

Feature Article

The Politics of State Structures: Citizenship and the National Machinery for Women in South Africa [1]

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Introduction

During the period of negotiation for a democratic political dispensation in South Africa, women were actively involved in the debate on promoting women's equality. The Women's Charter of Rights campaign (which had started in 1992 under the auspices of the Women's National Coalition) initiated an active political process through which women made their voices heard. In the period leading up to the finalisation of the South African Constitution, women added their contributions to the more than one million submissions put forward. These included suggestions for a National Machinery for Women, and were a consequence of the long and ongoing debate about what such machinery should look like, or whether women's issues should be located in a Women's Ministry rather than within a set of mechanisms. A consensus emerged among women that gender should be mainstreamed. This meant the creation of an integrated set of structures at the different levels of government (national, provincial and local) and the state.

A Commission on Gender Equality was included in the final draft of the constitution. This was due to the acceptance of the involvement of the Council for Traditional Leaders (CONTRALESA) in the determination of customary law; the idea was to provide women with a power base to counter the traditional leaders (Gender Research Project, 2000: 256).

After the 1994 election, the National Machinery for Women was systematically put in place, during which process the state came to be viewed as the site through which equality for women would be created. State feminism (government structures charged with promoting women's rights and status) and its accompanying "femocrat phenomenon" (feminists who take up policy positions) became a reality in the South African context. [2] While an impressive number of structures are now up and running, concern has been raised about their effectiveness with regard to policy-making. Furthermore, an unintended consequence of the creation of these structures has been the apparent demobilisation of civil society – the inactivity of women's organisations, or an over-reliance on women in government and the various newly-created structures to change women's lives. [3]

The shift of women's activism into the state arena has required that women's organisations now also engage the legislative and policy-making process. Women's lived experiences need to be reflected in legislation and policy, and it is important that the organic link between women's movements, feminist activists and femocrats is retained. [4]

Feminist scholars have contributed to a developing body of literature on the state by analysing the gendered nature of national machineries. This article is an attempt to locate an analysis of state feminism in South Africa in this body of literature, in order to assess the effectiveness of the National Machinery for Women in South Africa. I will start by undertaking a theoretical analysis of citizenship and the state, and then move on to a discussion of the results of an empirical analysis of the effectiveness of the National Machinery for Women in South Africa.

Theorising Women's Citizenship in Relation to the State

Citizenship is usually viewed as universally applicable to all the inhabitants confined within the borders of a specific nation-state by birth, or through naturalisation that confers upon them certain rights, such as the right to vote. The assumption is that citizenship is universally

applicable and transcends particularity and difference.

On closer analysis, however, citizenship appears as a discourse of masculinism, as the universal notion of citizenship applies to an abstract, disembodied individual who is male. Feminist scholars have pointed out the false universalism and exclusivity embedded in the concept of citizenship, through the general acceptance of the divide between the public and the private sphere, where women's caring roles in the private sphere have limited their participation in the public as equal citizens (Lister, 1997: 69).

Both liberal and civic republican concepts of citizenship have come under scrutiny. Liberal citizenship views all people as autonomous individuals who are the bearers of rights in the natural rights tradition. Civic republicanism, on the other hand, views political action as an integral aspect of citizenship. Feminists, drawing on the work of Marshall (1950), have accepted his three-tiered distinction between civil, political and social citizenship. In order to avoid merely focusing on rights (as Marshall does), Ruth Lister (1997) distinguishes between citizenship as status and citizenship as agency. Citizenship as status is indicative of citizens as rights-bearers, while agency refers to participation in civil society, often through grassroots activity. Citizenship is therefore not only an outcome, but also a process (Lister, 1997: 5).

Lister (1997: 33-35) argues that participation and obligation are the bases of both the liberal and republican traditions of citizenship. Civil and political rights are embedded in both. Liberal citizenship makes all citizens bearers of rights and ensures negative freedom – freedom from state involvement. But, as she points out, this is not a sufficient condition for democracy, because democracy needs to be backed up by social rights. For her, a typical justification for social rights comes in the form of agency. Rights cannot apply only to each individual according to the liberal tradition, but need to be located in the context of the wider society through political action. This will ensure that citizenship rights are not static, but open to interpretation, reinterpretation and renegotiation. She argues that participation represents an expression of human agency in the political arena, while rights enable people to act as agents.

What is important about Lister's argument is that the theorisation of citizenship has to include both individual rights and participation, as well as the relationship between the two. Through her argument, she attempts to collapse the binary opposition between individual and community that distinguishes liberalism and civic republicanism. Women need to be recast as active citizens, rather than merely the passive inhabitants of the private sphere.

Kathleen Jones (1994: 250), as well as Sarvasy and Siim (1994: 253), include in the concept of citizenship notions of identity and locales. Jones expands the concept of citizenship to include civic-minded action that moves away from formal participation in voting to other forms of participation in other arenas by people from different spheres. Citizenship then becomes more than merely a relationship between the state and its subjects, and also comes to include community politics and grassroots activism. While feminists often argue that women are more adept at community politics, this still excludes them from engaging relations of power in the state. What is needed is a reinterpretation of the relationship between state and its subjects to determine how this could benefit women.

Theorising the State from a Post-structuralist Perspective

By extending the conceptualisation of citizenship by Kathleen Jones (1994: 260) as “an action practiced by people of a certain identity in a specifiable locale”, I want to argue that the state is a locale where women participate in the construction of citizenship for women through being involved in discursive struggles surrounding legislation and policy. Accepting

this moves us from citizenship as a right to the inclusion of the relations between structures, discourse and agency.

The state has not been theorised in a very sophisticated manner by feminists, with women typically being seen merely as the objects of policy (Waylen, 1996: 16). But Dahlerup (1987: 109) has urged that feminists must break down their perception of the state as a unified block of power and look at the conflicting interests of the state. She argues (1987: 104) that we need to understand the role that the state plays in establishing, sustaining and changing systems in which women are oppressed and subordinated to men. Feminists drawing on post-structuralist analyses of the state have gone further and have argued (like Pringle and Watson, 1992: 63) that the state is a series of arenas or locales where interests are constituted and not merely represented. Therefore, the state needs to be viewed as the historical product of a collection of practices and discourses.

Policy outcomes therefore will depend on the interests constituted within the state. For groups to share in policy outcomes, their interests need to be articulated, constructed and maintained within the state. The dominant discourses take place through discursive struggles within different locales of the state, thus preventing it from acting as an entity (Pringle and Watson, 1992: 65). Inherent in this construction of the state as multiple and sometimes competing sites in which power is vested, is the organisation of power relations that determines how women are constituted as subjects and as citizens. In these sites, there are ceaseless struggles and confrontations, in which power relations are strengthened, transformed or reversed. This is what Wendy Brown (1992: 14) calls the bureaucratic dimension of state power: where power is expressed in institutional arrangements and discourse through hierarchalism and proceduralism as a cult of expertise - what Foucault has called "disciplinary power".

As Brown (1992: 14) argues, the state can be masculinist without intentionally or overtly pursuing the interests of men. Power is vested in the intentionality of control - in which different forms of masculinist power appear in different sites of the state, regulating through expertise in discourse how women's interests will be represented, and what type of solutions will be found for women's lack of equality.

Neither state power nor male dominance is unitary or systematic (Brown, 1992: 14). As Brown (1992: 15) argues, there are multiple dimensions of male power and female subordination. The state and masculine domination do not have a single source of power and the state's control of its subjects is unsystematic, multi-dimensional and generally unconscious. She calls this an ensemble of discourses that can contradict each other in different sites of the state.

To engage these different sites, we have to understand power in Foucauldian terms as a "strategical [sic] situation in a particular society" (Foucault, 1980: 93). It is in the inter-relationships between sites and discourse that women's interests and feminist politics are constructed (Pringle and Watson, 1992: 70). What is most often viewed as the outcome of state action (such as the form of laws or the shape of policies) is what Foucault (1980: 92) would call only "the terminal forms of power". What precedes these end products through the discursive process is far more important. Foucault has also theorised that power and knowledge are intricately inter-related. Discursive arenas are thus sites where power is constituted through knowledge and what is considered to be "the truth".

Because the outcomes of the discursive struggles in the state are usually laws or policies, power is vested in law as expert knowledge. As Smart (1989: 9-10) argues, law has its own testing ground, its own specialised language and its own system of results. It claims to have a method and to establish the truth of events. It therefore also has the power to disqualify

other knowledges and experiences. Smart (1989:12) further notes that law is taken to be outside the social body – it transcends it and acts upon it. Other knowledges are “disqualified knowledges”. Yet what women most often bring to the sites of power in the state are their everyday experiences of subordination, abuse, poverty and a lack of resources. If these experiences are not organised and legitimised by legal experts, women remain outside the discursive struggles, as discussed in the second part of this paper.

Post-structuralist politics also include the dynamic relationship between political institutions, political discourse and agency (Siim, 2000: 6). It is the agency of women both collectively and as individuals in the national machineries that help shape the discourses around gender equality in the state.

The State and Women's Organisations in South Africa

Increasingly, feminists have begun to argue that the state is a central arena for analysis for determining the effectiveness of women's political access, presence and influence. As Goetz (2003: 61) has indicated, state institutions will be responsive to women's interests depending on the institutional make-up of the state, the capacity of state institutions to translate gender equity policy commitments into action, and the level of administrative and political decentralisation.

A growing body of feminist literature on the state in South Africa has shown that the state is an important site in which policy influence needs to be exercised, and that the national machinery plays an important role in this regard. The machinery is, however, not a homogeneous body and some structures are more able to achieve policy successes than others. This depends on a number of factors, including the extent to which priorities are open to negotiation, the extent to which redistribution is pursued by the government, and the degree of openness and transparency of the government (Hassim, 2003: 523). Seidman's (2003) analysis of the Commission on Gender Equality shows how the divide between feminists and non-feminists inhibits the effective functioning of this structure.

While South Africa has a long history of women organising for women's equality, the more recent phenomenon of women organising and showing solidarity around the single issue of a Women's Charter led to the creation of the Women's National Coalition in 1992. [5] This umbrella body, consisting of hundreds of women's organisations, existed until the Women's Charter was completed. It also provided substantial inputs on the formation of the National Machinery for Women. The Coalition showed that women could work together across racial divides and find common ground on political issues. It was, however, a single issue that kept the Coalition together, and once the National Machinery for Woman was established and accepted, the Coalition petered out, with women shifting their activism into the state arena. For example, many leaders of the constituent women's organisations moved into the state as government representatives.

One argument is that the women's movement in South Africa has been demobilised; another is that it has become localised, shifting focus to local issues (one thinks of the grassroots New Women's Movement in the Western Cape, which organises around poverty issues). But there is no doubt that the integrated struggle against gender injustice provided by the Women's National Coalition has been fragmented.

The national commitment to gender equality, together with the seriousness of purpose with which the gender structures were implemented, gave rise to great hopes that the National Machinery for Women would be successful. However, there is no direct or guaranteed relationship between having structures in place and gaining policy influence or access for women. How women in these structures engage the discourses in the state contributes to

the influence of such structures or machineries.

The Politics of the National Machinery for Women

The establishment of the National Machinery for Women in South Africa was part of the negotiated settlement of the transition process toward democracy. Hassim (2003: 506) describes the process through which gender interests were incorporated and institutionalised as a gender pact. This "gender pact" included lengthy discussions among women activists, non-governmental organisations and academic institutions that could contribute different types of expertise (such as legal expertise). The Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand and key individuals in CALS played an important role, as a proposal drafted by their Gender Research Project guided government decision-makers (Gender Research Project, 2000: 179).

While the policy machinery was accepted in principle, it took a long time to establish. Teething problems are ongoing, with some of the structures lacking budgets and the staff often lacking gender training and job descriptions (Adams, 2001). Nevertheless, there is a general acceptance that the machinery has been created to promote women's equality, even if some politicians pay only lip service to this understanding.

National policy machineries are very often accused of being co-opted by the state, of being insensitive to women's demands, or of being completely inaccessible. A comparative study by Stetson and Mazur (1995), of fourteen countries outside Africa that put women's policy machineries in place, showed uneven rates of success in promoting women's equality. They point out that machineries established by social-democratic governments were more committed to women's equality, and more successful in making gains. Integrated structures were also more successful than isolated structures.

National machineries for women in Africa also exhibit varying degrees of success. As Mama (2000: 15) notes, the preliminary evidence suggests that these machineries have achieved the modest, liberal goal of giving women more space in the state; however, they have done little to alleviate the plight of ordinary women. Rather than being on the cutting edge, they have merely implemented mainstream policies (Mama, 2000: 23). Access by women's groups to the state has been limited; or they have been co-opted into the official rhetoric of the state; or they have been corralled by First Ladies [6] (Mama, 2000: 6; Mensah- Kutin et al, 2000: 45; see also Jibrin Ibrahim's article in this edition of *Feminist Africa*). The fragility or ineffectiveness of national machineries is heightened when governments agree to set them in place merely as vehicles for attracting donor funding. [7]

The relationship of such machineries with women's organisations in different African countries has also been fraught with problems (see, for example, Tripp, 2002: 16). As the Zimbabwean Women's National Research Centre (2000: 34) has remarked, if a national machinery wants to perform effectively, it is vital that it works closely with women's organisations and other civil society organisations.

The National Machinery for Women in South Africa is far more elaborate than in other African countries, and indeed some Western countries. The Office of the Status of Women forms the core of the machinery, with a mandate to draw up a National Gender Policy. [8] There are gender focal points in the different state departments, which have the dual aims of ensuring gender representation and monitoring policy. Likewise, there are gender focal points in the provincial departments, although not all of them are functional yet. An independent statutory body, the Commission on Gender Equality, is responsible for monitoring progress in women's equality in both government and the private sector.

In parliament, there is a multi-party women's caucus, responsible for monitoring gender equality, as well as a women's empowerment unit, which is charged with training and supporting women parliamentarians. In 1996, a very important committee, the Ad-hoc Joint Committee on the Improvement of the Quality of Life and the Status of Women (JCQLSW), was formed. In 1997, it became a Joint Standing Committee, with higher status and more permanence than an ad-hoc committee. Its mandate is to oversee the implementation of CEDAW and the Beijing Platform for Action, and it is considered part of the national machinery.

This set of mechanisms that make up the National Machinery for Women in South Africa have the tasks of ensuring both women's participation in decision-making and the accountability of state structures to women (Hassim, 2003: 508).

Method of Analysis

The method of analysis used by Stetson and Mazur (1995) relies on two criteria to determine the success of national machineries in the fourteen countries they studied: influence on policy; and accessibility of the national machinery to women's groups. However, their analysis does not look at the discursive struggles that happen within the state between the structures of the machineries, as well as within the women's organisations themselves. An analysis of the dynamic relationship between political institutions, discourse and human agency is absent.

My analysis here will incorporate these three dimensions of structures - the state, discourse and agency - to get a better understanding of where policy is made, and who exercises the agency that dominates the discourses in the state. While this analysis will shed light on the effectiveness of the machinery in influencing legislation, and the extent to which women's organisations have access to the machinery, it will also place the discursive struggles within the state at the centre of the analysis. I do this by tracking one piece of legislation (the Recognition of Customary Marriages Act, 120 of 1998) in order to determine the discourse and agency involved in the formulation of this bill.

The construction of a policy problem produces a certain policy solution that is a direct consequence of how the discourse constructed the problem in the first place (Bacchi, 1999: 42). An analysis of the institutional location of discourses will expose the differential power of different actors.

The Legislative Process on the Recognition of Customary Marriages Act: Discourse on Custom and Rights

The equality of women became integral to rights discourse in South Africa, which focused on the individual's ability to claim rights and state protection through the Bill of Rights. This pitted women's equality against their obligations according to custom and culture. Women's opposition to discriminatory customs was already visible during the transition phase, when the Commission on Gender Equality was created to balance the formation of CONTRALESA.

The legal problem that gave rise to the Recognition of Customary Marriages Act was the need to reconcile customary law with common law in the period leading up to the new democratic dispensation. After 1994, the aim became to harmonise customary law with the human rights enshrined in the new Bill of Rights. (The contribution of women activists who worked to make visible the discriminatory consequences for women of customary unions should also be recognised. [9])

The discourses that are constructed around customary law are of course profoundly gendered. The gendered organisation of power held by the traditional authorities is so pervasive that it has become invisible. As Chanock (1991: 55) has remarked, what African law can and will contain is not a reflection of culture, but a political process.

Before apartheid, the colonial administration contributed to entrenching gender relations that were detrimental to women. According to Nhlapo (1995: 161) “defensive customary law” was constructed during the historical process of interaction with colonial rule. This was an “official” version of African customs that arose as a result of destabilising social and political changes, and also in response to them. As Nhlapo rightly points out, constructed defensive customary law represented an alliance between colonial authorities and African male elders who controlled land and cattle, as well as women and children. This construction led to rigid legal rules that replaced more fluid and context-driven customs, and entrenched colonial dominance.

The negative consequences of defensive customary law for women have included the reinforcement of patriarchal norms, the according of superior status to senior males, the entrenchment of patriarchal bias through distortion of customs, and a more rigid division between the public and private sphere (Nhlapo, 1995: 162). Men were granted property-holding capacity, while women were placed outside the law. The male head of the household became the only true person in law, while women were treated as perpetual minors (see also Chanock, 1991: 55-57).

In the process of inventing expert legal knowledge in the colonial period, legislators and lawyers were uncomfortable with the continuously changing nature of custom, and preferred the certainty afforded by systematising the rules of customary law (Chanock, 1991: 57). This process, however, privileged men over women.

As Currie (1994: 152) argues, current debates tend to take the shape of past controversies. This has been the case with the prolonged debate about what aspects of customary law should be retained. The position on customary law during the negotiated settlement already involved the compromise of recognising customary law, but making it subject to the equality clause in the Bill of Rights. This means that customary law may not limit fundamental rights, except where such limitation is justifiable through the general limitation clause.

The discourse of custom therefore has to be reconciled with the discourse of rights. Bennett (1991: 23) points out that the conflict between customary law and human rights hinges on a difference of emphasis: where customary law emphasises the group, human rights emphasise the individual. The legal discourse in the South African constitution and the Bill of Rights is that of individual human rights, which establishes the framework for the analysis of customary law and the equality of women within structures of the state. In pursuing gender equality, women used a discourse of rights and individual equality that challenged their subordination to custom and culture.

Women's Agency through Submissions

To briefly outline the process, an Issue Paper represents the first public announcement of an investigation into a matter that requires legislative intervention or overhaul. It sets out the way in which the South African Law Commission (SALC) views the issue, as well as possible solutions. Throughout the subsequent process, the SALC tries to involve the public and attempts to elicit feedback on the Issue Paper. Recommendations are incorporated into the next stage, represented by the Discussion Paper (SALC Report, 1998: 2). Ideally, the public responds both to preliminary issues (such as the scope of the project) and to matters of substance.

The Issue Paper

The legislation (for the Recognition of Customary Marriages Act) originated in the SALC as part of law reform. The Issue Paper was published on 31 August 1996, and allowed two months for comments. As this was a very short period of time in which to prepare submissions, numerous interested parties required extensions, and the deadline was moved to 30 April 1997.

Thirty-seven written responses were received, far fewer than in the case of Issue Papers on other prospective pieces of legislation. The Gender Research Project of CALS, which was instrumental in organising workshops in civil society and consulting with the SALC, attributed the dearth of responses to the "technical, legal and academic nature of the debate" (2000: 263). The commission also benefited from feedback from the Commission on Gender Equality, the Office for the Status of Women, and gender focal points in all spheres of government.

Seven submissions were received from the Gender Research Project of CALS, the Rural Women's Movement (which had collaborated with CALS), the Women's Lobby, the Afrikaanse Christelike Vrouevereniging, Umhlangano Womama Basemakhaya Omayelana Nesithembu and the International Women's Rights Action Watch. Seventeen submissions came from the legal profession, and one from traditional leaders. In addition, four workshops were held on the topic (see SALC Report, Annexure E).

While the Issue Paper acknowledged that the official system of customary marriage was legally undeveloped, it did not attempt to put forward a coherent constitutional framework for the reform of customary law. Neither did it pronounce on whether there should be a single system of law (in which only one form of marriage would be recognised) or a dual system (in which people could choose between different systems) (Gender Research Project, 2000: 261-262). It did note the detrimental effects of polygamy and lobola (bride price).

Discussion Paper

The discussion paper was published on 29 August 1997, with 19 January 1998 given as the closing date for comments. After public requests for additional workshops, this date was moved to 28 February 1998. Twenty-seven written responses were finally received, ranging from individuals, government departments, NGOs and the business sector.

Thirteen one-day workshops were held under the auspices of the Gender and Children Directorate (Gender desk) of the Department of Justice, in conjunction with the SALC. These were staged by the gender focal points in the Justice Departments of the different provinces as information-gathering and dissemination exercises (SACL Report, 1998: 5).

During this phase of the process, five submissions were received from women's organisations, including the Gender Research Project at CALS, the Women's Lobby, the Commission on Gender Equality, the Rural Women's Movement, and the Office of the Status of Women in the Northern Province. Three submissions were received from traditional leaders, seven from government departments and four from legal organisations.

There were also six briefings, two of which were specifically for women's organisations: the National Women's Resource Centre and Malibongwe Women's Organisation.

All in all, 23 provincial and national workshops - involving NGOs, women's organisations, traditional leaders, the legal profession, state departments and religious communities - were

held in response to the Issue Paper and the Discussion Paper. [10]

What the Act Provided, and What Women Wanted

The Act abolished the minority status of women married under customary law. Wives in customary marriages acquired legal status, including the right to hold property and enter into contracts. The age at which one may enter into a customary marriage is now set at 18, with both spouses needing to consent. Marriages have to be registered, and a party other than the spouses may register the marriage. Monogamous marriages are to be in community of property unless there is an antenuptial agreement. Polygamy has been retained, and the Act remains silent on lobola.

It was clear from the submissions received that women wanted a holistic approach to the recognition of marriages not contracted under civil law (including customary, Muslim and other religious marriages). They viewed the SALC's approach as "piecemeal". They also wanted polygamy outlawed, and criticised the Act for merely making it cumbersome, therefore encouraging unregulated and unprotected forms of cohabitation. Women also wanted lobola abolished on the grounds that it was degrading. The Act was strongly criticised for not working retrospectively to change existing property regimes.

Consensus existed between women's groups and the SALC on core requirements for legislation, such as the consent of both parties to marriage, the registration of marriage, and the standardisation of the age of consent.

Influence through Structures

The final report by the SALC included a first draft of the Bill, which, upon revision, had the option of being redrafted. Subsequent processes involved the Portfolio Committee of the Justice Department, to which submissions could also be made. Here the role of the Joint Standing Committee on the Improvement of Quality of Life and Status of Women (JCQLSW) became important, as did the Gender Desk of the Justice Department.

The Joint Standing Committee on the Improvement of Quality of Life and Status of Women

The JCQLSW wanted the Bill to pass into law in 1998, and therefore requested that it be fast-tracked. Correspondence from the Chair of the JCQLSW to the Justice Department, as well as advocacy by the SALC and the state law adviser, ensured that the Bill was tabled during the 1998 mid-year recess (Second Annual Report, 1999: 22). While this speeded-up process ensured the passage of the Bill, it limited the time available to make submissions.

The JCQLSW also organised a workshop in Parliament. Here experts from the SALC and CALS provided inputs, and the Bill was thoroughly debated. In addition, the JCQLSW issued a pamphlet to stimulate debate. Entitled "Reviewing African Customary Law of Marriage", it included discussion of the following:

- the minority status of women under customary law
- the lack of capacity of women married under customary law to own property
- the role of lobola in formalising marriage
- whether polygamy should be banned; if not, how to protect the interests of women married under polygamy

- consent of both parties as a requirement for a valid marriage
- whether registration of the marriage should be required
- what the grounds for divorce should be, and the need for a woman to be able to apply for a divorce
- rights of custody, access and guardianship of children upon divorce (Second Annual Report, 1999: 23).

This pamphlet was distributed to MPs to take to their constituencies with a focus on the rural areas. Women MPs on the JCQLSW did a great deal of constituency work with women in the rural areas to ensure that the voices of these women were heard. Hearings were also held in rural areas as a joint initiative by the chair of the Parliamentary Women's Group and the Parliamentary Public Education Department (Second Annual Report, 1999: 23).

At the stage that the Bill was referred to the Portfolio Committee on Justice, not as many submissions had been made as usual. Submissions were received from legal experts, traditional leaders, and from women's organisations and structures, including the Commission on Gender Equality, the JCQLSW, NADEL (the National Association of Democratic Lawyers) and the Gender Project at CALS. Submissions were limited and not particularly comprehensive. In briefing the JCQLSW on the Bill, CALS had to make strategic choices because it wanted both a single legal system and to remain faithful to the constituency developed through the Rural Women's Movement (Gender Research Project, 200: 270).

The JCQLSW has at its disposal a list of over 100 women's organisations, legal organisations working on women's issues, and individuals doing research on women's issues. Documents are sometimes circulated to these groups; or some can be called on to make submissions. It is not clear to what extent these resources were used in the case of the Recognition of Customary Marriages Act. However, the JCQLSW did lobby strategic individuals in Parliament and the Department of Justice to ensure that the fast-tracking process was carried out (Gender Research Project, 2000: 269).

Public Hearings

Joint public hearings were held by the JCQLSW and the Justice Portfolio Committee on 29 and 30 September 1998, and were attended mainly by members of the legal profession, traditional leaders and human rights groups. They were held at very short notice, and organisations only had about two weeks to prepare submissions. The Act was passed on 11 November 1998.

Implications for Citizenship

It is clear from the above that access to participation by women's organisations is differentiated at many levels. In the case of this Act, women could have intervened at any point of the process. One possible obstacle is the urban bias of the process, resulting from the fact that it is easier for women living closer to Parliament to access information. Rural women were informed through workshops, the Rural Women's Movement and MPs who undertook constituency work in the rural areas, but this may not have been extensive enough. Furthermore, women may not have been aware of the advertising for the different stages of the process.

Complacency about women in the different structures in Parliament may also have been

responsible for the dearth of submissions from non-legal organisations. Some women's groups failed to make submissions even after being requested to do so.

There is no doubt that the JCQLSW played a pivotal role in fast-tracking the Bill, in making a submission and attending the public hearings, as well as involving rural women. While this committee was not originally part of the National Machinery for Women, it played a central role (at the time this research was being undertaken) in government as a monitoring body that required accountability from political actors and women. During this period, Pregs Govender chaired the JCQLSW, and her input during many of the monitoring processes was significant. [11]

What played a major role in determining the influence that the National Machinery for Women had on this Bill was the discourse of gender mainstreaming that existed prior to the inception of these structures. The negotiation process through which the national machinery was created was to a large extent influenced by academic research projects and submissions from academics. The role that CALS played in presenting the position of the Rural Women's Movement and swaying some of the decisions of the SALC, is clear from the analysis of the Recognition of Customary Marriages Act. (The Rural Women's Movement had requested that CALS do research on the position of women in customary unions, and this research had an important impact on the way the Act was written.)

Although women's access was not reflected in the form of numerous submissions, the workshops that were held did reflect women's voices. The Gender Research Project (2000: 269) confirms what this research also shows: that civil society advocacy had a limited but important effect with regard to the matrimonial property regime and the issue of polygamy. The arguments put forward in workshops persuaded the SALC that customary marriages should be in community of property, and while polygamy has not been outlawed, the Act provides that the matrimonial estate be divided by a court at the time of a second and each subsequent marriage.

Policy influence was exercised by certain structures of the machinery. There was consensus between the SALC and women's organisations with regard to important aspects of the Bill (as detailed above). Most of the recommendations concerning issues on which consensus existed were incorporated in the Bill. But the approach of women and the framers of the Bill differed significantly with regard to the recognition of unions not recognised under civil law. In the end, the Act was a compromise in which polygamy remained, but was made cumbersome for men through the registration of marriages and the inheritance regime. The piecemeal approach was followed because a unification of law regarding different types of marriages could not be accommodated in the process of law reform. But as the Gender Research Project (2000: 270) said in explaining the decision by CALS to accept this Bill: It [the Bill] provided for equality within a form of customary marriage that for all purposes, reflected the practices of women seeking marriages that gave them legal security while enabling them to maintain positive cultural links.

It may be too early to determine whether the integrated set of structures is influential because of its mainstreaming effect, or whether certain structures play an important role because they are situated strategically. In the case of this Act, the strategic position of the JCQLSW definitely contributed to a successful policy influence. Other structures, such as the Office of the Status of Women and the Gender Desk in the Department of Justice, played a limited role. The Commission on Gender Equality certainly exercised its monitoring (watchdog) role, but its involvement was also limited. The irony here is that the JCQLSW was not intended as part of the National Machinery, but was added later. It could be argued that without the JCQLSW, and the particularly dynamic leadership of one individual, policy influence would have been more limited. The fact that the JCQLSW is understaffed is cause for concern. Most of the work was done by the chairperson, Pregs Govender. [12]

The limited number of submissions received indicated a lack of mobilisation around this specific piece of legislation. As the Gender Research Project (2000: 275) rightly points out, the Rural Women's Movement was not able to participate in the process other than through the specialist knowledge of CALS. This could be attributed to a number of causes: the lack of education and information hampering most South African women, the absence of a major public campaign around this Bill, and the urban bias of the legislative process. At the same time, it reinforces the importance of alliances between women's groups and expert bodies in civil society. Other pieces of legislation that cross the urban/rural divide and class and race differentiations, such as the Domestic Violence Act, have involved more submissions (with the help of legal NGOs) and more activism.

The state opened a space for women to be involved, but the discourse on customary unions was ultimately formulated by legal experts outside the state. This made it more difficult for the National Machinery for Women to intervene in the process. A gender rights discourse, however, made it easier to resist subordinating women's equality to cultural demands.

Conclusion

Returning to my theoretical argument about the state as a site of power that regulates discourse, this research shows both an unequal distribution of discursive power, and that different discursive inputs were made within different sites in the state. Expert knowledge of the law tends to frame the debate and determine the boundaries of what is possible. In the case of this Act, the SALC framed both the Issue and the Discussion Papers, and the recommendations that were taken seriously came from legal organisations dealing with women's issues, such as CALS.

In this kind of process, power originates from innumerable points - in this case, it came from the SALC, CALS and the Rural Women's Movement, among others. As Foucault (1980: 100) has remarked, "we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one, but as a multiplicity of discursive elements that can come into play in various strategies". As this suggests, it is these discourses that we must reconstruct. If we look at the submissions on this particular Act, the voice of culture (articulated by the traditional leaders) was a submerged one. They wanted customary marriages to be recognised without recognising women's human rights (Gender Research Project, 2000: 267). Yet, even though the voice of tradition was submerged, it nevertheless remains reflected in the retention of polygamy and lobola in the Act. [13] But even if rural women were not able to exercise their own agency, they spoke through legal experts, and were aware of the consequences of retaining polygamy and lobola. In the reconstruction of the discourse, it was the voices of experts that were heard.

The inter-related meanings of discourse, which often reflect contradictory power relations in the state, require women activists to be vigilant. As Friedman (1999: 9) has pointed out, it is often only the most vocal and articulate who are heard. Women need to engage every point of access in a strategic fashion, and need to be attentive to the diverse power relations and how they can be subverted. In this endeavour, there needs to be an alliance between women in civil society and the state, and a return to women's activism.

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Footnotes

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[2] See Gouws A (1996) "The Rise of the Femocrat?" *Agenda* 30.

[3] See Hassim S and A Gouws (1998) "Redefining Public Space: Women's Organizations, Gender Consciousness and Civil Society in South Africa" *Politikon SA Journal of Political Science*, 25: 2.

[4] See Schneider E M (1991) "The Dialectics of Rights and Politics: Perspectives on the Women's Movement in K T Bartlett and R Kennedy (eds) *Feminist Legal Theory*. Boulder: Westview Press.

[5] For an excellent analysis of this history, see Hassim, S (2004), forthcoming.

[6] The "First Lady" syndrome refers to the tendency for wives of rulers to assume the right to represent all female citizens and their concerns, while in fact endorsing their husband's political agendas.

[7] See Mensah-Kutin et al 2000, Wangusa, 2000, Dambe, 2000 and Chisala and Nkonkomalimba, 2000.

[8] The Office of the Status of Women released its draft policy in August 2001, after many years of deliberations. The process was not consultative or transparent, as is usually the case. The long delay in the drafting of the National Gender Policy caused great frustration in the National Machinery (see Gender Research Project, 2000: 180).

[9] See Mamdani's argument (2000) about the clash between notions of equality that involve rights and notions of culture. See also Salo and Lewis, 2002: 2.

[10] See "Memorandum on the Objects of the Recognition of Customary Marriages Bill", 1998.

[11] Sadly, Govender resigned from Parliament at the end of 2002.

[12] The lack of a supportive environment for the JCQLSW contributed to Govender's decision to resign.

[13] Legislation is under way to give traditional leaders more political power in the redistribution of land, which will impact on women's legal rights to land.

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