AUS POLITIK UND WISSENSCHAFT

Whither Africa on Whether Women's Rights Are Human Rights? Issues at the Africa Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Laws on Gender Issues, 19 - 20 August 1994, Victoria Falls, Zimbabwe

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The Commonwealth Secretariat, based in London, waged an experiment. It invited senior judges to take time off for a weekend for a judicial colloquium. Senior judges, many of them women, from 15 African countries of the Commonwealth, responded to the invitation. They came to learn about and to bring their own experience to bear on the question of the application of international human rights laws and norms in the area of gender. By the end of the conference, I think that all agreed that the experiment was a success.

The aim of the Colloquium was to discuss the concept that human rights is not limited just to how a country treats its political prisoners, but also how it treats its women. The lodestar for guiding governments and courts on treatment of women is the 1979 UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). This instrument along with the latest Declaration on the Elimination of Violence Against Women (20 December 1993) and the 1981 African Charter on Human and People's Rights were presented and explained. Lectures on the dialogue now taking place between women's NGO's such as the WiLDAF (Women in Law and Development in Africa) and the African Commission on Human and People's Rights were especially informative. Specifically their talks revolve around the following issue: whether an additional protocol to the African Charter is needed to address specific rights of women in Africa when it comes to female circumcision and discriminatory traditions, or whether the present Article 18(3) of the Charter enjoining states to undertake the "elimination of every discrimination against women" can suffice on condition that women in Africa are educated about their right (under Article 56 of the Charter) to lodge complaints with the Commission against violation of their rights.

On the level of domestic implemention of international human rights for women in Africa, illustrations of how seriously courts in Africa are taking the international law governing women's human rights were presented by the senior-most justices of the hosting country Zimbabwe. The latest decision of the Supreme Court of Zimbabwe in the case of *Rattigan and Ors vs. The Chief Immigration Officer and Ors*, S.C. 64/94 (May 26 and June 1,

1994), delivered by Chief Justice Gubbay just two months before the Victoria Falls colloquium, gave participants a vivid example of how the Zimbabwean courts have taken up the challenge of advancing the interests of women. Citing *Dow v. Attorney-General* (1992) LRC (Constit) 623 (Botswana Court of Appeal) on the question of breathing life into domestic constitutions in order to meet the ever growing demands for governing a society by acceptable concepts of human dignity, the Chief Justice gave the petitioning female citizens locus standi to bring the case. He then granted them the right to obtain from Immigration authorities permanent residence permits for their foreign husbands, just as Zimbabwean male citizens are allowed in regard to their foreign wives. Up to this decision, foreign husbands were treated differently from foreign wives. Foreign husbands had to possess particular skills or bring in investment capital in order to get a residence permit.[1] Foreign wives could simply bring in their skills as housewives.

The discussion of the question of domestic application of women's human rights was not just confined to Africa. The participants were treated also to a comparative perspective, thanks to the presence of Canadian and Indian representatives. Justices from the Supreme Courts of Canada and India lectured on the domestic application in their courts of new jurisprudence that redefines concepts of equality and access to justice by women. In Canada, the Supreme Court moved early to liberally interpret the 1982 Charter of Rights and Freedoms, section 15 of which guarantees equal benefit of the law. The test of equality is not the classic Aristotelian equality (likes are to be treated alike). The Court aims rather at achieving "substantive equality". This means that people are no longer simply compared on the superficial basis of sex or skin colour alone. Compared are social data on actual and potential needs and abilities of classes of persons (e.g. women earn 66% of what males earn). And the court's duty is to find ways to equalise a disadvantaged group with an advantaged group. The presentation of such new definitions gave rise then at the Colloquium to a discussion on what this could mean for African courts, especially, for example, in the area of maintenance suits brought by female spouses against their male partners. There ensued a very interesting debate on the possibilities that courts in an African context have to apply the laws of maintenance in such a new way that women attain economic independence of and equality with men.

Another example of Canadian jurisprudence of striking interest – this time in criminal law – came from the area of violence against women. In *R. v. Lavallee* (1990) 1 S.C.R. 852, the Canadian Supreme Court held that the right of self-defence by a woman suffering repeated beatings from her defacto or de jure husband can be extended to cover a situation in which she shoots him in the back while he is walking away and not during a frontal attack. The Court thus redefined the parameters of fear of imminent danger to one's life that make up the common law rule of self-defence, which reflected a male reality, to

1 Cf *C. Jones*, Concepts of Equality in Cases of Discrimination Against Women: Examples from Africa, forthcoming in *G. Ludwar-Ene / M. Reh* (eds.), Gender and Identity, Bayreuth

reflect the reality of a battered woman. This example gave rise to a discussion on whether women may sue – also in African contexts – the state for damages or specific relief for violation of their human rights against sex discrimination when state agents such as police do not take seriously women's complaints of battery or attempted rape within or outside the home.[2]

The next presentation on developments in India revealed an equally innovative jurisprudence of relevance for the African context. For example, the Supreme Court of India has specifically turned its attention to the question of how women's issues are to be brought to the attention of courts in a society where women feel so intimidated that they do not wish to stand up alone as an individual to bring a complaint before a court. Faced with such social facts, the then Chief Justice of India, P. N. Bhagwati, introduced a reform of the common law of locus standi. As a result, individuals are no longer required to bring suits. This was achieved by the notion of "epistolary" intervention, underpinned by the common law notion that the duty of a court is to remedy a wrong. Under the epistolary procedure anyone may bring in a written epistle the Court's attention to an unjust situation. The Court will then have summonses issued for a proper investigation and adjudication of the issue.[3]

There were two issues that emerged from the discussions that could not be addressed in depth. One related to how courts are to deal with women's human rights in relation to religious laws in Africa, i.e. whether religious laws are to be seen as immutable and therefore to be confined to private sphere, or as part of the public sphere and therefore mutable as concepts of women's rights change. The second issue had to do with how far African traditional laws, in contrast to religious laws, can be classified as secular law that could be welded into a "common law" in any one land, subject to change in favour of women's human rights. Any resolution of these two issues on the immutability or mutability of religious and/or social traditional law will depend on how judges resolve another fundamental question. That question is how the choices of law in Africa should evolve: whether choices of law open to litigants and judges should be whittled away as part of a European-like process of monopolization by the state; or whether other notions of maintaining plurality based on a fundament of common human rights shall prevail.

All participants agreed that the wealth of exchange of women's rights as human rights in the African context warranted further colloquia. The process of recognizing one's own gender bias and learning how to exchange gender bias for gender sensitivity has to be carried on.

2 Cf The Namibia High Court in S v D and Anor., S.A.L.R. (1992) (1) 513, where the cautionary rule of requiring corroboration of a women victim's evidence in a rape case was declared discriminatory against women.

3 For a Botswana view of the Indian procedure see *A. Mogwe*, Law, Popular Accress and Social Change in India, University of Kent, Canterbury, Dissertation 1990.