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Opportunities, challenges and strategies for progress on gender equality from the perspective of human rights activism in sub-Saharan Africa, and reflections on growing inequalities between different groups of women

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Introduction

Legal challenges and law reform efforts have proven to be a mixed bag of success. The contradictory role of the law as both a tool for social change and maintaining the status quo has never been more apparent. The paper uses examples of law reform efforts and legal challenges to discuss opportunities and challenges and highlight judicial attitudes, lack of understanding or rejection of international human rights standards and, inherent gender bias is responsible for the uncertain outcomes. After the initial successes of litigation that challenged laws that overtly discriminated against women, getting courts to understand and apply substantive equality has not been easy. Some reforms have benefited some groups, but growing inequalities between different groups of women are making a case for paying attention to intra-group dynamics and the impact of reforms to marginalised groups.

Opportunities and Challenges

Creating a legally enabling framework

The fall of Constitutions that were handed down to newly independent States when they gained their independence fast-track progress on women's rights and paved the way for the removal of gender discriminatory laws. Most of the Constitutions contained similar claw-back clauses that prohibited discrimination broadly but legally sanctioned it in personal and customary laws. While some second or third wave constitutions still maintain overtly discriminatory provisions like the inability of women to confer citizenship to their children whose fathers are non-nationals and restrictions on reproductive autonomy, women have been able to use the constitutional gains to advance rights.

The adoption of the Maputo Protocol was another watershed moment that enabled advocacy on several vital reforms, particularly before the regional human rights systems. The adoption of the first general comment on Sexual and Reproductive health at the African Commission on Human and Peoples' Rights. In various countries, the ratification of the Protocol has enabled the commencement of legislative and policy discussions that are intended to domesticate the Protocol. The comprehensive provision on discrimination and violence against women has provided an enabling and helpful framework for articulating key demands at national levels. The watered-down, ambiguous and uncertain provisions of the Protocol have however extended the reign of havoc in women's lives. The provisions that deal with registration of marriages – marriages must be registered to be recognised, inheritance rights – widows' inheritance rights are subject to remarriage and division of property at divorce – spouses are entitled to an equitable share of the marriage while law does not provide the tools to arrive at an equitable share, and the protection of women in polygamous marriages – without tools of how protection should look like, have done little in the way of cleansing family law of its association with discrimination against women.

CEDAW's general recommendation no.19 that made the decisive link between violence and discrimination and the model law on domestic violence helped to usher in domestic violence legislation which included a civil and criminal law framework. The believability problem of rape survivors suffered a minor blow when there was a wave of court cases and subsequent legislation that moved to repeal laws that required the court to exercise caution or corroboration of evidence in rape cases. The abolition of marital power has enabled women to be economically independent and transact on their own. The success of legislative interventions continues to be stalled or shelved, partly attributable to attempts to domesticate the provisions mentioned above of the Maputo protocol. Prevailing and dominant perceptions about the believability of women often frustrate attempts to legislate on violence against women issues. The failure to build-in institutional frameworks that are essential to supporting the new laws or providing financial

resources to enable implementation has meant that the laws have remained unimplemented. Lack of access to justice and a lack of a robust civil society has not made it possible to hold the State accountable. Decriminalisation of marital rape, division of property at divorce and decriminalisation of termination of pregnancy.

In Courtrooms, before national courts, the past two decades were initially characterised by removing discriminatory gender norms from statute and practices. In Nigeria – challenging the legal requirement that married women need to obtain their husbands consent in order to obtain passports, South Africa – challenging the constitutionality of the primogeniture rule, Swaziland – challenging the compulsory registration of property that belongs to married women in their husbands' name, Tanzania – challenging customary law of succession, Uganda – criminalisation of adultery for women only and Zimbabwe – challenge to the constitutionality of the primogeniture rule and the right of the mother to assist in obtaining a passport for her child. There were significant moments of progress when courts were asked to adjudicate on the difference in treatment, formal equality, between men and women. In some instances, the judge-made law went to influence legislative reforms, and in other instances, the changes were ignored or swiftly reversed. The focus of the first cases was to assert formal equality, the difference in treatment, and remove discrimination based on gender. What has not been so straightforward has been the removal of substantive barriers to equality in the courts.

The limitations of the law as a tool for social change and the challenges posed by the uncertainties of judge-made law is becoming more evident in the regional human rights systems. The systems have not been tested sufficiently to show whether they are useful as a forum for the advancement of women's rights, but the emerging jurisprudence is concerning. Most cases were successful; complainants were awarded compensation and findings of violations were made. The legal and policy impact that is needed to bring about the broader impact has been missing.

Litigating before the regional human rights systems

In almost ten years since the African Court on Human and Peoples' Rights started issuing decisions, there has only been one case on women's human rights. Similarly, in almost four decades since the African Commission on Human and Peoples' Rights started operating, there have only been two cases on women's human rights. These cases came after initial litigation that was patently about women's rights failed to frame the issues¹ as women's rights cases. The first case Women journalists were sexually assaulted at a political rally². The ACHPR held that violence which is overwhelmingly gender-specific and disproportionately affected women because they are women. The main reason why the victims were targeted was that they held particular views were women and journalists. The sexual nature of their violations evidenced this. The case presented a critical case to confirm that violence against women amounts to discrimination under the African Charter, which the Commission did.

¹ Doebler v Sudan: a case about women sentenced to lashes for wearing pants, dancing with men, crossing legs and sitting with boys. The case turned on the punishment that they received that it was grossly disproportionate.

² EIPR & Interights v Egypt: Women journalists were sexually assaulted at a political rally. The ACHPR held that violence which is overwhelmingly gender-specific and disproportionately affected women because they are women. The main reason why the victims were targeted is that they hold particular views, are women, and they are journalists. The sexual nature of their violations evidences this. The case presented a critical case to confirm that violence against women amounts to discrimination under the African Charter

The second case, The case centred on the State's failure to protect the complainant from abduction and forced marriage. The court struggled to find that gender-based violence was in issue. "Notably, the gravamen of discrimination is the unjustifiable distinction or differential treatment of persons in relevantly analogous situations. This is clear from the definitions of discrimination in international human rights law. For example, **Article 1(f) of the Protocol to the African Charter on the Rights of Women in Africa (the Women's Protocol) defines discrimination as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women [...] of human rights and fundamental freedoms in all spheres of life.** In General Recommendation (GR) No. 19, the Committee on CEDAW interprets discrimination to include "gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately." Although it found in favour of the complainant, on the issue of violence as discrimination, it insisted on the difference in treatment. It required the complainant to identify the comparator and show how the treatment complained of, and that of a comparator is comparable. The complainant could not identify the comparator – a similarly situated person who was accorded the necessary protection³.

Attacks against the independence of accountability mechanisms and the ACHPR in particular by member States broadly and the deployment of "African traditional values" at the African Union by member states who have used the language to push back against the advancement of women's rights before various United Nations bodies raises concerns.

The Regional Economic Courts, the Southern Africa Development Community(SADC), before it was swiftly indisposed, and the East African Court of justice (EACJ) have not developed jurisprudence on women's human rights. The Economic Community of West African States (ECOWAS) has over the past decade, since it made its first pronouncement on women's human rights in 2008, added two more decisions on women's human rights to its tally. While the three decisions found in favour of the complainants and awarded them damages, there is also a struggle in understanding the State obligation to protect women from violence and gender-based violence more broadly.

The first case was a case that concerned the sexual slavery case⁴. The basis of discrimination claim was that the practice of sexual slavery, sadaka, is a practice exclusively affecting women; it is discrimination based on sex. She was not in a position to freely give her consent to marry or divorce. She faced discrimination based on social origin. The court held that the discrimination that Korau suffered is not attributable to the State but instead to Naroua, the former Master. It continued to hold that slavery was attributable to the State, but discrimination against her based on sex can only be attributed to the

³ Equality Now v Ethiopia: The case centred on the State's failure to protect the complainant from abduction and forced marriage. The court struggled to find that gender-based violence was in issue. "Notably, the gravamen of discrimination is the unjustifiable distinction or differential treatment of persons in relevantly analogous situations. This is clear from the definitions of discrimination in international human rights law. For example, **Article 1(f) of the Protocol to the African Charter on the Rights of Women in Africa (the Women's Protocol) defines discrimination as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women [...] of human rights and fundamental freedoms in all spheres of life.** In General Recommendation (GR) No. 19, the Committee on CEDAW interprets discrimination to include "gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."

⁴ Korau v Niger

perpetrator. She was a victim of slavery, and the State is to be held accountable for the inaction of its administrative and judicial authorities.

The second case was *Njemanze*⁵. In that case, women who had been harassed by the police and suspected of being sex workers sued the State on the basis that the arrests were unlawful and that their rights were violated when they were declared as prostitutes. The court also found that the treatment meted out to the applicants constitutes gender-based violence because the police routinely harassed women.

The third case concerned the failure of the State to protect women from domestic violence. The court also found in favour of the complainant on the basis that she suffered inhuman and degrading treatment. It, however, did not find the State responsible for the failure to protect her from domestic violence and that she had suffered discrimination as a result. The court started by explaining that it understood discrimination to be "incrimination led against the fairer sex or a category of people determined by their belonging to the female sex". It proceeded to hold that for the court to find that conduct was discriminatory the "facts must be endowed with a certain generality, a certain systemic nature that may make it possible to assert that they are deliberately discriminatory". On the question of state accountability for domestic violence, the court held that "the facts are confined to a private, family sphere, and there is no general or systemic character" and that "the facts apply to a nobody, not a kind, a concept that by definition encompasses a plurality". It also added that "domestic violence does not involve, either near from near or far, a state body to justify any involvement of the state" and that "the rigorously private nature of the critical acts, the very frame of their commission, the home of the couple, forbid any attachment with public power".

Intra-group dynamics

Intra-group dynamics are becoming more visible and pronounced than they have ever been. It is a reflection of inequality between various groups of women. The differences between groups do not only impact on who is considered worthy of legal protection, but it also impacts on the legitimacy of the claims that can be advanced by various groups. One of the findings of the *Njemanze* case was that it was a violation to declare the complainants "prostitutes" as if it would have been legitimate to subject "prostitutes" to the unlawful conduct. In contexts which are increasingly hostile against lesbian, bisexual and transgender women, the inclusion of LBT women in women's spaces or broader human rights spaces remains contested. Shortly after the granting of the Coalition of African Lesbian's observer status, the African Union started demanding that the ACHPR reverses its decision on the basis that it was not consistent with "Traditional African values". After three years of resisting the instructions, an unprecedented attack on the independence of the ACHPR ensued, and the Commission finally relented and withdrew the observer status. The nature of the attack made it clear that LBT women were used as a scapegoat by countries that wanted to weaken accountability mechanisms. Some of the attacks came from civil society formations who argued that advancing rights of lesbians, applying for observer status, at the ACHPR was pursuing a radical agenda.

These inequalities are much more pronounced in the family law. For obvious reasons, international, regional and national human rights standards have traditionally focused on the protection of women's rights in the family setting. Mostly, the rights that we protected were the rights of married women. With the declining rates in marriage and the expanding reality of family formations that are not necessarily centred on marriage, the law has been found wanting. Women in cohabiting relationships often bear the

⁵ *Njemanze and others v Nigeria*

brunt of legal systems that do not recognise their relationships or regard them as worthy of legal protection. In this battle, married women have opposed proposals for reforms mostly for fear of cohabitation co-existing with recognised monogamous marriages. Increasingly, women who own property and are in cohabiting relationships are also opposing the reforms because of the fear that the recognition forces them to share their property. This argument is also used to oppose legal frameworks that want to make community of property at the dissolution of marriage a default system. Part of the argument is that while the fight is based on a generalised view of women who because of their lower socioeconomic status had to be given, by law, a share of the marital property, it is unjust to demand that women share property that is registered in their name when they don't suffer the disadvantages that women do. These reforms are also seen as penalising women who have been able to rise above the limitations that have been placed by society.

The advent of the Maputo Protocol that expressly provided for the protection of women who are in polygamous marriages contrary to the Convention on the Elimination of Discrimination against Women (CEDAW) Committee has also created uncertainty on the nature of the protection that it confers. The consequences of the relationship between the husband and wives, the wives and, third parties remain unclear.

Strategies

Several different actors are emerging as key to creating an enabling environment to bring about social change. First cases before national courts were brought mainly by movement leaders who challenged the law and practices because their rights were violated, but they also saw the cases as part of a broader social change. Movement building work that supports individuals and movements who want to challenge injustice is a crucial investment. While there have been investments in legal empowerment and literacy, there is a need to connect the knowledge with activism if the State is to be held accountable. Class analysis has to exist to ensure that the jurisprudence that is developed does not have a class bias because of the interest that the complainants are advancing.

The limited understanding of equality remains pervasive, and the consequences show in litigation and law reform efforts. The required shifts include deliberate work in deepening an understanding of the various manifestations of inequality and how substantive equality is critical. This knowledge gap is apparent in discussions and process that cuts across all aspects of women's lives. In a context organising devoid of political analysis is possible, it is essential to build a vision and a shared politics.

There is evidence of the power of strategic collaborations which include harnessing working with social movements meaningfully. Token inclusion of marginalised groups in legislative and litigation process has denied the women's sector of the benefits of the cross-learnings and powers that come from effective partnerships. NGOs are rarely able to mobilise on their own, and most have proven to be utilitarian because of funding obligations and the restrictions that are placed on what they can do. These limitations have often made it not possible to capitalise and respond to crucial political moments that can change the social script. Small formations with different objectives have demonstrated agility and responsiveness that makes it possible to push for more considerable social change. More importantly, more significant strides in legislative and policy reforms have been made possible by these collaborations. The ability to publicly demonstrate and amplify criticism and shortcomings of legal and policy frameworks to a broader audience has brought back the urgency to the discussion of State responsibility to protect women.

The global impact of the #metoo movement, which sought to create solidarity with women who speak out on sexual assault and sexual harassment created an enabling environment for women to speak. It was also able to make visible the limitations of the law in dealing with sexual assault and sexual harassment issues which justified the public naming of perpetrators. It showed the challenges and complicity of seemingly legitimate legal tools like non-disclosure agreements in enabling offenders to use the agreements to silence their victims and to proceed and violate more women. While women in some countries have been emboldened to speak out in numbers and expose people who have used the law, threats and intimidation to silence survivors, the movement did not arrive with its anchor organisation, a Time's up. Time's up provided an enabling environment for survivors to name perpetrators and defend retaliatory actions. Several women in various countries are currently battling defamation lawsuits, criminal proceeding or threats under domestic violence legislation, harassment laws, cybercrimes that have been unleashed to silence them.

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