhance the social and economic well-being of citizens, the White Paper argues for 'the equitable allocation and distribution of resources...Social development and economic development are therefore interdependent and mutually reinforcing'. The link between social and economic development is not mere rhetoric. A key plank in the developmental social welfare platform is the creation of employment; this is a responsibility of macroeconomic policy in general *but also* specifically of the Department of Social Development (previously Welfare and Population) through the Community Based Public Works Programme, funded out of the social security and welfare budget. Public works programmes are seen to have the twin benefits of addressing the infrastructural needs of the country as well as reducing poverty and long term dependence on state assistance. They are therefore seen as developmental in their impact, and considerable resources have been directed into these programmes. However, there is an inbuilt normative choice here. Reflecting on the notion of developmental social welfare in 2003, in the context of a debate on the Basic Income Grant, Ravi Naidoo of the trade union research agency NALEDI argues that the 'trendy concept of developmental social welfare has failed miserably' and that it has embedded notions of 'an undeserving poor' and 'promoted ways for the 'able-bodied' to pull themselves up by their own bootstraps'.⁴³

The White Paper identifies a wide and impressive set of guiding principles, seventeen in all, including democracy, human rights, justice, transparency and accountability. An examination of the list of principles suggests the policy is based on wide-ranging and expansive conceptions of citizenship. In the particular formulations of the guiding principles, it is compatible with the capabilities approach developed by Amartya Sen which focuses less on the elaboration of the entitlements of citizenship and much more on whether all members of society are capable of achieving an enhanced quality of life. For example, non-discrimination is specified in addition to equity; where equity refers to the distribution of material resources, non-discrimination focuses on 'tolerance, mutual respect, diversity, and the inclusion of all groups in society.' The policy is based on the principle that the quality of life of all people should be raised through a redistribution of resources and services. In yoking the cultural

concept of 'ubuntu' (humanity) the White Paper signals the importance of cultural norms and values, particularly the principle of caring and mutual interdependence, to the project of development. Elsewhere, in the "Agenda for Action", the policy emphasizes the need for government programs to ensure the realization of citizens; 'dignity, safety and creativity.'

This expansive notion of development initially found resonance and widespread support in civil society. The White Paper was developed under the new 'rules of the game' with regard to public decision-making introduced by the ANC government, in which policies would be developed through extensive consultations between government and civil society, and where public policies in a range of areas – the economy, health and welfare, trade and so on – were assumed to be synergistic. The White Paper was developed in a context of general optimism about the ability of the state to lead a process of transformation and a faith in the democratic process. Indeed the notion of 'partnership' between state and civil society runs through the entire policy. The idea of partnership can be understood in two ways. Firstly, it reflects the value place on the democratic process of agreeing on common goals. The policy process begins with a discussion paper that is open for public debate; these concerns are to be taken into account in drafting a Green Paper, in which there is structured participation of NGOs and civil society organizations and finally a White Paper is drafted which forms the basis of legislative change and policy directions. This consultative process assumes that there will be synergies in the broad frameworks governing social policy. However, the overarching trade-offs between spending priorities (for example, spending on arms rather than welfare) are not part of the consultation; decisions on these overall priorities lie within Cabinet's responsibility.

Secondly, the idea of participation framed a vision of service delivery through contractual agreements between government, NGOs and business. 'Partnerships' also signaled the start of a process of 'outsourcing' some aspects of the delivery of key services and this sense of the term will get further discussion in the discussion of the child support grant and BIG. At the conceptual level, partnership read in this sense reveals an inherent tension in the document between a capabilities approach and one that might be considered more neo-liberal. Intervention strategies were to be based on a principle of affordability and sustainability – 'financially viable, cost efficient and effective' – presented in these neutral terms in the White Paper. But of course welfare budgets are notoriously vulnerable to 'fiscal responsibility' and became the political lightning rod in contestations over what constituted affordability in relation to both the child support grant and the Basic Income Grant. The plan

of action for the policy recognized the fiscal, economic and infrastructural constraints on government's ability to implement the principles of developmental social welfare. Social security provisions are to be 'phased in' on the principle of the progressive realization of benefits (this wording conforms to the constitutional provisions on social rights) as well as sustainability. The issue of how rapidly this would be done and what the targets for inclusion would be are not specified in the White Paper and, like the question of affordability, would be intensely contested in the welfare debates that have ensued. Although a highly advanced social security system was in place by 1994, there were gaps in this system: pensions covered by far the bulk of the welfare budget, while other grants (disability, parents' allowances and child support) were relatively small. The paid inclusion of women into government also resulted in the women's movement being able to put through a range of new legislation, such as the Domestic Violence Act and the Maintenance Act, both of which required substantial increases in budgetary allocation if they were to be effectively implemented.⁴⁴ Despite the emphasis on participation, poor women were relatively poorly organised and had very little voice in national level policy debates, making it unlikely from the outset that they would have much power over budgetary choices.

The White Paper names the importance of the informal welfare sector (religious organizations and NGOs) as well as informal special support systems including community care in meeting social service needs. Again, this is posed in the White Paper in the spirit of 'national collective responsibility', but it leaves open the question of the precise balance between the different sectors of welfare provisioning. In this respect the emphasis on the cultural value of caring might perhaps be seen as loading the dice against women, who bear the practical burdens of care-work within families and communities. As Lund et al note, 'a double equation is at work which assumes that community care is equal to care by families which is equal to unpaid care by mostly women.'⁴⁵ Women's caring burdens have dramatically increased as the HIV/AIDS infection rates have assumed pandemic proportions. Indeed early evidence from the pandemic is showing that it is not only women who are carrying an even greater burden of caring but that children are increasingly having to take on these roles. The shift away from the language of rights and entitlements in the White Paper would seem to dilute the particular (and greater) responsibility of the state in meeting social security needs through the redistribution of public resources.

A final area of tension in the White Paper relates to the ways in which 'the family' is invoked in the document. Under the sub-heading 'The family', the White Paper simply states: 'The

family is the basic unit of society. Family life will be strengthened and promoted through family-oriented policies and programmes'. It is not difficult to understand why 'strengthening family life' is a desirable goal for many in South Africa, given the ways in which the migrant labour policies of the apartheid state and the dominance of residentially-based domestic work denied basic human comfort and intimacy to so many Africans. The White Paper leaves open, perhaps intentionally, the definition of what constitutes family (while stipulating the social security provisions should include homosexuals). These specificities are left to particular policies to articulate and while in some instances (such as the Lund Committee on the implementation of a child support grant) opportunities were taken to shift away from nuclear, male-headed family forms as the norm, this approach is not guaranteed in the overarching policy framework, leaving perhaps too much to the political will and ideological perspectives of particular policymakers.

The increasing centralisation of macroeconomic decision-making from 1996 undermined the assumptions of consultative, participatory decision-making assumed by the White Paper. For women's organisations, the ability to leverage the symbolic power and legislative representation of women into policy outcomes was severely undermined. Government's assertion of fiscal restraint introduced a new discourse into policy-making: the debate was increasingly less concerned with what was desirable and increasingly more concerned with what was possible. Affordability was often assessed in narrow fiscal terms and by prioritising gross inequalities rather than a concern with the long term costs of failing to address pervasive systemic inequalities. The formal provisions of the Constitution proved inappropriate in dealing with the ways in which government prioritises spending. Although the right to social security is entrenched in the socio-economic rights clause in constitution (section 27) the implementation of this right is by no means automatic, nor does it guarantee that the extent of social security provided will be adequate to ensure a decent standard of living. The important proviso to the right to social security is a qualifying clause in section 27 of the Bill of Rights which defines the state's obligations as limited to 'available resources'.⁴⁶

The immediate consequences of the emphasis on affordability were seen in the process of overhauling the system of child and family benefits, which the Department of Welfare instituted in 1996 and which coincided with the public debate on the White Paper on Social Welfare. The changes to the welfare provisions for children began in a transitional context of translating broad policy formulations into concrete programmes and the deliberations of the

Lund Committee, which spearheaded the changes, reveal the tensions between equity and affordability.

By July 1996, poor mothers were paid a total monthly grant of R565 (made up of a parent allowance of R430 and a child support grant of R135) for a maximum of two children up to the age of eighteen (that is, to a maximum of R700). For those families receiving it, the grant played a major poverty alleviation role in raising overall household income above the household subsistence level. However, as noted above, the grant reached very few African households, with Indian and Coloured families being the primary beneficiaries. Attempts to entrench the racial equity of the grant produced the perverse consequence that while more poor families received the grant the monetary value of the grant was drastically reduced. The Committee had to work within the government's decision not to increase overall spending. At the time, government had already cut defence spending significantly (virtually halved between 1990/91 and 1996/97 fiscal years) and increased social security spending by 120% over the same period. There was a strong perception in the Committee that no further increases were likely and that the demands on the existing budget were likely to increase under the impact of the HIV/AIDS epidemic. The Committee's recommendations were therefore based on a fiscally constrained scenario in which the already inadequate welfare budget faced further cuts from the central government.

The changes in the state maintenance grant went along with the proposed privatization of maintenance, shifting greater responsibility onto parents (but aimed mainly fathers who did not support their children). While this was couched in terms of parental responsibility, it was criticized by feminist policy analysts for shifting a greater burden onto women, given women's actual primary responsibility for childcare.⁴⁷ In particular, Naidoo and Bozalek argue that 'economic policy is formed around assumptions that women's work will subsidize cuts in social spending.'⁴⁸ Beth Goldblatt questions the effectiveness of the private maintenance system, pointing to the massive failure of fathers to pay the maintenance grants awarded by courts, in part because of high levels of unemployment.⁴⁹ Even where maintenance is paid by fathers, Grace Khunou argues that these payments are a source of conflict in many households, and reinforces the power of those who do have money.⁵⁰ Furthermore, Goldblatt (2004) argues that the removal of the parental allowance (almost exclusively accessed by mothers) that was part of the state maintenance grant denies women access to money that they were in the past able to claim as their own entitlement.

A number of problems remain with regard to the effective implementation of the grant. Firstly, women's organisations have criticised the two-tier means test to establish eligibility for the grant. The means test requires that the primary care-giver prove that he or she is a member of a household with a combined income below R9 600 per annum for urban households and R13 200 per annum for rural dwellings or those in informal areas. Other elements of the means-test include a requirement that the primary care-giver show that she/he is actively seeking employment.

The Lund Committee was itself not convinced of the benefits of means-testing, favouring instead a universal grant. The Committee noted that the means test imposed administrative costs on the system as it required extensive assessment and monitoring. It also imposed costs on parents which could act as a negative incentive, particularly for foster parents. Furthermore, procedures for the state maintenance grant were not clear to all sectors in the welfare system and had been inconsistently applied; it was likely that these problems would continue. Finally, the Committee warned that means-testing could be a biased process. 'Communities, especially in poorer areas, are so greatly under the domain of traditional leaders with extensive powers of patronage that caution should be exercised in this approach. The track record of civic associations in impartial decision-making is likewise uneven.'⁵¹ However, Department of Welfare officials insisted on the retention of this mechanism, concerned that there might otherwise be overwhelming numbers of people applying for the grant and that many of them might be 'unworthy', at least in economic terms. Nevertheless, the Committee stressed that the test should be a simple economic test and should not 'in any way depend on a definition of a family.'⁵² However, the old means test appears to still be in place. Recent research shows that many welfare officials informally add on new 'tests' of eligibility, such as proof of tax being paid, and letters certified by police officers.⁵³ The South African NGO Coalition (SANGOCO) has called for the existing means test to be replaced with one that is based on the income of the primary care-giver, arguing that this will be easier to administer. As Liebenberg points out, 'this is particularly important in view of the fact that the child support grant requires a doubling of the capacity of the welfare system to process grants. The present system is already over-burdened with huge backlogs in poverty-stricken areas.'⁵⁴

These problems are exacerbated by poor management and delivery systems, and in some cases corrupt practices at the provincial levels, which initially led to *under*-spending of welfare budgets for three consecutive years. Since the implementation of the child support

grant, spending has dramatically increased, imposing new administrative and fiscal burdens on provinces, which are mainly responsible for administering the grant. The Lund Committee anticipated that a major hurdle in the implementation of the grant would be administrative, and recommended 'a synergistic relationship with the Department of Health' as well as other departments in the social sectors.⁵⁵ In an assessment of the effectiveness of the grant commissioned by the Department of Welfare and conducted in 2000, the Community Agency for Social Enquiry (CASE) found that the capacity and competence of the Department of Welfare to administer the grant was limited by a range of problems: insufficient information, outdated application forms, lack of co-ordination between the Departments of Welfare, Health and Home Affairs, poor departmental co-operation with NGOs and community organisations and by 'indifferent and even hostile attitudes on the part of Welfare staff'.⁵⁶ The government has sought to deal with some of the administrative problems related to delivering grants by privatising the payment aspect and creating a common agency for grants payments that would take back control over grants payments from the provincial to the national level of government. This has by no means made the grants more accessible; indeed many pensioners have complained that queues remain as long as ever and that the private companies are using the payment process as an opportunity to sell insurance policies and even short term loans to pensioners. The provinces with the best resources (Gauteng and Western Cape) have been most successful in reaching delivery targets while those with the greatest need (Eastern Province and Limpopo) also have the least functional delivery systems and have been the least successful in reaching their targets.⁵⁷

Most street children and children in child-headed households cannot access the grant because they do not have the necessary identity documents to apply, or they do not know the procedures for application. The Alliance for Children's Entitlement to Social Security (ACCESS) estimates that 75.8% of South African children live below a poverty line of R400 per month. many NGOs, has recommended increases in the level of the grant, but noted that 'this would require a political decision involving a trade-off with other grants and budgetary items'.⁵⁸ As I have noted above, the government has been responsive to these recommendations. By 2003, close to three million poor children were receiving the grant⁵⁹ and by December 2004 this number had increased to 5.4million, despite the administrative difficulties described above.⁶⁰

A major discursive shift introduced by the Lund Committee was the move away from the 'familist', male worker model of social policy. The Committee chose to adopt a 'follow the

child' policy, with emphasis on the child rather than the carer – in other words, the grant would be paid to the primary care-giver on behalf of the child. Means-testing would therefore no longer comprise any component of moral assessment of the worthiness of carer (at least in theory); nor would carers who were not mothers be excluded from the grant. The Committee adopted the policy in recognition of the fluidity and diversity of household forms. This was a significant shift away from the normative assumption that nuclear family was the desirable model, which was inscribed in apartheid-era social welfare and, importantly, it addressed the rights of children born into polygamous families. At least in formal terms, the effect was to de-link child care from normative assumptions about family forms or gender responsibilities. As the Committee noted, 'it resolves the problem of how to define the family in such a complex and multi-cultured society. It says that children, however many in a household, of whatever status, are important and need to be protected.'⁶¹

Of course, these shifts in the core assumptions of the child support grant do not as yet translate into shifts in the views of welfare officials and the media. In reality, moral discourses continue to infect social security provision, crowding out rights based arguments for social security. In debates about the child support grant, there was a strong view among many in government that welfare grants reinforced apartheid privileges, had no developmental potential and should be phased out in favour of greater attention to programmes such as community-based public works.⁶² Even some ANC women MPs took a conservative view of welfare as reinforcing a 'culture of entitlement,' with welfare grants seen as handouts that reinforced dependency on the state. As one MP argued, 'women should look at developing themselves'.⁶³ Fraser-Moleketi herself accused poor people of not doing enough: 'communities had to change the thinking of those who held out their hands for help but kept their sleeves down, a sign that they were not willing to work.'⁶⁴ The child support grant continues to be blamed for increasing teenage pregnancy (that is, that young girls are getting pregnant in order to access cash), that women are spending the money on 'clothing and lipstick' and even an allegation by the Minister of Social Development that mothers have 'rented' out their children to others so that they can claim social assistance. Newspaper reports castigate 'runaway mothers' who 'claim the child support grant meant to feed their offspring'.⁶⁵ One researcher found that the grant was termed the 'thigh grant' in one community, ostensibly referring to the belief that women 'spread their thighs' for cash.⁶⁶ Even the Chairperson of the Commission on Gender Equality had to be gently reminded by feminist activists not to fall into the trap of stereotyping women receiving the child support grants as undeserving.

The Basic Income Grant

The Lund Committee's brief was a narrow one, and the debates which accompanied the release of its recommendations and subsequent problems with the implementation of the child support grant as well as major inefficiencies in the delivery of all social grants have re-opened larger questions about the overall system of social assistance. A central concern among many welfare activists was the narrow reach of social security. However redistributive in effect, by their nature pensions only reach a limited number of people. Although by 2004 uptake of the child support grant outstripped government expectations, a significant proportion of poor children below fourteen years of age do not receive the grant; at the moment, all poor children over seven do not receive support. Up to 60% of the poor – mainly those between the ages of fourteen and sixty – are not getting any social security at all. Lund estimates that 11.8 million of the poorest 23.8 million South Africans live in households that receive no social assistance.⁶⁷ The trickle down effects of the GEAR policy are not materialising; levels of growth remained well below the rate required to address underlying social needs. Unemployment has continued to rise and employment creation through the public works programme was disappointing. It has been estimated that the Community Based Public Works Programme created between 13 000 and 33 000 jobs per annum between 1996 and 2001.⁶⁸ By the end of the 1990s, COSATU as well as a range of civil society organisations were arguing strongly for a more inclusive system of social security that would have poverty-reducing effects.

The chief proposal put forward by COSATU, at a Presidential Job Summit to address unemployment, was for a Basic Income Grant (BIG) as a universal poverty-reduction mechanism. COSATU envisaged that a relatively small universal grant (R100 per month) would be introduced for all individuals (including children). Although neither business nor government were enthusiastic about a Basic Income Grant,⁶⁹ COSATU kept up pressure for the grant both within the tripartite alliance as well as in the media. In July 2001 the BIG Coalition involving twelve organisations was formed. By this time, government had appointed a Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Committee) in March 2000, chaired by feminist activist and leading member of DAWN, Vivienne Taylor.

The Committee's brief was to review existing grants, including social assistance and social insurance mechanisms and, after a process of consultation, make specific recommendations for implementation. Apart from practical administrative and fiscal considerations, their recommendations were also to take account of the 'adequacy of adherence to principles of social solidarity.'⁷⁰ The Committee released a report in March 2002 entitled *Transforming the present- Protecting the future*, in which it made a range of recommendations, including mechanisms to improve the institutional arrangements for grant payments, streamlining existing grants and laying out a financial framework for comprehensive social protection. Political attention, however, focused most intensely on the Committee's recommendation with regard to the Basic Income Grant. The Committee recommended the 'gradual development of a comprehensive and integrated income support.' It noted that the 'conditions for an immediate implementation of a Basic Income Grant do not exist. In particular there is a need to first put in place appropriate capacity and institutional arrangements to ensure effective implementation.'⁷¹ The Taylor Committee argued that existing social assistance schemes reduced poverty by 23% while the BIG would reduce the gap by as much as 74% with over six million people raised above the poverty line. The Committee recommended that a Basic Income Grant be phased in by 2006. Although this was a somewhat guarded recommendation, it was taken as endorsement of the views of COSATU and the BIG Coalition, who then used it as the basis for further activism, now arguing for implementation of the Taylor Committee recommendations.

Although the Taylor Committee report was received with acclaim by civil society and even supported in principle by the Minister of Social Development, the ANC voted against it at the party's National Congress in December 2002. Senior ANC member and government spokesperson Joel Netshitenzhe, reporting on Cabinet debate on the Taylor report, commented that Cabinet had a different philosophy to that adopted by the Taylor Committee. Their view was that 'only the disabled or sick should receive hand-outs, while able-bodied adults should enjoy the opportunity, the dignity and the rewards of work'.⁷²

The government has countered criticism of the existing welfare system by pointing to steady increases in budgetary allocations to welfare since 2000. Servaas van der Berg has shown that 'the first years after the political transition saw a large and significant shift of social spending away from the more affluent to the formerly disadvantaged members of the population, and that most social spending is relatively well targeted to reach those most in need of it.'⁷³ As Stephen Gelb shows in the following analysis of social sector spending, there

have been striking increases in budgetary allocations to welfare, even compared with other social sector spending.

Table 2: Government budget: size and distribution

	1990/1	1995/6	1998/9	2001/ 2	2002/3	2003/4	2004/5	2005/6
Education	18	21	22	20	20	20	20	19
Health	9	10	11	11	11	11	11	11
Social security,	6	10	12	12	14	15	16	16
Housing, other soc	13	5	3	4	4	5	5	5
Social services (total)	46	46	48	48	49	50	51	51
Protection services	20	17	16	17	17	17	16	16
Economic services	14	11	9	11	12	13	13	13
Interest	12	19	20	17	15	13	13	13
Other	8	7	8	7	6	7	6	6
Total	100	100	100	100	100	100	100	100

Source: Stephen Gelb, *Inequality in South Africa: Nature, Causes, Responses*, Johannesburg: The Edge Institute.

The most recent research on the economic and social impact of social grants, conducted on behalf of the Department of Social Development by Economic Policy Research Institute (which has been associated with the BIG Coalition), shows that rising expenditure has begun to impact positively on poverty, labour market participation and productivity. Minister of Social Development Zola Skweyiya argues that 'income support is more than a safety net for the poorest and most vulnerable people in our society. It is also a trampoline that enables many people in these households to jump over the barriers of economic and social exclusion'.⁷⁴ The study showed a 66.6% reduction in poverty, when the destitution poverty line (a measure of relative destitution based on the household expenditures of households in the lowest twenty percent of the income distribution) is used as a benchmark. The study found that the progressive extension of the child support grant up to the age of 14 would reduce the poverty gap by 57%. Receipt of the child support grant correlates to increasing enrolment of children in primary school, with Lund reporting a remarkable eight percent increase in enrolment in grant-receiving households.⁷⁵ The EPRI study also found that the major social grants are significantly and positively associated with greater household expenditure on food and consequently better nutritional outcomes. The impact of existing social grants also seems to be addressing other areas that are of concern to the proponents of a Basic Income Grant. The study found that 'social grants provide potential labour market participants with the resources and security necessary to invest in high risk/ high reward job

search, [and that] living in a household receiving social grants is correlated with a higher success rate in finding employment'.⁷⁶

The likely impacts of a Basic Income Grant on poor women

Nor surprisingly, the most prominent debates about Basic Income Grant have related to affordability and administrative capacity. The impact of the BIG on women has not been directly addressed by the major participants in the BIG Coalition but the proposal raises a number of issues for feminist analysts. A range of women's organisations has argued that the BIG should be supported by women on the grounds that women carry the major burden of poverty, and that 'women are often more responsible than men in using income collectively and developmentally.'⁷⁷ Furthermore, the universal nature of the grant will certainly remove the stigma attached to other social assistance grants, and the absence of a means-test will reduce the degree of moral regulation of women. However, there are a number of assumptions embedded in arguments for the Basic Income Grant that bear closer attention. These relate to assumptions about intra-household behaviour, the impact of a direct cash grant on women's autonomy and the consequences of a universal grant for enhancing women's citizenship entitlements and shifting from notions of female dependency. I will deal with these very briefly.

There has been little attention among Basic Income Grant proponents to the internal power dynamics within households. It is assumed that members of a household will pool their grants and that these would then be used for the benefit of the household as a whole. This assumes also that the interests of the household are unitary and that there will be consensus as to the spending priorities. There is inadequate research into internal household dynamics and much of the discussion is thus highly speculative. However, existing research suggests that households are not monolithic entities in which incomes will be pooled.⁷⁸ Some of these concerns have been raised in relation to the BIG. As Beth Goldblatt (2003) asks, 'is it possible or likely that lack of trust will prevent women and men from pooling the BIG or deciding together how it should be spent?' Francie Lund has pointed out that there is a further assumption that people live in just one household, alluding to the fact that household forms in South Africa are fluid and diverse. Eva Harman has shown how the distribution of social grants is 'mediated by social relations, historical dynamics and material conditions'.⁷⁹ While her research shows that grants are pooled within some poor households, this does not mean that distribution within the households is fair and may indeed increase dependency of non-grant recipients on recipients. Merely receiving a grant, such as a pension, does not

mean that the recipient will have the power to decide how the grant will be used.⁸⁰ The elderly for example, may receive pensions and thereby secure their place and some degree of care from their families but may give up the grant to younger (possibly male) and more powerful members of the household. From this point of view, a direct grant to each member of the household may reduce such dependencies but lack of power in the private sphere may lead to grants being appropriated. Work on the spread of HIV shows the extent to which women lack power over decision-making within households – even where the risk of not asserting voice is extreme illness and even death.⁸¹ Some have argued that a Basic Income Grant will reduce the extent of domestic violence as women will have access to cash and therefore independence. This seems a far-fetched expectation.

An area in which there is more likely to be a gendered impact lies in the potential shift that would result in rural households away from remittances to reliance on a basic income grant – the ‘crowding out’ effect that some see as a likely consequence.⁸² Although migrant remittances are crucial to the survival of rural households, they are also part of a cycle of power. Dorrit Posel’s research on the varied patterns of distribution of migrant remittances within rural households suggests that we cannot assume that migrants remit to rural households out of altruism.⁸³ Posel found that remittances are being directed not at households but at particular individuals in households, and that migrants may be more responsive to the needs of some household members than to others. Some claimants within households – such as old people and children - are seen as valid claimants whilst others (notably young women) are seen as invalid.

A universal grant may therefore have the effect of uncoupling support for rural households from the vagaries of the remittance system and might offer rural women greater autonomy and enable them to overcome other barriers to economic security. Although women have yet to gain equal rights to ownership and access to communal land, they are able to purchase other forms of land through accessing a state subsidy.⁸⁴ The major barrier to this thus far has been lack of cash (purchasers are required to make a cash deposit before the state will issue a subsidy). An income grant might make it possible for women in households where there is more than one woman to pool their income and purchase the land they are currently working. A basic monthly income might make it easier for women to access low levels of credit to increase their productivity. Evidence suggests that there is a definite gender pattern in household spending. Lund’s work on pensions shows that the grant is most generally put to common household use and that, moreover, pension money that goes to women is spent

better (that is, on food, health and education) than that which goes to men.⁸⁵ Directing cash grants to women is therefore likely to enhance the quality of life of poor women and children. However, these assumptions have not yet been tested by empirical research and cannot be said to decisively provide support for the idea that a small cash grant will be empowering for women.

The paucity of gendered analysis in social assistance debates is partly attributable to the decline in feminist activism since the advent of democracy. Gender politics in the last ten years has centred on increasing women's representation in various institutions while the original link between representation and equality outcomes appears to have been broken. In the apartheid era, a clear line was drawn between struggles for formal equality and those for substantive equality. Formal equality – the achievement of equal rights and opportunities was regarded as an inadequate conceptualization of liberation. The achievement of formal political and civil rights, while an important gain in itself, was understood as a weak form of equality that would have little impact on the lives of poor women. What was needed was substantive equality, understood as the transformation of the economic conditions that produce gender equality.⁸⁶ The Women's Charter for Effective Equality, adopted by the Women's National Coalition in 1994, articulates a notion of equality that is closer to the vision of substantive equality, with a very clear emphasis on the structural and systemic underpinnings of women's subordinate status.

Definitions of equality of course need to be grounded in the particular context in which claims are being made. I would argue that a strong notion of equality, one that would provide some guidance about appropriate policy choices in South Africa, would rest on the extent to which formal discrimination in law and policy is reduced,⁸⁷ the extent to which overall poverty is reduced, the degree to which women have autonomy and are able to make choices free of the constraints of care work within families and communities, as well as free of the pressure to remain in oppressive and violent relationships,⁸⁸ and the extent to which women feel safe in society. This notion of equality has specific implications for social policy, as it would require that resources be directed in such a way that they serve not only to address the needs of the poorest women, but are also become part of an incremental process of enhancing women's autonomy and full participation in political and economic processes.

In South Africa and in other developing country contexts the conceptualization of equality primarily in terms of labour market participation and autonomy from family responsibilities is

flawed. Firstly, the issue of access to labour markets is different in the context of high and chronic joblessness. Secondly, the caring needs of middle class women have not resulted in demands for publicly funded systems of family support. The availability of cheap childcare and domestic work for the middle class meant that there was virtually no demand for high quality state-provided childcare. The economic and political processes that accompanied demands for greater public responsibility in providing care in northern welfare states⁸⁹ do not exist in South Africa. In South Africa supply (of private childcare) has outstripped demand and consequently the bulk of carework is likely to remain within the private sphere.

Conclusions

This paper has shown that although the transition to democracy has led to the elaboration of wide-ranging set of civil, political and social rights, the gendered patterns of poverty and inequality have not been significantly reduced. The deracialisation of social assistance has led included some poor women into the social security safety nets but the gap in coverage excluded the majority of poor women between the ages of fourteen and sixty. The extent to which poor women have been able to access their citizenship rights has been limited by faltering political will to address poverty in a comprehensive manner, by an overarching macroeconomic framework that prioritises fiscal restraint over redistribution and by an administrative system and infrastructure that is unable to fulfill basic tasks of service delivery.

Despite some progress in using social grants as part of a developmental strategy, the type of welfare system being built in South Africa is a residual system, reacting only to the worst effects of market or family failures and providing assistance to social groups seen as 'deserving'. Women access support only through their children until they reach the age of sixty. Provision of benefits is not generous, benefits are not universal but income tested and access to benefits is difficult. Unless the basis of entitlements changes in ways that recognize women's entitlements as citizenship rights, poor women will continue to be excluded from the system of social entitlements. Equally importantly, unless the increased representation includes debate and activism about the meanings of gender equality in the South African context, the likelihood is the parity in representation will increase the access of women elites rather than have the outcome of increased gender equality.

ENDNOTES

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- ¹ This article is based on research conducted as part on the UNRISD Programme on Gender and Social Policy in Developing Countries. A version of this article will appear in Shahra Razavi and Shireen Hassim (ed.) *Gender and Social Policy in Developing Countries*, London: Palgrave, 2006.
- ² Sandra Liebenberg, "Social security and human rights: Current issues," in *Economic and Social Rights in South Africa Review*, Vol. 1, No. 2 (1998).
- ³ This term is part of United Nations jargon. Despite its clumsiness and its technocratic connotations, I retain it here because it is the common phrase used in South Africa.
- ⁴ Neva Seidman Makgetla, *Women and the economy in south Africa*, www.genderstats.org.za/economy.shtml, p. 2.
- ⁵ Makgetla, p.7.
- ⁶ Ibid., 40.
- ⁷ Ibid., 41.
- ⁸ Michael Samson, 2002, p.71.
- ⁹ Debbie Budlender, *Women and poverty*, www.genderstats.org.za/poverty.shtml, p. 10.
- ¹⁰ African National Congress, *The Reconstruction and Development Programme*, Johannesburg: Umanyano Publications, 1995, 17-18.
- ¹¹ Baden, Hassim and Meintjes, 45.
- ¹² Kaiser Family Foundation, 2002, "Hitting home: how households cope with the impact of the HIV/AIDS epidemic", October, p.4.
- ¹³ Kaiser Family Foundation, p.2.
- ¹⁴ Jeremy Seekings, "The broader importance of welfare reform in South Africa", *Social Dynamics*, Vol. 28, No. 2 (Winter, 2002); TRIPS paper?
- ¹⁵ Francie Lund, with Sally Ardington and Mary Harber, "Welfare" in Debbie Budlender (ed.) *The Women's Budget*, Cape Town: IDASA, 1996, p. 97.
- ¹⁶ Servaas van der Berg, "South African social security under apartheid and beyond," *Development Southern Africa*, Vol. 14, No. 4 (December 1997).
- ¹⁷ Van der Berg, 1997, p. 486.
- ¹⁸ Francie Lund, "State restructuring of welfare", *Transformation*, No. 6, 1988.
- ¹⁹ Van der Berg, 1997, p. 487.
- ²⁰ Lund, 1998, p. 24.
- ²¹ Lund (1988) points out that welfare agencies accepted these changes because they were highly dependent on state subsidies. However, some did make private arrangements to equalize salaries of their social workers
- ²² Julia C. Wells, 1992, *We Now Demand!*, Johannesburg: University of Witwatersrand Press.
- ²³ Seth Koven and Sonya Michel (eds.), p. 2. But it is important to note that the term maternalist is inherently ambiguous; it can be used as easily to defend the primacy of women's role in the private as it can be used to expand their roles to the public.
- ²⁴ Cheryl Walker, *Women and Resistance in South Africa*, London: Onyx, 1981.
- ²⁵ Seekings, 2002, p. 12.
- ²⁶ Van der Berg, 1997, p. 488.
- ²⁷ Libby Ardington and Francie Lund, 1995.
- ²⁸ Van der Berg, 1997, p. 486.
- ²⁹ Leila Patel, *Restructuring Social Welfare: Options for South Africa*, Johannesburg: Ravan Press, 1992, p. 41.
- ³⁰ Lund, 1988, p.25
- ³¹ Lund, 1990, p.70.
- ³² Lund et al, 1996, p. 97.
- ³³ FJ Lund, "State social benefits in South Africa", *International Social Security Review*, Vol. 46, No. 3:5-25; A. Case and A. Deaton, 1996, *Large cash transfers to the elderly in South Africa*, Research program in Development Studies. Princeton: Princeton University.
- ³⁴ Case and Deaton, 1996, p. 23.
- ³⁵ Cited in Lund et al, 1996, p. 101.

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- ³⁶ Lund et al, p. 102.
- ³⁷ Patel, 1992, p. 45.
- ³⁸ Patel, 1992: 109
- ³⁹ See Patel, 1992, chapter three for a useful discussion of these initiatives.
- ⁴⁰ Lund, 1988.
- ⁴¹ Stephen Gelb, personal communication.
- ⁴² Government of South Africa, White Paper on Social Welfare, ch 2
- ⁴³ Ravi Naidoo, "The Basic Income Grant: Poverty, politics and policy-making" Harold Wolpe Memorial Lecture, University of Natal.
- ⁴⁴ Lisa Vetten, 2003, "The budget appears to be less than required': four government departments' expenditure on activities addressing violence against women", Unpublished draft report (Johannesburg: Centre for the Study of Violence and Reconciliation).
- ⁴⁵ Lund et al, 1996, p. 115.
- ⁴⁶ Constitution of South Africa, 1996.
- ⁴⁷ Marie Naidoo and Vivienne Bozalek, "Maintenance grant parity: women pay the price," in *Agenda*, No. 33, 1997: 30.
- ⁴⁸ *Ibid*: 31.
- ⁴⁹ Beth Goldblatt, 2004.
- ⁵⁰ Grace Khunou, 2004, "Is human fatherhood a social invention? Attitudes and views of men on maintenance", in Debbie Budlender and Bhikinkosi Moyo (eds.) *What About the Children: The Silent Voices in Maintenance*, Johannesburg: Tshwaranang Legal Advocacy Centre, p.80.
- ⁵¹ Lund Committee, p. 29.
- ⁵² Lund Committee, p. 92.
- ⁵³ Comments by Beth Goldblatt, CALS Workshop on Gender and Social Security, December 2004
- ⁵⁴ Liebenberg, 1998: 11.
- ⁵⁵ Government of South Africa, 1996: 99.
- ⁵⁶ Community Agency for Social Enquiry (CASE), "A social impact study on the phasing-in of the child support grant," Johannesburg: CASE, 2000: 120.
- ⁵⁷ Teresa Guthrie, 2002, "Family and social security benefits in South Africa", *Social Dynamics*, Vol. 28, No. 2: 122-245.
- ⁵⁸ CASE, 2000: 120.
- ⁵⁹ Woolard, 2003.
- ⁶⁰ Vivienne Taylor, Paper presented to CALS workshop on Gender and Social Security, December 2004.
- ⁶¹ Lund Committee, p. 91.
- ⁶² Interview with Francie Lund.
- ⁶³ Minutes of Portfolio Committee on Welfare, 13 Oct 2000
- ⁶⁴ Andre Koopman, 'Poor urged to roll up their sleeves', Cape Times, May 25, 1999
- ⁶⁵ Victor Rhupiso, "Dumped with daddy", *Sunday Times Metro*, February 23, 2003.
- ⁶⁶ Comment by Sibongile Ndatshe, CALS workshop, December 2004.
- ⁶⁷ Francie Lund, 2004, "Gender and social security: What we know, what we think we know and what we really don't know", Paper presented at CALS Workshop on Gender and Social Security, December.
- ⁶⁸ Anna McCord, 2002.
- ⁶⁹ Paradoxically, the Democratic Party which in many respects can be seen as the party of business, has supported the introduction of BIG.
- ⁷⁰ Taylor Committee, 2002, p. 10.
- ⁷¹ Taylor Committee, 2002, 63.
- ⁷² Netshitenzhe, press release.
- ⁷³ Servaas van der Berg, 2001, "Redistribution through the Budget: Public Expenditure Increase in South Africa, 1993-1997", *Social Dynamics*, 21 (1), p. 157
- ⁷⁴ Ministry of Social Development, 'Opening Remarks by Dr Zola Skweyiya, Minister for Social Development, at the launch of the report on the economic and social impact of social grants, Pretoria, 10 December 2004'.
- ⁷⁵ Lund, 2004.

⁷⁶ Ministry of Social Development, 2004.

⁷⁷ Beth Goldblatt, 2003.

⁷⁸ Dorrit Posel, 2001, "How do households work? Migration, the household and remittance behaviour in South Africa", *Social Dynamics* 21(1).

⁷⁹ Eva Harman, "Social grants and their social circulations", paper presented at the II Annual USBIG Conference of the Eastern Economic Association, February 21-23, 2003.

⁸⁰ Naila Kabeer, 1991, Reversed Realities.

⁸¹ Albertyn, 2003.

⁸² Lund, 2002.

⁸³ Posel, 2001, p. 170.

⁸⁴ Cheryl Walker, "Piety in the sky", 2002.

⁸⁵ Lund, 2004.

⁸⁶ Elsewhere Catherine Albertyn and I have argued that even this conceptualization of freedom is limited, as it fails to address the social and cultural dimensions of inequality. See Albertyn and Hassim, 2003, "The boundaries of democracy"

⁸⁷ Of course, certain forms of gender discrimination are both inevitable and desirable, such as in relation to maternity and reproductive health benefits.

⁸⁸ Ann Shola Orloff, "Gender and the social rights of citizenship: The comparative analysis of gender relations and welfare states", *American Sociological Review*, 58(3), p. 319. Orloff takes this argument much further in suggesting that social policies should aim at decommodification of gender relations by enabling women to form and maintain autonomous households. I am hesitant to apply this notion to women in the South African context, given the particular cultural attachments and support systems that women value within family and communities. It could also be argued that the high number of women-headed households in South Africa suggests that women are indeed free to form autonomous households, but this has patently not empowered women to become full and equal citizens.

⁸⁹ Bergqvist and Nyberg, p. 288.

ary recent year), Pakendorf explains that Mbeki respects the political importance of welfare departments and infrastructure. That started two budgets yet trickled through the economy. Just before an election, you step up that programme. If you then verbally denounce that which makes your ally Cosatu - unhappy, there is an added advantage: you take one issue off the table.' In sum, says Pakendorf, 'Mbeki is doing the old classical politic right.' (*Business Report*, 12 November 2003.)

iii. Statistics South Africa (2002), *Earning and Spending in South Africa*, Pretoria; *Business Day*, 22 November 2002.

iv. Cosatu (2003), 'End of Year Statement', Johannesburg, 22 December, p.2.

v. Statistics South Africa (2001), *South Africa in Transition*, Pretoria, for 1995, and Statistics South Africa (2003), *Labour Force Survey, September 2002*,

vi "Totem and Taboo", *The Nation* 279.8(2004),29.

vii. *Sunday Times Gauteng Metro*, 19 May 2002.

viii "Totem and Taboo", *The Nation* 279.8(2004),29.

ix. Cited in Lynas, M. (2003), 'Playing Dirty at the WTO,' *Third World Network Features*, Penang, Malaysia, June.

x. Kwa, *Power Politics in the WTO*, p.24.

xi. *The Straights Times*, 3 September 2003.

xii. Further coverage of Erwin's role at Doha can be found in Bond, P and .Manyanya, M. (2003), *Zimbabwe's Plunge: Exhausted Nationalism, Neoliberal Justice*, London.

Merlin Press, Pietermaritzburg, University of Natal Press and Harare, Weaver Press, pp.142-145.

xiii. Tandon, Y. (1999), 'A Blip or a Turnaround?,' *Journal of Social Change and Development*, 49, December. For more, see any of the excellent pu training/research.

NGO, Seatini, including Tandon's personal recollections of indignity at Doha. Tandon - once a Ugandan Marxist guerilla and briefly a culture minister - Global justice movements and the best Third World nationalist civil servants, in the manner of Martin Khor and Third World Network.

xiv. The story is told in detail in Keet, D. (2002), *South Africa's Official Role and Position in Promoting the World Trade Organisation*, Cape Town, Alternative Information and Development Centre.

xv. Erwin, A. (1999), 'Statement to the World Trade Organisation Plenary', Seattle, December 1.

xvi. Erwin, A. (2003), 'Statement on the 5th Ministerial Meeting of the World Trade Organisation held in Cancun Mexico in September 2003,' Speech to the SA Parliament National Assembly, Cape Town, 26 September. On the basis of an agreement in the National Economic Development and Labour Council, Erwin himself was mandated to maintain a strong position in favour of labour clauses at Seattle, so his remark to parliament in 2003 is especially revealing.

xvii. Manuel, T. (2000), 'Address to the Seminar on South Africa's Relations and Creation of National Wealth and Social Welfare,' Rand Afrikaans University Centre for European Study in Africa, Johannesburg, 20 October.

xviii. *New Agenda*, 8, 2002.

xix. Harvey, 'The "New" Imperialism.'

xx. Amin, S. (2003), 'Confronting the Empire,' presented to the conference on The Work of Karl Marx and the Challenges of the 21st Century, Institute of Philosophy of the Ministry of Science, Technology and the Environment, the National Association of Economists of Cuba, the Cuban Trade Union Federation and the Centre for the Study of Economy and Planning, Havana, 5-8 May.

xxi. <http://squat.net/cia/gp/greenpepper.htm>, 26 March 2003.

xxii. Kasrils, R. (2003), 'South Africans' Water,' *New York Times*, 5 June.

xxiii. For updates on corruption and resettlement/compensation problems, see <http://www.irn.org>, especially Mopheme/The Survivor (Maseru), 9 April 2003.

xxiv. The story is told in Bond, *Against Global Apartheid*, Chapter Three; and *Unsustainable South Africa*, Chapters Three-Six.

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The Relevance of Rights for Systemic Change for Women¹

Lee Lakeman

Introduction

New Orleans is devastated. We are confronted with transparent patriarchy: its stratifications of class, race and sex, its practices of control, crisis level global degradation of the environment, methods of systemic profiteering and the political economic powers that enforce them. The progression of losses should cause us to change the world immediately: our world, not just Louisiana or the USA! We should act decisively, immediately on behalf of the people of New Orleans and on our own behalf as people dependent on the planet earth and as women.

In New Orleans the impoverishment of women, the racializing of poverty, the plunder of oil and war, the corruption of government by personal and corporate greed was laid bare. You saw the women, the poor. You saw that the faces left in squalor were black and female, those who could not buy safety. You connected the for-profit “development” of swampy wetlands with the warming ocean and with the hurricane force wind and sea. You saw that privatized, for-profit hospitals left patients behind. You saw the government clamp-down on information after the first anarchic info-packed media days. You noted the centralized commercial media search for the spin elements of one hero, one surviving baby and one bureaucrat to damn. You recognized those like Cheney who hung George Bush out to dry since his term is nearly up and a new face is required.

Do you similarly register the Canadian and global story of violence against women? Do you look for the gendered class and race stratification in state abandonment and state protection?² Do you recognize and resist the pre-existing conditions that render all women vulnerable, know the government policies denying those conditions or fragmenting them, recognize federal rejection of responsibility for services or advocacy to ameliorate those conditions. Do you observe and protest Canadian government post '95 policies that fragment, interrupt, and bury the Canadian Women's movement against sexist violence?³

We live in the reflected glare of the cameras on New Orleans. We cannot and must not ignore it in any consideration of what peace and whose equality is protected by the *Canadian Charter of Rights and Freedoms*. Nor can we ignore the five years of research conducted by the Canadian Association of Sexual Assault Centres or the

¹ This chapter was published in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, ed. Sheila McIntyre and Sanda Rodgers, Lexis Nexis Butterworths, Toronto: June 2006.

² Lakeman, L. *Obsession, with Intent, Violence Against Women* (Black Rose Books: Montreal, 2005) at 59-91 and 210-211. This book contains a five-year study by The Canadian Association of Sexual Assault Centers as to why women cannot secure convictions when complaining of criminal sexual assault.

³ *Ibid.* at 40-41, 75-81.

voices of women, especially Aboriginal Women, in the April 2005 CASAC Day of Feminist Dialogue.⁴ Like those facing New Orleans, we have a lot to assess, to face about rights.

Our Privilege, Our Obligation: to press authorities to live up to the Promise

There is a challenge, especially for those of us who have led women to a belief that Canadian Courts, the Canadian *Charter*, and the Canadian Parliament would delineate, encode, protect and remedy women's rights. We lent our credibility and authority to the promise of a better life, including to the access to life and liberty promised by Rights. This promise seems too much like climbing from the flood-waters and into the attic, without an axe to get to the roof. We cannot rely on the protection of Rights, however well articulated, without a widespread women's movement to force authorities to ensure Rights enforcement. We cannot afford to exempt those with legal training or other class credentials and privileges from the responsibilities of that movement.

I am among the world's lucky women raised in the luxurious myth (however blinding), that progress (in the form of indivisible Human Rights determined by government, secured internationally, enacted across communities and upheld in courts) is inevitable. To the extent that our liberal public education admitted the realities of group oppression, we were taught that ending poverty, sexism and racism, was a matter of education and reason, of convincing and persuading "the powers that be". We too often accept that each case will educate the legal, political or ideological authorities until they "get it". But it is hard to point to such advances in the fifty-year herstory of Human Rights and Human Rights mechanisms. Among those mechanisms is the *Charter of Rights and Freedoms*, itself part of that lineage of UN Human Rights: state based and liberal minded.

However discouraged, most women engaged in anti-violence advocacy reject the broad denunciation by the male left of women's use of the state. Some focus their disapproval on the use of the *Charter*. Why use a vehicle constructed by the elite for the exercise of the elite? They argue that attachment to democracy compels that we use parliament. But parliament seems no more accessible than the Court, elections no more effective for women than appointment processes; both are too far from responsible and meaningful democracy. In any case, both are completely interwoven. Neither the courts nor the legislature can claim fair representation of or common cause with, the women using or those working in anti-violence centers. At this political moment both institutions dangerously compound each other's failings.

We remain active and willfully hopeful in the constant battle to protect our shared sense of entitlement, our shared vision and the encoding of those as Rights. But we urge greater commitment to our interrelated progress toward the enactment of rights. We urge legal practitioners and theorists to place more hope in and to act more cooperatively with the construction of democracy in extra parliamentary political movements and alliances. Hope does not rest in the state: neither in the courts, the legislature nor in those NGO's that operate as extensions of the state.

⁴ *The CASAC Day of Feminist Dialogue* at the Wosk Center for Dialogue Simon Fraser University was video taped and is now in production for release by CASAC Vancouver in 2006.

Positive/Transforming Obligations Not Punitive/ Repressive Order

Over the last fifty years we have constructed a North American consensus of the inherent, pre-existing, natural human rights of everyone. That consensus about our rights is articulated in everyday speech by the majority of people. We are not just after punishment. Rights mean not being placed in harms way, neither made nor held vulnerable. For women, as for the poor of New Orleans, that means the *status quo* must not be maintained. Ultimately, we pursue our right to live fully, unmolested, and in community with our fair share of the world's resources and a fair share of its opportunities. The visioning exercise led by the World March of Women has helped women around the world to articulate in the Charter for Humanity what the component parts of such a righteous global community might be.

Both in New Orleans and in our cross - Canada study, women speak about their "right" to survive, to be treated with dignity, to be rescued, protected from violence and abuse, to resist war, to be treated humanely, to receive life sustaining public services, to be free from exploitation or abandonment; of the right to transforming corrective action. They speak of the recognition of unfairness, inequality, bias, disadvantage, and exploitation. They speak of their right to have authorities come to their aid but not to force them, nor to undermine privacy or autonomy. They speak of their right to expect authorities to put women's well-being above profit, to provision people, to recognize and assist their relatedness as families and as groups, to recognize and assist them as communities and as individuals, and to accept and assist their collective cultures as the creation of individuals and the shaper of individuals over time and place. They speak about their right to positive relationships, to the redistribution of wealth, and to participate in decisions concerning natural resources. But this consensus is unsupported, much less honoured, by capitalist power holders, legal authorities, or state functionaries.

Neo-liberalism has us caught in an ideological war to break that consensus. While it is still important to "speak truth to power" as the Quakers say, we are sometimes sidetracked into legal arguments and proceedings, knowing that we can neither be heard, nor win, or sidetracked into foolish arguments because we are determined to win something, anything, no matter how far from our principle struggle. Our real hope is in democracy, not the limited democracy of votes or courts, but that of civil society. A democracy enriched by the consciousness of the participants in the struggle. Too often cases of our Rights are fought without a wider collective strategy determined by self-organized groups of the oppressed. There are limited resources available for social change. Resources identified for legal work rarely privilege the issues, expertise or the democracy creating processes identified by oppressed groups. Such disintegration of methods has to change.

The Situation is Dire

Violence against women is a normal experience for women in Canada. Men commit that violence with impunity. Most women have fended off violence directly. Fifty per cent of us have endured criminal assault. Most women know others who didn't escape. Five hundred Aboriginal women have gone missing in the last twenty years. Sixty wives are killed in an average year. In spite of women's complaints against men, from Paul Bernardo and Robert Pickton to the ordinary violent husband, men elude police intervention and effective criminal sanction. Violence against women is effectively

decriminalized. Women's self defense against impoverishment and violent subjugation is targeted for criminalization.⁵

Feminist praxis continues to assert the gendered specificity of the experience of poverty and violence.⁶ Increasing public agreement with feminist activists necessitates backlash, including challenges to the political identification of women as a group. Government and the courts, with academic cooperation, endorse such challenges. Meanwhile the economic condition of women worldwide, which renders women vulnerable to violence and which is maintained in part by violence against women, is worsening.

Before the storm, there were weekly protests in New Orleans responding to the murder of Jenard Thomas and to police killings of unarmed youth. Two New Orleans police officers were charged with committing rape while in uniform. Louisiana ranks 48th in the country for the lowest teacher salaries. On average the state spends \$4,724 per child on education. Forty percent of the black population is illiterate. The men are targeted for criminalization, and so increasingly are the women. Felony charges come easily and result in the loss of voting rights and what little democratic control is had.

In both countries, agencies and individuals within policing and within the administration of justice have sabotaged initiatives to protect women not only with individual acts of violence against women but also with the personal and systemic collusion that sustains it.⁷

We are appalled by New Orleans. Enraged by the worldwide sexist violation of women. Those who share in this sense of our rights, who see the neglect and abuse of the rights of ordinary men and women, experience our obligation to act. The human heart knows that to fail to act once we have vision and consensus, once we are aware of injustice, is to deaden ourselves.

Many attempt aid: take note of the breadth and range of the charitable activity responding to hurricane victims and responding to victims of male violence. But charitable responses to New Orleans are at best, inadequate. So too is charity an insufficient response to violence against women.⁸

Too many move with charity rather than progressive politics, with the assertion of facts instead of media strategy, with patronizing benevolence and not with

⁵ Lakeman, *supra* note 1 at 79-80.

⁶ *Ibid.* at 78-82.

⁷ For example, the collusive community responses to Braeme and Ramsey. David Braeme, the Tacoma, Washington police chief and violent husband who eventually shot and killed his wife in a parking lot in front of his children in April 2003; Judge Ramsey of Prince George who blackmailed, coerced, and raped Aboriginal girls in state care who had come before his court, up until 2003. These criminal justice system officials could not have been unknown as abusers to their colleagues, at their courthouses, at police detachments or in the governing council chambers, possibly including the band council offices.

⁸ Lakeman, *supra* note 1.

righteousness, with a call for the “security” of law and order instead of creating among ourselves a new, just, social, economic and political order. What is required is social change, political change. As yet we have no broad agreement as to how to achieve such change. Of course we must be charitable and intelligent and social beings. But to respond to a crisis created and perpetuated by patriarchy including capitalism, without attacking patriarchy, is fools’ play.⁹

Are we cowed? Is it too much for us, this multi-media deathwatch? Is the endless repetition of the individualized stories of the oppressed part of the attack?¹⁰ Do longer and longer lists of lost causes, oft repeated, deflate us? Are we rendered hopeless by stories of government restructuring? By the grim revelations of court appointments? The sheer gall of the refusal to uphold Rights stuns us. The shell game between parliament, the courts and the capitalists is childishly obvious, midway trickery.

Self avowed liberals should abandon their willfully ignorant neutrality (at least) and life threatening bigotry (at worst) toward the corrupted delivery of services to the oppressed. Neutrality called New Orleans a “natural disaster”. It recognized those in New Orleans as “people” only, instead of as “black”, called those abandoned to squalor and death “black people” instead of the “black poor”, noted the “dead black poor people” and did not say they were disproportionately “women with children”, “the infirm and the elderly who are mostly women”.¹¹ These same liberals speak of people’s rights to peace but ignore the specific tyranny of men’s violence against women, speak of victim right’s to law and order and not women’s rights to peace and justice, speak of gender equality instead of women’s oppression and women’s rights. Political activists should be apologizing for their failure to notice, expect and believe that those left in the ravages of New Orleans would and did organize as ordinary people always do, for their own survival and the survival of others. Intervention in the crisis should reinforce that self-chosen leadership and self-organized mutual aid.

Oppressed people are always in a process of resistance. On the bottom the problem is not ignorance of the horrors. At the top, ignorance about the horrors is willful. To the extent that education or propaganda moves us toward change, strategies must incorporate these realities.

What makes action political, is its relationship to the transformation of the power executing and recreating oppression. What makes transformation successful and

⁹ Many argue the political links to the Louisiana floods of the 1920’s that produced the popular revolt harnessed by Huey Long that at least hurried the Roosevelt reforms meant to head off civil war in the US. Is there any point to lobbying strategies at this moment? Is insurrection all that is left to us?

¹⁰ Armstrong, L. *Rocking the Cradle of Sexual Politics: What Happened When Women Said Incest* (Boston: Addison-Wesley, 1994).

¹¹ See the following articles by the Institute for Women’s Policy Research: *The Women of New Orleans and the Gulf Coast: Multiple Disadvantages and Key Assets for Recovery, Part I*; *New Report Finds More Than Half of New Orleans Families Headed by Single Mothers*; *Women of Gulf Coast Key to Rebuilding After Katrina and Rita*, online: Institute for Women’s Policy Research <<http://www.iwpr.org>>.

sustaining is a carefully constructed democratic collectivity that embodies affirmative action, equality of opportunity and outcome. Truthful meaningful argument will put the oppressed at ease but will render the powerful ill at ease. To create and accept this in a legal strategy is enormously difficult; contradictory, in fact, to legal tradition. Avoiding liberal speech is a key step.

Deceitful propaganda desensitizes us to real harm done to others. Perhaps there is some momentary excuse for those of us not in New Orleans. We have been subjected (for more than a week about New Orleans, for more than a decade about sexist violence) to the torture of passively watching white supremacy and male supremacy in action. We see the capitalist take over and destruction of the Gulf Coast and the offer to reconstruct it - at our expense - in their image. We watch the commercialization of violence against women, the commodification of women everywhere, and the cynical use of the public consensus by virtually every political player. On the national scene, we saw the promise of more services to assist women violated in the famous Red Book of Liberal party election promises, even as the responsibility for those services was being offloaded onto the provinces simultaneously by cuts to CAP funding. The right to welfare was lost, as was civil legal aid, transition house funds and more. This year we see the appropriation by federal politicians of public sympathy for the plight of street prostitutes to justify the profit generating legalization of domestic prostitution, and the banning of human trafficking used as an excuse for the repression of immigration.¹²

The media coverage endured can reduce us to repeating the hateful message that the divisions between us are essential and undefeatable, that our neighbours are mindlessly murderous, that any stranger wants to kill us, that danger lies in angry women or the desperate poor, or the sexualized black stranger, that there are too few resources to sustain us all, that everyone but us is barbaric, even everyone like us. The pornographic imaging stuns, degrades and isolates those portrayed. Viewers too have been subjugated by being forced to witness degradation and death. Are we struck dumb in the horror of witnessing the punishments of our peers, meant to “encourage the others”?

We have been diverted from our righteous outrage by stories of looting and rape, of lone gunmen, of the night terrors of gangs.¹³ We have been forced to hear the American poor and black described as “refugees”. Similarly, women complaining of violence are described as helpless and pathetic victims: patronized by charity to a state of less than citizens. There is no question of Rights here. They are “lucky” to be rescued by the benevolent, the police or the military. We are told that the refusal to leave the danger zone, to survive by demanding the right to care, is a demand to be taken over. Similar logic rationalizes wife battering. To use these stereotypes to win cases or make legal/political argument also is exploitation. And often it is exploitation that the woman involved cannot protest.

¹² Lakeman, *supra* note 1 at 212, 216-217.

¹³ This is the Deep South and racialized rape stories are typically suspect and unsympathetic to women. The nature of the stories suggested that the perpetrator s were unleashed, dangerous, and uncivilized (black?) men. Louisiana anti rape services confirmed two rapes (there were approximately 30,000 people in the stadium alone, which is the equivalent of small towns in North America in which there are at least that many rapes happening in any evening).

Pornographic propaganda can, and for a while in New Orleans did, whip up a sense of danger from the exaggerated ugly possibility in each other. It can leave people in utter despair. It can dissuade us all from organizing. It can leave people tolerating or even begging that the authorities, however corrupt and brutal, take control - to save ordinary impoverished and oppressed people from each other. It can confound the hunger for collective structures and community cooperation with wanting Law and Order. It can obfuscate the construction of the crisis: the collusion between the individual men terrorizing, state authorities and the larger more powerful profiteers.

What Will They Do When They Know That We Know?

Nevertheless we know. Global warming of gulf waters, wonton 'development' devastating wetlands and escalating greedy oil and gas exploration met the increasingly under-funded infrastructure of the New Orleans dike systems in the wrath of the wind and sea.¹⁴ On the other side of the great Atlantic expanse of water, under the direction of their states, men from impoverished communities use the resources needed by the poor to bomb the populations of other great cities and to wall in the righteous aspirations of the peoples of the Middle East in order to free the flow of oil. Women around the world have declared that daily sexist violence and imposed poverty predetermine their lives, their culture and the enjoyment of liberty. They are stripped of their peace and freedom and robbed of the culture of women. Women are aware that the brutality of individual men is sustained and regenerated, recreated with the collusion of government and corporate powers.

Most westerners know what is happening to New Orleans and to women. The injustice of the racism and the class bigotry and sexism has been so obvious. The understanding that New Orleans and its residents were already severely divided by race and class is commonplace. There is a commonly held and expressed understanding that the poor were the ones in danger. The abdication of state responsibility to protect and rescue and to rescue with dignity was commonly expressed. The construction of the black population as criminal was transparent. The ludicrous application of Law and Order was undeniable.

Who can still claim ignorance that women face men's abuse, violent criminal sexist abuse, daily, at home, at work and in the streets? Who is unaware that we have no state protection of our rights? Who has not seen women diverted, blamed, framed? Who can claim that all possible efforts for women are being made?

To render humans inactive or unintelligent in defense of their own liberty and community, whether in New Orleans or with regard to women, requires deceit, isolation and active repression. The only answer to active repression is more visionary and effective resistance.

With feminist analysis, a political will and an opportunity for action we can take instruction from the actual events, the hideous spectacles, the media construction of its

¹⁴ Joseph Boyden, "The Drowning of New Orleans" *Maclean's* 118:37 (12 September 2005) at 10.; Jill Mahoney "The changing face of New Orleans " *The Globe and Mail* (2 March 2006) A15.

herstory and the repressive show of force. We must match deceit with information; isolation with organization and mutual aid. To be democratic and progressive, political activity requires shared information and consciousness but also joint activity, reflection and accountability. All of which are sorely lacking in legal strategies and the coalitions needed to sustain them.

Rights Courts

To the extent that Louisiana folk have legal rights, who will sue and bill the profiteers? Who can and will lay the charges of negligence, of corruption, of racketeering, of undue use of force, of hate crime? Who will describe the third party liability of profiteering hospitals, landlords, and governments? Where will we acknowledge the multiple constitutional crises and international consequences? How shall we take these incidents of mistreatment of the dispossessed to the United Nations?

Who will assure that the affirmative action of correction and restitution is as sexed, raced and classed as the impact. Who will assess the herstoric pre-existing disadvantage and see to it that the future undoes it? What democratic process will assure the approval of those most affected? To construct those processes is key to transformative work. When do we begin corrective action?

And what about violence against women? Compare the numbers. More than a thousand have been found dead in New Orleans. In the USA in 2003, more than 1200 US wives and girlfriends were murdered. Women sustained more than 555,000 serious injuries from men's domestic abuse.¹⁵ Statistics Canada reports that from the age of 16, one in every two women in Canada has been physically or sexually criminally assaulted by a man, at least once.¹⁶ More than one in four Canadian women have been assaulted by a male partner.¹⁷ What about the murder of prostitutes, incest murders, the missing Aboriginal women?

Both the government of the USA and that of Canada disparage rather than cooperate with national advocacy groups by and for women.¹⁸ There are almost no enabling mechanisms for the intervention of women's groups in court rulings on violence against women cases creating social policy. Court Challenges funding is limited, not available at the provincial level where there is no test case litigation fund, few lawyers offer themselves pro bono for this work and there is an increasing resistance at the Supreme Court level to our interventions.

¹⁵ Jennifer Gonnerman & Sara Catania, "No Safe Haven? A Special Report on Domestic Violence" *Mother Jones* 30:4 (July/August 2005) at 36.

¹⁶ Statistics Canada, "The Violence Against Women Survey" cited in Diane Brady, "A New Measure of Violence" *Maclean's* 106:48 (29 Nov. 1993).

¹⁷ *Ibid.*

¹⁸ Lakeman, *supra* note 1.

If women's rights in Canada are Rights, who will make the police attend, investigate, and stand between her and the gun?¹⁹ How shall we force the arrest, the prosecution, the fair trials and sentencing of men who brutalize their wives and children? Who will sue the authorities for negligence, for failure in their duty of care, for the consequences of humiliation, physical disability and death? Who will demand restitution or compensation where the crimes, for lack of police investigation, will never be proven? Who will measure the harm of racialized brutal policing in dissuading women from calling for protection? Who can reunite women with their children when divorce law is privatized and fails to recognize sexist violence? Without poverty law and legal aid, who will defend the rights of the poverty stricken from theft charges? Who will protect prostitutes from criminalization? And if the pressure to legalize continues, who will protect them from the feudalism of the gangs? Who will criminalize the owners, developers, government officials and profiteers in the global sex trade in women and children and support women's right **not** to prostitute?

Judicial Appointments as a Function of Government

The American *Violence Against Women Act*²⁰ is a government initiative, as is the *Canadian Charter of Rights and Freedoms*, as are the federal budgets that limit both. So is the appointment of Supreme Court Judges. The end of the careers of conservatives should herald the search by the legal/political community for those who have a demonstrated commitment to Justice and Human Rights to redeem the courts (both American and Canadian) from their current state of disrepute with the governed. Not with the governing. Unless Rights are rendered meaningful in the courts, by judgments against those who transgress as individuals, governments and corporations, they prove a false and cynical charade - requiring our honest denunciation.

But screening out obvious bigotry is not enough. Supreme Court appointment processes could and should be scrutinized. There should be some admission that the economic and political position into which one is born, and which one holds over a lifetime, is a particular and limited vantage point from which to view the world.²¹

We are calling on an understanding of shared experience of the world in building the political category woman and the notion of violence against women. "The very idea of 'woman' as an identifiable identity - one which resonates with a shared sexual status that is not completely individual in nature derives from the idea of feminism itself.

¹⁹ See Bonnie Mooney's story in Lakeman, *supra* note 1 at 119-122. See also *Castle Rock v. Gonzales* currently before the US Supreme Court. This case looks at women who have taken out restraining orders but may not enjoy an entitlement to enforcement. This was the argument of the Canadian government against Bonnie Mooney to prevent her from successfully holding the police accountable for their failure to protect her from her husband. He killed her friend and maimed her daughter in his attempt to kill Bonnie.

²⁰ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162.

²¹ Note the bootstraps arguments of the Chief Justice Beverly McLachlin in deciding the *Gosselin* poverty case in Quebec.

Recognizing this identifiable category is central to a feminist construction of democracy".²²

But one can strive to overcome, to transcend. Certainly one can demonstrate commitment to fairness and liberty for all. We can recognize that to be in favour of fairness is not the same as being biased or corrupt. Currently to be seen as a rational, dispassionate legal person requires indifference to human suffering.

We should be questioning the usefulness of any court to our rights.²³ Instead we face a commercial media assault spinning the positives in the appointments. "They are women," said Chief Justice Beverly McLaughlin, welcoming Justices Abella and Charron. Thus, we are forced to counter a program of "Gender Decoys",²⁴ as gender stands in for democracy. "As a result", says Eisenstein, "the sex often just changes while the gendered politics can and often does remain the same."

Justice Rosalie Abella of the Supreme Court of Canada said, "Human Rights are a direct assault on the status quo and so we tend to yearn for the rights that are less expensive, less confusing and less frightening...We have permitted those who have enough to say 'enough is enough', allowing them to set the agenda while they accuse everyone else of having an 'agenda' and leaving millions wondering where human rights they were promised are."²⁵ The recent *NAPE* case excusing governments from pay equity, and the *Gosselin* case excusing governments from providing economic rights, confirm Abella's prediction.

Feminists want it all: human and full democratic control of our own governance. As internationalists we want our share of the wealth and resources of the world and a full share for everyone else. We want peace and justice.

Legislated Rights

Feminists call for the legislation and adjudication that will assure the sexual, political and economic autonomy of women that under-girds any hope of exercising the right to evade abusive men.²⁶ Although Canadians and Americans together have

²² Zillah Eisenstein, (2005) "The Court and Gender Decoys – What's a Woman Anyway?" online: Women's Human Rights net <www.whrnet.org/docs/issue_whatwoman.html>.

²³ Lakeman, *supra* note 1. The few Supreme Court successes in both countries can be argued to be a product of the rights cases since the FDR appointments. Recent appointments, the inadequate application of the Charter and changes to Canadian governance do not bode well.

²⁴ Eisenstein, *supra* note 21.

²⁵ Alec Scott, "The Supremes", online: Saturday Night <http://www.saturdaynight.ca/feature/article_print.cfm?listing_id=53>. In his article, Scott attacks both Abella and Charron with classic sexist insults. He calls them less than intellectuals compared to the "great men of the courts", "partisan" and "utopian".

achieved the legislative entrenchment of some Rights, the last few years have demonstrated an exponentially accelerating loss of both our accumulated legislated and adjudicated Rights. Now that crisis has exposed the reality so baldly, none of us should be interested in returning to the normal, the status quo.

We can be almost certain that the US government will not shape aid to suit the disproportionate number of women, black culture, the black community so often held together by women, or those already impoverished who are disproportionately women. We see no legislature committed to the peaceful future for women.

If state imposed corrections were to be serious, if we were seriously effective in accessing Rights, we would be celebrating the legislation of Guaranteed Livable Incomes across North America. Community infrastructures for health, education, transportation and genuine human security would be the subject of announced funding increases, national standards and democratized processes.

Even without a transformative agenda, with thousands dead, the US national governments should be increasing the funds to those enabled through the *Violence Against Women Act*, instead of implementing funding cuts at this ten year anniversary. The Canadian government should be proposing to top the \$75 million dollar equality advocacy fund for anti - violence centers demanded by the Canadian women's movement. It should be assuring the regulation of funds transferred to the provinces so that transition houses, women centers and anti-rape centers receive needed service dollars.²⁷ Civil legal aid should be assured. Police should be scurrying to see that the behaviour of officers complies with the *Charter* when calls of violence against women are received. They should fear the court cases that would surely hold them accountable.

What a relief that would be, from the stonewalling of government in the current cases. Together, police and courts, local and federal officials, challenge the rights women claim to protection for battered women who call police, especially those women who set up restraining orders or protection orders. Governments help police evade any legal obligation to protect battered women.²⁸

Governments of both countries are implicated in the continuous oppression, the existing stratification of humans, and in the determination of who is in harm's way, who will escape, and who will get aid. National governments may not be able to totally prevent or control either hurricanes or individual male violence. They can reduce the likelihood of exploitation and they can reduce vulnerability to abuse. There is no doubt that by human rights agreements about the rights of women and the rights of displaced persons, governments are obliged to ameliorate the effects of abuse and to rebuild

²⁶ Note the loss of welfare, unemployment benefits, public sector jobs held by women the increased call on women's unpaid labour, and the legal and policy challenges to 'women only' organizations.

²⁷ Lakeman, *supra* note 1 at 76-80.

²⁸ *Ibid.* See in particular, the cases of Bonnie Mooney (who sued both levels of government as well as the RCMP), Sherry Heron (her family in a coroner's inquest sought to correct police failure); *Castle Rock v. Gonzales*.

damaged communities, including the community of women, in a manner that moves us toward liberty, justice and peace.

The changes to FEMA, a privatized Haliburton contract for a modern version of Jim Crow Reconstruction, will not do for New Orleans and the Gulf Coast. The Canadian government contracts for a model that standardizes women abuse centers into socially undisturbing charities is equally unacceptable. The changes to governance of executive federalism, post 1995 cuts to social programs, the loss of women's welfare, the entrenchment of sexist family law and the promotion of prostitution constitute neo-liberal restructuring of the Canadian community.²⁹ Neither will we accept misuse of the public consensus on the injustice of violence against women to create new government programs that promote law and order, but fail to address substantive women's equality. Nor endure the state tolerance of violence that prevents such equality.

For those of us working to end violence against women, two legislative dates are highly significant: the anniversaries of *The Charter of Rights and Freedoms* and of the *American Violence Against Women Act* of 1995. Both relied on state machinery to reduce violence against women and to mitigate its impact on the freedom and well being of women. Both were sabotaged by ten years of needless ideological budget cuts.³⁰ Both have been undermined by a lack of diligence in application. Both have been the location for state refusal to cooperate with feminist organizations as a compensating voice for the inadequacies of current democracies.³¹

The 2005 parliamentary session contemplated new legislation to encode gender based analysis. No such mechanism will make the difference when women are desperate for a guarantee of income, legal aid, adequate police services and adequate resources for the independent women's movement. If we allow the legislatures of either country to continue to undermine these commonly understood notions of human rights we are doomed. And if we rely solely on current Human Rights mechanisms for the protection and sustenance of peoples and the advancement of women, we do so at our peril. We must operate as though each case or each initiative is a small but important moment for education/ alliance/mobilization that reveals the system to those subjected to it and that allows us greater experience of each other as equals and allies.

The Poor Government

It is not credible that the government of the USA is incapable of rescuing and supporting those at risk. Confronted with the contradictions of the costly military invasion of the Middle East and the refusal to rescue the Black American Gulf Coast population, Bush claimed on CNN that "We have the resources to do both". Of course George W. Bush

²⁹ Lakeman, *supra* note 1 at xii, 119-124.

³⁰ *Supra* note 14: " President Bush's recent budget under-funded Violence Against Women Act Programs by \$40 million a year a Center for Disease control rape prevention program by \$36 million a year and grants for battered women's shelters by 49million a year below their authorization ".

³¹ See victim's rights versus women's rights in Lakeman, *supra* note 1 at 75-99.

does have the resources: as an enormously rich white man, a capitalist himself, as a powerful government leader and as head of this rich and powerful state.

Paul Martin, no less than Bush, stands among the profiteers of the world with an army, a government, the power to appoint judges and a cooperative propaganda machine. Nor is it credible that any western government, including the Canadian government, is inadequately resourced. The analysis sponsored by FAFIA of the last ten years of budgets indicates not only that anti-deficit planning was unnecessarily brutal but also that surpluses have been siphoned off into special funds, away from public consideration. The government is fully capable of reversing the daily escalating impoverishment of single women, single mothers and Aboriginal women and of funding a significant part of the resistance of women's groups to the daily enforcement of inequality through the fear of rape, beatings and the murder of women.

Rights Determined by International Capital

We came into the 21st century saddled with the history of our communities as settler populations. Our constitutions are built on the dead bodies and conquered resources of Aboriginal people. Our infrastructure is built on the backs of migrant, indentured and enslaved labour. Our societies are maintained on the unpaid labour of women. It is one thing to be privileged by that history and another to be complicit in this moment of its recreation.

The hopeful light that shone in the reforms of the state over the last fifty years is shadowed and quickly waning. Concepts of community are replaced with marketplace, citizen with purchaser. Groups of the oppressed, having named their unequal status, their herstorical disadvantage, created movements of resistance within the community and the state. Sometimes they are denied the legitimacy of their group or community: that political identity with which oppressed groups resist. World wide, too many women are rendered stateless or paperless, both by migration from state to state and by internal migrations and economic dislocations. Aboriginal downtown east side prostitutes do not carry identification, nor do illegal immigrants, those informal workers of all sorts. Others are rendered less than citizen by health decrees or harm reduction strategies.³²

Homelessness follows from both economic desperation and from escaping violent men, unless we are prepared to call shelters and transition houses and stadiums in which we warehouse the poor, home. Women are denied the exercise of civil and economic rights that might combine with social and political rights to allow progress. Patriarchy, including Neo-Liberal Capitalism, has almost completely displaced any official acceptance of the **positive obligations** of governments (including those in the richest governments in the world) to govern democratically, to establish and protect a fair and just peace including through income and resource redistribution, or even just through feeding and sheltering their own residents.

The job of governing has moved from securing citizens to securing the state and capital. Governments allow themselves the use of propaganda, the interference with or destruction of authentic leadership and reconstruction of civil society. In the end,

³² Lakeman, *supra* note 1 at 92-99.

patriarchy - including capitalism - demands brutality to control a population who believe they have rights. In New Orleans decisions are being enforced with militarization in all its forms. The right would have us replace charity not with public services but with the army. To claim to make the needy secure by allowing incarceration or a “shoot to kill” policy in targeted policing, is to make a war on the oppressed as surely as any other imperial army.

Enforcement comes too in regressive domestic policing that herds the young, the destitute, the sexualized or racialized into prisons, and ignores the infringement of Rights. Private armies are allowed to control our transit systems and public facilities and to guard property as though it were private. Police leave women and children, those trafficked and those at home, to men - whether individuals or in gangs (another form of private army). Enforcement by commercial, legal and illegal, security services is normalized: they are the private armies of capitalists and war lords alike, whether on Canal Street, in Canadian shopping malls, strip clubs or whole sections of towns policed by business owners thugs.

Sexist dicta are enforced too by individual violent men “deputized” to rape and batter in the service of sexism.³³ They are encouraged to see themselves as keeping women and children in line, keeping a proper family, cleaning up the streets, getting their due. Just like any other right wing squad.

Patriarchal world order is enforced - no matter how large or how small the resistance or the uppity behaviour. Women who complain of violence are counter charged, house arrest imposed for survival theft, maternal custody and access lost for women who complain of incest or wife assault but cannot secure proof.

Great activist thinkers ranging from Hannah Arendt to Andrea Dworkin remind us that those of us not caught directly in the vice of the repressive violence have a special obligation to think and to act in resistance.³⁴ If not us, then who will hold the individual men, the patriarchal institutions, the capitalists and the state authorities accountable? And if us, then we should assure ourselves and each other that we are equipped with more than legal argument and court cases. Democratic, self-organized and sustained independent women’s groups and coalitions are essential. Court cases will sometimes be part of the strategy. The stakes are always high: the ghosts of women abused, including the ghosts of New Orleans, join too many others.

³³ Andrea Dworkin (Address, Violence Against Women Conference, Canadian Mental Health Association, Banff Springs Hotel, Banff, Alberta, 1993).

³⁴ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1964); H. Arendt, *On Violence* (New York: Harcourt, Brace and World, 1970); H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1979).

WOMEN'S CONSTITUTIONAL ACTIVISM IN CANADA AND SOUTH AFRICA

Marilou McPhedran*

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

* 2007 Sallows Chair in Human Rights, College of Law, University of Saskatchewan, Canada and Co-director, International Women's Rights Project, Centre for Global Studies, University of Victoria. www.iwrp.org Appreciation is expressed to Penny Andrews and Susan Bazilli for the invitation to share my reflections as a feminist activist lawyer, based largely on the model I now teach - "evidence-based advocacy" – grounded in skills learned as a lawyer and strategist doing considerable pro bono work, including co-founding several grassroots non-governmental organizations with missions to address root causes of women's inequality, including LEAF - the Women's Legal education and Action Fund www.leaf.ca - an internationally recognised pioneer in high impact litigation strategies for women's rights. marilou.mcphedran@gmail.com

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>

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ABBREVIATIONS

ANC	African National Congress, South Africa (South Africa)
ANCWL	ANC Women's League (SA)
AWC	Alexandra Women's Council (SA)
Black Sash	Women's Defence of the Constitution League (SA)
CACSW	Canadian Advisory Council on the Status of Women, (Canada)
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women (United Nations)
CODESA	Convention for a Democratic South Africa
Commission	Royal Commission on the Status of Women (C)
CGE	Commission for Gender Equality (SA)
ERA	Equal Rights Amendment (C) USA
Federation	Federation of South African Women
NAC	National Action Committee on the Status of Women (C)
WNC	Women's National Council (SA)

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 mainstream³ 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.

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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

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 - in just over a decade. 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 - one side

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

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being women's impact on constitution-making and thus on final constitutional text; but 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.

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[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 (Federation) - 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: since 1985, April 17th has been celebrated in Canada 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

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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.

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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

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.

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Agenda', inviting speakers from other countries - including Mary Maboreke from Zimbabwe, Bience Gawanas from Namibia and Unity Dow from Botswana - so as to "empower women to participate in all the crucial aspects of the transformation ..."²⁸

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...²⁹

Canada

Whenever I don't know whether to fight or not, I fight. Emily Murphy³⁰

"Famous Five" Persons

In 1928, five women³¹ 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.³²

²⁸ Bazilli, 'Preface', Putting Women on the Agenda

²⁹ Elizabeth A. Sheehy, 'Women and Equality Rights in Canada: Sobering Reflections, Impossible Choices' in Bazilli, Putting Women on the Agenda, p. 272

³⁰ 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.

³¹ 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>

³² 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."

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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.³³ On October 18, 1929, Lord Chancellor Sankey of the Privy Council, provided the English lords' unanimous answer,³⁴

...and to those who would ask why the word [persons] should include female, the obvious answer is, why should it not?"³⁵

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.³⁶

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.³⁷

³³ 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.

³⁴ 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.

³⁵ 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.

³⁶ 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."

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.³⁸

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.³⁹ 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."⁴⁰

³⁷ 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 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.

³⁸ Pauline Jewitt, "Where were the MEN when Canada set out to find what makes life tough for its women?" *Maclean's 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.

³⁹ 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]

⁴⁰ *Canadian Bill of Rights*, S.C. 1960 c.44 [still in force, but subject to the Constitution Act 1982]

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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 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. ⁴¹ 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 Committee ⁴² alleging violations by Canada under the Optional Protocol to the International Covenant on Civil and Political Rights. ⁴³

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

⁴¹ A.G. Canada v. Lavell [1974] SCR1349 [hereinafter Lavell]

⁴² 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.

⁴³ (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>

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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.⁴⁴

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.⁴⁵

Thus, repeated judicial denial of the discrimination rampant in Canadian women's daily lives, plus governmental preference for less accountability⁴⁶ set the stage for a political standoff that triggered women's constitutional activism in the 1980s.⁴⁷ 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

⁴⁴ 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.

⁴⁵ Bliss v. A.-G. Canada, [1979] 1 SCR 183.

⁴⁶ The federal government had not followed the recommendation that the CACSW should report openly to Parliament.

⁴⁷ 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.

honest woman [Doris Anderson] at the same time as denying us our rights as citizens... Boom.'⁴⁸

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.⁴⁹

On the anniversary of the Persons Case in 1980, the federal minister responsible for the status of women in Canada⁵⁰ 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.⁵¹

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

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ 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.

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joint parliamentary committee reviewing the draft constitution. Representing the largest national women's NGO, the NAC spokeswoman reminded parliamentarians that Canada had just signed the United Nations Convention on the Elimination of all forms of Discrimination Against Women, CEDAW,⁵² 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.⁵³

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?^{54 55}

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.⁵⁶

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,

⁵² 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.

⁵³ The NAC analysis was consistent with what the joint committee heard from the CACSW, see note 49.

⁵⁴ 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

⁵⁵ 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" plus neo-conservative women columnists are now the most widely read.

⁵⁶ Kome, p. 35

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this success before the special joint committee represented “only the first stage in the feminist effort to redesign Canadian institutions through constitutional modification.”⁵⁷

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.⁵⁸

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.⁵⁹ However, the amended constitutional

⁵⁷ 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

⁵⁸ 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.

⁵⁹ At this point, the author must become narrator.⁵⁹ 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

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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.⁶⁰ 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.⁶¹ 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.⁶²

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.⁶³

& not till the 20th. [Referring to the Nov.5.81 Accord to which premiers agreed "in principle" but the drafting was done by 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.

⁶⁰ Canadian Charter of Rights and Freedoms, part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), c.1

⁶¹ 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)

⁶² 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.'"

⁶³ Katherine J. de Jong, 'Sexual Equality: Interpreting Section 28' in Bayefsky & Eberts, at 528

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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. ⁶⁴ 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. ⁶⁵

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.' ⁶⁶

With the following table, compare the largely ad hoc, unfunded women's constitutional activism in Canada and the South African investment in consultations, conferences and coalition building among women activists, integrating women's emancipation with the liberation struggle and the resulting interim and final constitutions of 1994 and 1996. ⁶⁷

⁶⁴ B. Bozzoli, 'Marxism, feminism and South African Studies' (1983) 9 Journal of South African Studies, 2, in Albertyn et al, Engendering, p. 3

⁶⁵ 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).

⁶⁶ Ginwala, 'Women and the Elephant - The need to redress gender oppression' in Bazilli, p.62

⁶⁷ 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 directly in the process of determining how their rights would be protected in a new legal and constitutional order. Such an 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

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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	

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.⁶⁸

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,

⁶⁸ 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.⁶⁹

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.⁷⁰

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

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.⁷¹ 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 women activist lawyers have taken different points of view on seeking or relying on

⁶⁹ 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)

⁷⁰ The Honourable Claire L'Heureux-Dubé, 'Preface', in Faraday et al (eds.), *Making Equality Rights Real*, p.3.

⁷¹ CBC Archives. www.cbc.ca

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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.⁷²

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

⁷² 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

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(4) of the *Constitution Act, 1982*, women are entitled to substantive equality rights " ⁷³

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,⁷⁴ mobilizing a national /international campaign on violence against Aboriginal women ⁷⁵ 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. ⁷⁶

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 represented the voices of those most affected, namely, poor, rural women. The WNC lobbied the Multi-Party Negotiations directly on the issue. As an

⁷³ 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

⁷⁴ <http://www.nwac-hq.org/news.htm>

⁷⁵ <http://www.sistersinspirit.ca> and http://www.amnesty.ca/take_action/actions/canada_stolensisters_2005.php

⁷⁶ Although the Declaration is a non-binding aspirational statement, only Canada and one other Council member voted against it.

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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.⁷⁷ The Constitution now includes mechanisms that are 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, Fester - at the time a commissioner on the constitutionally entrenched Commission for Gender Equality (CGE)

⁷⁸ - 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.'⁷⁹

⁷⁷ 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

⁷⁸ Section 187 of the Constitution Act of South Africa 1996; Commission on Gender Equality Act No.39 of 1996

⁷⁹ 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>

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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.⁸⁰

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.⁸¹

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.'⁸²

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

⁸⁰ 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*

⁸¹ Albertina Sisulu, "Preface" in Gertrude Ntiti Shope, *ANC, Malibongwe – Celebrating Our Unsung Heroines* (Jet Park: Teamwork Printers, 2002), p.6

⁸² Patrick Watson and Benjamin Barber, *The Struggle for Democracy*, (Lester & Orpen Dennys Ltd, 1988) at 166.

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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).⁸³

In contrast to Majury, Beverley Baines⁸⁴ 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.

⁸⁵

At the time of writing, 2006, 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.⁸⁶ 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 society - all of which legal empowerment contributes to - in improving the lives of the disadvantaged. A growing array of qualitative and quantitative research more

⁸³ 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. "

⁸⁴ 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.

⁸⁵ 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."

⁸⁶ 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

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specifically suggests that legal empowerment has helped advance poverty alleviation, good governance, and other development goals.⁸⁷

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.⁸⁸

⁸⁷ 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.

⁸⁸ Sisulu, Malibongwe, above