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The Women's Legal Centre During its First Five Years

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I INTRODUCTION

The Women's Legal Centre (WLC) has since 1999 brought cases to the courts and worked in Parliament and in administrative agencies to advance gender equality in the Republic of South Africa. From its inauguration, its commitment to women's rights and the use of constitutional litigation and public policy advocacy to protect those rights were shared with other organizations. Within that community of human rights and gender advocacy organizations, the WLC was to become, however, the preeminent organization working at the intersections where rule of law and women's rights converge.

The purpose here is to present WLC's record during its first five years and to assess that record. Presented for context are a description of the state of women's rights at the time WLC was established, the needs WLC sought to address, its mission, and strategies.¹

• Ph.D. in Political Science, feminist activist, Founding President of Pro Mujer providing microfinance services to over 200,000 women in Latin America, member of Board of Directors of non-governmental organizations committed to community based women's empowerment and economic development in developing countries, and Scholar-in-Residence at Women & Politics Institute, School of Public Affairs, American University, Washington, D.C.

II FROM IDEA TO REALITY

During South Africa's political tectonic plate-shifting years, WLC's founders expressed their desire to establish an organization that would use constitutional litigation, legislative monitoring and policy advocacy to advance gender equality. Michelle O'Sullivan, WLC's first and current Director, recalled the energy, optimism for change, and activity directed at advancing women's rights. *

'Nineteen ninety-two was a time when ... there was scope for a lot of powerful changes to be effected through law. My friends and I were all members of the National Association of Democratic Lawyers. It was a very exciting time. We all saw that we had opportunities to be involved in a transformation process in ways that lawyers in other countries never or only at the end of their careers have.

In 1992, 1993 and 1994 there was a multidisciplinary group of academics and some practitioners who looked at women's issues in relation to ongoing [constitutional drafting] negotiations..... We did quite a few submissions to CODESA [Convention for a Democratic South Africa] '.

The idea to establish a women's legal rights organization emerged for O'Sullivan during a course on Women and Law being taught by Kate O'Regan, later to become a Constitutional Court Justice, and Christina Murray.

'That was what inspired me. I'd always been involved in gender issues while at the University. But, it had been in relation to matters like reproductive rights and social welfare....The course was the first time we

¹Sources of information include reports, newsletters, memoranda and other WLC documents;

newspaper and magazine accounts; and interviews with the Director, attorneys and

other WLC staff members; clients; WLC Trustees; representatives of organizations with which WLC has collaborated, outside advocates with whom WLC has worked, women's rights scholars, and funders.

* Quotations taken from interviews are not cited in footnotes. For a list of persons interviewed see References (7). I want to express my appreciation to those interviewed for their generosity in sharing their time, knowledge and perspectives.

were exposed to legal feminist theories—there was a good group of students involved. It was an engaging course—it was fantastic. It was the highlight of my university career'

The extensive literature then available on 'cause lawyering' and the prominence of organizations in South Africa that tried to advance the cause of human rights through the courts during apartheid were, perhaps in a more subtle way, influences as well.

O'Sullivan and a number of like-minded women lawyers formed the South African Legal Working Group at a time when the interim constitution was being negotiated. Their expressed purpose was 'to provide South African women with the means to claim and assert their fundamental rights through the legal process'.² They sought funding to do so. After almost five years of persistence in seeking funds, and four funding proposals later, WLC, a direct though third generation descendent of the South African Legal Working Group, received an affirmative response.

They then proceeded to obtain the legal authority to operate. They created the Women's Legal Centre Trust, a private trust that could create the Women's Legal Centre. Six months and nineteen days later, the process concluded when The Cape of Good Hope Law Society accredited WLC as a Law Centre. WLC now had authorization to litigate.

In January 1999, still before the Cape Law Society acted, O'Sullivan located, moved into and equipped an office; and recruited staff. She and the seven members of the Trust, all of whom contributed as many hours as they could while keeping their paid professional commitments, worked at a high level of energy to prepare for the opening of the new law centre.

After more than five years, those involved in the transition from idea to reality still convey the excitement at what had been accomplished. 'It was ground-breaking-- to create a

² Cape Town Legal Working Group *Funding proposal* (Sept 1995) 1

path for gender issues'. It was the first organization in South Africa to focus solely on women's rights constitutional litigation.

III STATUS OF WOMEN'S RIGHTS IN 1999

(1) The Constitution

The Constitution provided the direction which the subsequent legislative, administrative and judicial actions were to follow. The language of gender equality in the Constitution is unambiguous, made even clearer by the use of non-sexist nouns and pronouns, except when gender nouns and pronouns are used to assure the inclusion of women. Provisions relating to women's rights are incorporated throughout the document and appear first at the very beginning, in Section 1. There human dignity and non-sexism are presented as founding values.³

The Bill of Rights, the second chapter of the Constitution, deals specifically and extensively with equality. It prohibits both state and private discriminatory action, and restricts freedom of expression when expression advocates hate based on gender and incites to cause harm.⁴ The enumerated rights cover indirect as well as direct discrimination—an acknowledgment that unwritten, institutionalized sexism restricts and imposes hardships on women. The state is prohibited from discriminating unfairly on seventeen specified grounds that include gender, sex, pregnancy, marital status, sexual orientation, and birth.⁵ Other provisions of particular importance to women are the right to dignity; the right 'to be free from all forms of violence from... private sources'—a right that protects against domestic violence; the right 'to make decisions regarding reproduction,' and the right 'to security and control over' one's body.⁶ Also important to women, given the reality that poverty is a

³ *Supra* S 1(a) & (b)

⁴ *Ibid* S 9(3) & S 16(2) (c)

⁵ *Ibid* S 9 (3) & (4)

women's issue, are socio-economic rights, such as access to adequate housing, health care, sufficient food and water, and social security.⁷ The Constitution, while legitimizing customary and religious law, gives supremacy to the rights that are significant to women and charges the state with their promotion and fulfillment.⁸

The Bill of Rights appends to the enumerated rights additional rights embodied in international instruments and even foreign laws. Section 39 asserts that courts 'must consider international law; and may consider foreign law'.⁹ The Constitution, thereby, incorporates rights contained in instruments of great importance to women, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Vienna Declaration on Violence Against Women.¹⁰

The Constitution establishes independent institutions to 'strengthen constitutional democracy'.¹¹ Among these are the Commission for Gender Equality, charged with promoting 'respect for gender equality and the protection, development and attainment of gender equality,' and the South African Human Rights Commission, charged with promoting 'respect for human rights and a culture of human rights'; and promoting 'the protection, development and attainment of human rights'.¹²

⁶ *Ibid* S 10 & S 12 (1) (c) & (2) (a) & (b)

⁷ *Ibid* S 26 (1) & S 27 (1)

⁸ *Ibid* S 31 (1) & (2) & S 7 (2)

⁹ *Ibid* S 39 (1) (b) & (c)

¹⁰ Convention on the Elimination of All Forms of Discrimination Against Women,(1979) 180 UNGAR XXXIV,(1980) 19 ILM 33 ;The Declaration on the Elimination of Violence Against Women, GA Res 104 UN GAOR. 48th Sess Agenda Item 111, UN Doc A/RES/48/104 (1993)

¹¹ *Supra* S 181 (1)

¹² *Ibid* S 187(1) S 184 (1) (a) &(b)

The Constitution, further, advocates affirmative action in its requirement that race and gender be considered in appointing judicial officers and that public administration be 'broadly representative of the South African people'.¹³

(2) Legislation

Once the Interim Constitution was in place, Parliament, directed by the constitutional requirement that the state 'protect, promote and fulfill' the enumerated rights, began to address women's concerns. Parliament established a Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, tried to ensure that all parliamentary committees consider gender; and established a Women's Budget Initiative—the latter helpful in assessing the budgetary impact on women.¹⁴ Parliament, in the early years, passed significant legislation addressing many important women's issues, including domestic violence, job discrimination, sexual harassment in the workplace, affirmative action, reproductive choice, rights in customary marriages, spousal maintenance, pornography and eviction.¹⁵

That the legislation dealing with eviction, a response to the forced evictions during apartheid, is an aid to women illustrates the reality of women's interests in the world of converging societal roles. The Act requires that the courts, when deciding on eviction

¹³ *Supra* S 174 (2) & S 195 (1) (i)

¹⁴ S Jagwanth & C Murray Ten years as transformation: how has gender equality in South Africa fared? Pre-published draft 10, published in *Canadian Journal of Women and the Law* vol14 (2002, 255-299; P Andrews *The Stepchild of National Liberation: Women's rights in the New South Africa* in P Andrews and S Ellman, 'The Post-apartheid Constitutions', 339

¹⁵ Prevention of Family Violence Act, Act 133 of 1993; Labour Relations Act, Act 66 of 1995; Employment Equity Act, Act 55 of 1998; Choice on Termination of Pregnancy Act, Act 92 of 1996; Recognition of Customary Marriages Act, Act 120 of 1998; Maintenance Act, Act 99 of 1998; Films and Publications Act, Act 65 of 1996]

matters, consider the needs of 'the elderly, children, disabled persons and households headed by women'.¹⁶ This is a list that multiply affects women, since it is women who are usually responsible for the care of the elderly, children and the disabled.

Consistent with the constitutional intent that the administrative branch of government share the commitment to gender equality, Parliament created government structures to implement women's rights and to monitor the progress within government agencies. The President's organization chart included an Office on the Status of Women and various departments had gender desks.

(4) Court decisions

Like the legislative and executive branches, the judicial branch moved gender equality forward. In *President of the Republic of South Africa v Hugo* the Constitutional Court defined equality widely enough to cover substantive, as well as formal equality.¹⁷ This definition freed women's rights jurisprudence from the restrictions that the formal equality standard imposed in other countries. In *S v Baloyi*, another example of a favourable women's rights decision, the court made clear in addressing the issue of domestic violence that eliminating domestic violence had to be a national priority.¹⁸

Other courts also supported women's rights. In *Christian Lawyers Association v Minister of Health and Others*, for example, the High Court confirmed women's rights regarding reproduction.¹⁹

(4) Status of women's rights in 1999

The year WLC was established, the legal environment for taking on the challenge of constitutional litigation and policy advocacy on behalf of women's rights was favourable.

¹⁶ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998, S 4

¹⁷ CCT 11/96 (18 April 1997, now cited as 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)

¹⁸ *S v Baloyi* (2000) (1) BCLR 86 (CC)

¹⁹ 1998 (11) BCLR 1434 (T)

The constitutional provisions were ample. There were important legal and policy gains as a result of legislative, administrative and judicial action. There were significant international instruments and decisions in the courts of other countries. The Constitution, policies and jurisprudence that had acknowledged and addressed issues of sex-based discrimination and gender equality brought women's rights and gender equality to a new level—but women were not yet where the promise of gender equality would still have to take them.

IV NEED

To give substance to the constitutional design required massive changes in the assumptions, structures, policies and procedures of all societal institutions. To give substance to gender equality, which was part of that design, similarly required massive changes. 'The legal landscape,' in Andrews' description, 'was littered with gross gender inequalities'.²⁰ To realize the Constitution's promise was an enormous undertaking and, in reason, could not have been achieved in five years under the best of conditions.

The conditions were not the best, for there were significant obstructions to progress. Important among these were the realities that gender equality was subordinate to racial equality and that customary and religious law as practiced were often incompatible with women's rights..

During the negotiations for the Interim Constitution and the 1996 Constitution, interest in reversing apartheid's oppressive racial legacy outweighed interest in advancing women's rights. Apartheid affected women, but women were also affected by non-racial policies. The Constitution raised gender equality to a level of parity with racial equality. This was an important victory. But, the parity expressed in the Constitution was not widely embraced. Racial equality was considered more important. That view persisted after the adoption of the constitutions.

²⁰ *Supra n14*, 327

During the constitutional negotiations, conflicts between customary and religious law and women's rights were not resolved. The Constitution affords protection to customary law and religious law to the extent that they are not inconsistent with the other rights in the Constitution. It left resolution of the inconsistencies between women's rights and customary law and religious law to another time.²¹ Jagwanth and Murray point out that customary law 'is indisputably based on patriarchal values and is discriminatory against women'.²² They quote TR Nhlapo, who has written extensively on customary law. Nhlapo asks 'What is it about custom that is inimical to women's rights?' He then answers.

'It is everything that emanates from an attitude to women in marriage and in the family which sees them solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves'.²³

Aspects of religious law are open to similar criticisms.

The Constitution both recognizes customary and religious law and restricts these laws from violating the rights extended to women.²⁴ What this protection covers is not clear, however. Despite constitutional protection and despite legislation which accords women married under customary law the same status as women married under civil law and provides that they may acquire property and enter into contracts, the reality was that the rights of millions of women remained severely restricted in 1999.²⁵

A further weakness in the rights foundation was that by 1999 there was a lack of confidence that the government agencies and offices established to advance women's rights could be relied on to implement the constitutional promises to women. Jagwanth and

²¹ S 31 (a) & (b)

²² *Op cit* 34

²³ TR Nhlapo 'The African family and women's rights: friends or foes?' *Acta Juridica* (1991) 135

²⁴ *Op cit* S 31

²⁵ *Op cit*

Murray, assessing their effectiveness, support this conclusion. They argue that the Commission on Gender Equality, whatever its achievements, had not been strong enough to deliver the changes needed, and that the gender focal points located in some departments were often headed by persons in positions without influence. While they acknowledge 'limited successes,' these efforts are under-resourced and lack skilled staff.²⁶ Further, the impact of the Office on the Status of Women, located in the President's office,

'thus far appears to have been extremely limited'—bureaucratic practices have made access ... to the heads of government departments difficult. [W]ith a staff of just three members, it is difficult to see the office making a significant impact'.²⁷

By 1999, The Constitutional Court had dealt with only three cases in which sex discrimination or gender equality violations were claimed. In two of them, the claim of sex-based discrimination was brought by men. One challenged the Child Care Act for allowing the adoption of children born outside of marriage without the father's consent.²⁸ The other challenged the provision under the Presidential Act for allowing sentences to be reduced for certain women prisoners who were parents while there was no similar reduced sentences provision for fathers.²⁹ The third case, which involved a R 2 000 000 life insurance policy, was brought by a woman --but a woman, it is clear, of relative economic privilege.³⁰

After analyzing the cases dealing with gender equality and cases that have implications for women, Jagwanth and Murray conclude:

'[I]t is clear that judicial enforcement of the equality rights of women has been limited. The problem is exacerbated by the fact that the courts have generally applied the equality provision in cases involving

²⁶ *Op cit* 11

²⁷ *Ibid* 9

²⁸ *Fraser v. Children's Court, Pretoria North* (1997) (2) BCLR 153 (CC), Child Care Act, Act 74 of 1983

²⁹ *President of the Republic v. Hugo* (1997) (6) BCLR 798 (CC), President Act, Act 17 of 1994

³⁰ *Brink v Kitshoff NO CCT 15/95 (15 May 1996), now cited as 1996 (6) BCLR 752, 1996(4) SA 197 (CC)]*

relatively privileged groups. The cases suggest that those people who would benefit most from the protection of the equality provision—indeed those whom the provision was specifically designed to protect—have not used it: women and other disadvantaged groups are not reaching the courts. The institutional obstacles that are being faced by disadvantaged groups seeking to secure rights through the courts are of course not unique to South Africa. In South Africa, however, the problem is compounded by the high level of poverty and illiteracy among black rural women and by the inadequacy of funding, state or otherwise, for human rights education and constitutional litigation'.³¹

The 1996 funding proposal for a women's legal center pointed out that bringing a case to court can cost R100 000.³² Consistent with the financial obstacle, Jagwanth and Murray point out,

'most of the Constitutional Court cases which have made an impact on the lives of disadvantaged South Africans have been brought by organised interest groups....[I]t is rare to find suits brought by individual litigants in this regard....The role of civil society thus becomes paramount, and ensures that judicial rights discourse does not remain the domain of the privileged few in society'.³³

The need to advance gender equality persisted. WLC in an early funding proposal expressed agreement 'that the importance of addressing racism is vast'. but in the same sentence advanced 'that the development of women is an equally important process', noting that

'in the general wave of change in South Africa, it has often been undermined, and indeed sometimes ignored'.³⁴

A year later, noting the importance of influencing the legislative process, a successor funding proposal observed it was clear from recent Bills that one could not assume the government would pass laws sensitive to women's needs; nor could one assume that

³¹ *Op cit* 31-32

³² Cape Town Legal Working Group, *Funding Proposal* (1996) np

³³ *Op cit* 16

³⁴ Cape Town Legal Working Group, *Funding Proposal* (1995) np

legislation would be in accord with constitutional rights and values—‘there is a limit to what the constitution can deliver’.³⁵ The limits of the Constitution were being echoed five years later, when a WLC attorney assessed :

‘We look at the Constitution and have to say “There is nothing wrong with that document....It sets out to correct imbalances occasioned by gender inequality. ... We’re correcting things.” There’s nothing that should be holding us back, and then you get to realize... we need to do more’.

Andrews’ chapter in *The Post-Apartheid Constitutions*, written in 2000, is tellingly titled ‘The Stepchild of National Liberation: Women and Rights in the New South Africa’.³⁶

Based on civil society’s importance in the struggle against apartheid and an awareness of the financial impossibility for individual women to claim their constitutional rights, the accepted assumption was that the task of bringing unaddressed women’s issues to court and of advancing public policies would have to be undertaken by civil society organizations.

This was precisely the task that the Women’s Legal Centre was eager to take on. The founders believed that an organization dedicated to gender equality litigation and gender policy advocacy was necessary. Only a dedicated mission could avoid the distractions from competing areas of inequality and could produce the specialized knowledge required to understand and appreciate the complexity of the discrimination affecting women. There was no organization doing what WLC proposed to do. Established, respected organizations litigated sex discrimination cases, but sex discrimination was not their exclusive, nor even their primary, concern. There were university-based units that did research and advocacy regarding law and gender, but they didn’t offer litigation services. There were organizations specializing in one or more substantive areas of women’s rights that worked to influence public policies affecting women, but the range of their issues was limited. There was no other organization with WLC’s mission.

³⁵ Cape Town Legal Working Group, *Funding Proposal* (1996) np

³⁶ *Loc cit*

At the celebration launching the WLC, Kate O'Regan, then a Justice of the Constitutional Court, acknowledged the need the Centre was intent on meeting.

'We are...recognizing the problems that women face are far more complex than formal equality, and specialist litigators and lobbyists in that area will be able to address those problems far more effectively than people who have not thought about the issues'.³⁷

V MISSION AND STRATEGIES

(1) *Mission and early strategies*

WLC intended to advance the rights of women through public interest litigation, particularly constitutional litigation. The Constitution held out the promise that the courts would be open to such litigation. The Bill of Rights gives everyone access to the courts, sanctions public interest litigation and class action suits, and obligates courts when interpreting legislation or developing common law to 'promote the spirit, purport and objects of the Bill of Rights' and consider international law..³⁸ The Constitution provides an appropriate test for bringing public interest cases. The test, Jagwanth and Murray explain, is not whether the party in a case suffered under the law but whether the law is objectively unconstitutional. The theory of objective constitutional invalidity, in addition to providing standing for public interest litigants, helps the court to identify the equality issues at stake and to recognize their impact on 'vulnerable groups...not represented before the court'.³⁹ "The difference between what is and what should be," a WLC attorney commented, "is what pays our salaries."

WLC's justification for using litigation was a faith that court decisions matter. While recognizing litigation's limitations in affecting people's lives, the founders, Trustees and staff believed that 'the importance of constitutional rights and the possibility of litigation

³⁷ Women's Legal Centre, *Annual Report* (1999) 4

³⁸ *Op cit* S 39 (2) & (1), S 38 (c), S 38 (d), S 34

³⁹ *Op cit* 6

based on these rights is vast'.⁴⁰ But, as a WLC attorney observed, 'You get the sense that the courts just need to be pushed'.

WLC recognized, a founder pointed out, 'the diversity of women's needs and the diversity of their disadvantages. Women are not one size fits all'. The women WLC determined to serve were the most vulnerable—those disadvantaged by poverty and racism, as well as by sexism. 'Poverty has a particular impact on people's ability to exercise their rights,' another founder added. WLC would bring women's rights issues which, for a complex of reasons, the most disadvantaged women could not themselves pursue. WLC did not intend, however, to operate as a law clinic. Though there would be no charge to the clients, WLC wanted to pursue precedent-setting litigation—litigation that would have a wide national impact and would enlarge the jurisprudence on women's rights and gender equality. The principles governing WLC's litigation strategy, as announced after its first year in business, are clear.

'Any litigation ... should advance substantive equality for women, ensuring practical legal rights. In this way the Women's Legal Centre seeks to develop laws that will improve the lives of women who have been disadvantaged by social and economic conditions'.⁴¹

The standard was that all litigation had to be outcomes-based. Potential outcomes included the overturning of legislation; the creation of new jurisprudence (new laws and legal principles); the extension of existing jurisprudence; and the enforcement of women's legal rights through positive court orders, or through the court ordering the enactment of legislation.

'Litigation must have a wide impact. A substantial group of women must benefit from the outcome of a particular case'.⁴²

⁴⁰ Cape Town Working Legal Group, *Funding Proposal (1995)* np

⁴¹ The Women's Legal Centre, *News* (July-December 2000) 2

⁴² *Ibid*

WLC during its first year began adding 'alternative lawyering' to its litigation strategy. First to be added were assistance in writing briefs for constitutional and public interest cases concerning women's rights and gender equality and, perhaps realizing the enormity of its mission and the desirability of increasing the number of gender interested litigators, it added training for paralegals and women lawyers who might conduct public interest constitutional litigation in regard to gender issues.⁴³ WLC also added public policy advocacy to its mission when a court action resulted in positive orders for enforcement or for the enactment of legislation. Taking a court case to the next step was one reason for adopting public policy advocacy. But other reasons reinforced the need to connect advocacy and litigation. 'Court decisions would be meaningless,' one of the founding trustees successfully argued, 'unless we also tried to have an impact on appropriate legislation and policies'.

The mission's two main components—litigation and advocacy, became mutually supportive strategies for reaching the same public policy ends. Which of these two to use would depend on a number of factors related to timing, appropriateness and record of past efforts. When the impediments to enjoying constitutionally granted rights were statutes, regulations or operating procedures – or their absence, then the appropriate first step for eliminating the impediment might well be advocacy. Strategies would be used sequentially: efforts would be made to change public policy and, if unsuccessful, WLC could go to court. Its position in court could be strengthened by the failure of other government policy centers to act. If the case resulted in an order for public policy change, then WLC hoped it could assist in shaping policy.

⁴³ Women's Legal Centre, *Annual Report* (1999) 3

Public policy advocacy, announced initially as a secondary commitment—a commitment ‘where resources permit,’ expanded to include training judges and lawyers.⁴⁴

An Advocate and former Judge pointed to the need.

‘The High Court, which is where most of the litigation takes place on these issues, is a mixed bag....All of the lawyers, all of the judges, almost without exception, are people who were trained pre-1994 and practiced pre-1994. We all come from a pre-constitutional era and the tendency... is to see the Constitution as an add-on..... I think there is still quite a strong tendency to think that constitutional law is something different. This is the wrong premise, because the Constitution has to envelop everything and everything has to be found in the Constitution. Learning that is a slow process and we haven't gotten there yet.

One of the judges in the Appeals Court put it right when he said, “Some judges think this is a case about a contract. They decide the case on the common law and ask, ‘By the way, is there anything in the Constitution which says the conclusion I’ve reached is wrong’. Others start from the premise that contract law has its authority in the Constitution. Everything has its authority in the Constitution and works inward, rather than the other way”. Of course, most cases can be decided without reference to the Constitution. But, the question is whether you think the Constitution is an add-on, or whether you think it’s the premise’.

Without trained judges, the same issue would have to be raised repeatedly before any impact could be felt. Following the trail dictated by the need for training brought WLC to extend the reach of its training to include law enforcers and many others.

(2) Strategy selection

Determining how to proceed with an issue was a matter of thoughtful consideration. It was described by a WLC attorney.

‘You just don’t stumble on the strategies. It requires thinking, identifying the various parts of the issue’. What’s in the law? What are the barriers in the law? What’s the legal basis for crossing them? These are the questions we have to ask. Once we have thought through that process, we have to think of the best ways to intervene—whether it’s law reform or litigation. What we do effectively contributes to a better jurisprudence

⁴⁴ *Ibid*

because we have gone through the process. Our focus is specifically on dealing with the barriers so that they go away once successful in the constitutional challenge'.

(3) Relationship to government

Though established to push government to act and press for elaboration of stated rights, WLC did not want to position itself as an adversary. The loud opposition to government by the human rights component of civil society during the apartheid years was deemed no longer appropriate. WLC wanted to be seen as government's ally. One founding Trustee recalled:

'We wanted to establish credibility with politicians and not be an anti-government organization.

Democracy can be quite volatile under the surface. We wanted to avoid polarizations. We didn't want to be confrontational. Our position was: We celebrate our democracy. We want to bring about change.

We are taking an area that is slow to change. There is so much to do. We are taking this on to help you.'

O'Sullivan and the Trustees, through their work in helping to create the constitutional democracy, had sufficient credibility among those now in government for this view to be accepted.

'To sustain a human rights culture,' Mzolisi Mtshaulana wrote about the time WLC began operating, 'it is no longer necessary to collide with the law. It is only necessary to harness it creatively'.⁴⁵ WLC looked forward to harnessing the constitution creatively.

(4) Working with other organizations

When WLC was established there were civil society organizations that dealt with women's issues and civil society organizations that took on public interest litigation.

O'Sullivan and the Trustees were concerned that some organizations might view WLC as an unwelcome trespasser, trampling on their territory. They wanted to establish WLC's place

⁴⁵ P M Mtshaulana, 'The History and Role of the Constitutional Court of South Africa' in Andrews & Ellman *op cit* 529

on the organizational terrain—a place that didn't intrude on the territorial integrity of other organizations; they did not want to pose a threat; they did not want to be a polarizing force. On the contrary, they wanted to establish collegial relationships. 'We spent a lot of time discussing how to relate to other NGOs and on trying to win acceptance,' one Trustee recalled.

'We felt we had to be careful not to be seen as taking over other people's work. We were always asking "How do we distinguish ourselves?" We consulted with at least twenty-five organizations'.

WLC worked to establish relationships and continues to work to maintain them.

WLC is an important participant in issue networks, partners with organizations where appropriate, and provides assistance for building their organizational capacity.⁴⁶

An amalgam of comments from spokespersons of organizations with which WLC works is that WLC's present staff members are patient, easy to work with, supportive and know how to partner. A founding member of LRC commented that he has appreciated their 'attitude of collegiality'. 'Some organizations try to grab the limelight', he continued.

'In my dealings with the Women's Legal Centre, they don't have that attitude. It's best illustrated in the *South African Human Rights Commission* case where we had two applicants, the Human Rights Commission and the Women's Legal Centre Trust. We agreed that we were both going to be applicants and the question was who should be the first applicant. This is quite material, because the first applicant is the party whose name gets attached to the case and the party who gets the...glory,

⁴⁶ A partial list of the organizations with which WLC works closely includes:

Centre for Applied Legal Studies (CALS), University of Witwatersrand; Aids Law Project, Centre for the Study of Violence; Centre for the Study of Violence and Reconciliation; Community Law Centre's Socio-Economic Rights Project, University of the Western Cape; Health Professionals Council; Institute of Criminology, University of Cape Town; Justice for Women Alliance; Legal Working Group on Sexual Harassment; Rape Crisis Cape Town Trust; Reproductive Health Research Unit; Reproductive Rights Alliance; Sex Worker Education and Advocacy Task Force (SWEAT); South Africa Association of Labour Lawyers; Treatment Action Campaign; United Sanctuary Against Abuse; Violence Against Women Network; and Women on Farms Project.

press reports and so on. I said to Michelle [O'Sullivan], "Look, actually you are the experts in this case, you know more about it than anyone else. But the truth is, also, that the Human Rights Commission is a body created by the Constitution. It's a national institution and it's a body which will never be refused [standing] by the Constitutional Court. They will always be allowed in the door and also it's a body to which they are inherently sympathetic. And I think the case is best served by the Human Rights Commission being the first applicant", And she said, "Fine". That's the attitude'.

(5) Mission enlargement

WLC has been true to its early stated mission, but has not confined itself to impact litigation and gender advocacy. The shift occurred, O'Sullivan explained, with the realization that law is a tool.

' On its own, it's not going to achieve the goals that we set for ourselves. We needed to engage in a public interest strategy that included media information, conferences, training, publications. Without a public interest strategy we wouldn't be effective'.

What O'Sullivan calls a public interest strategy is referred to here as a public information- public education strategy. It is directed at disseminating information through a variety of media and in a variety of formats, including its own Resource Room, a small library open for public use. WLC aims to reach both narrowly targeted publics and more broadly defined audiences. Among the hoped for outcomes of its education efforts are increased knowledge among women as to their rights and changes in the culture of sexism.

An explicit obligation of many organizations in South Africa is affirmative action. For a human rights organization such as WLC, the obligation rises to the level of mission. WLC has from time to time asserted this obligation.

Perhaps forecasting a further addition to the WLC mission is its work in other African countries. Lawyers, feminists and human rights advocates elsewhere in Africa are inviting WLC to assist them by providing training. WLC has accepted these invitations with enthusiasm.

(1) Litigation

(a) Priorities

At the launching ceremony in June 1999, WLC identified its substantive priorities. They were: access to housing and land, in particular for women farm workers; women's access to health care services, including reproductive health care services; violence against women; domestic worker's access to social security; customary and religious laws that affect women; and the proposed equality legislation.⁴⁷

The priority categories grew each year and WLC specified in each category narrower issues and identified principles to be gained. The specificity and principles reveal an incremental strategy, beginning with a more easily accepted component of a broader and more complex right and moving issue by issue to less readily acceptable components. For example, WLC started with the issue of maintenance following the death of the bread winner in a customary marriage and moved to the issue of maintenance in a non-marriage relationship of domestic partners.

WLC's expanded reach, greater specificity and clarity of purpose are revealed in the goals and aims identified at the conclusion of its fifth year of operation. A partial list taken from its plan for the following year includes maintenance, pensions, access to social security, the state's duty of care to provide reproductive health care services, intentional HIV infection, violence against women within the South Africa Police Service, custody, Muslim personal law, domestic partnerships, unfair discrimination, women's access to resources, social security, and equality issues under the Equality Act.⁴⁸ Some of the specified aims are:

-to deal with the issue of financial exploitation and sexual harassment and get the Court to develop a definition of *quid pro quo* harassment;

⁴⁷ Women's Legal Centre document, statement by M O'Sullivan (17 June 1999) 1

⁴⁸ 'Strategic Planning Report' (January 2004) S 12

- to hold employers liable for sexual harassment perpetrated by employees on fellow employees; and to establish employer's liability for a hostile work environment resulting from sexual harassment;

- to test failure to arrest, evictions and economic abuse in matters of domestic violence;

- to litigate police abuse of sex workers;

- to focus on the need to develop the criminal law and engender a gender sensitive approach to sentencing in cases involving women who kill their abusive partners;

- to challenge the interpretation of prescription laws so that victims of child sexual abuse can institute claims;

- to hold the state liable for failing to protect girls from sexual violence while at school;

- to define what constitutes a valid customary marriage; and

- to pursue duty of care concerning women's access to health care.

The litigation envisioned for the year – only partially indicated here-- required WLC to advance cases already undertaken, increase the number of cases dealing with some specified issues, identify new appropriate test cases, monitor cases in the system for possible *amicus curiae* intervention, get information about litigation support already available in a particular area of women's rights, and strategize with other organizations about possible public interest cases.⁴⁹

(b) Selecting cases

WLC's litigation strategy begins with a determination of the issues it wants to raise and then selection of cases appropriate for carrying those issues to court. In the beginning

⁴⁹ *Ibid* S 12-35

the felt need was to walk without tripping. One WLC Trustee during its early years confirmed this.

‘We were in full agreement...that, because of the nature of our litigation, we could not make mistakes. We can't make mistakes’.

In deciding what cases to take, O'Sullivan recalled, ‘It had to be the right case and we had to be able to win’. A little less than three years later, O'Sullivan abandoned some of this caution. In the Fall of 2002 at a meeting organized by one of WLC's funders, the founder of the Legal Resources Centre spoke of the desirability of taking on many cases before finding the ‘right’ case. He pointed out that there is an impact, win or lose. Before this conversation she had been thinking about her approach to taking on cases, but hadn't focused enough to change.

‘When he said that, it had a major effect. I got back to the office and the next week we started litigating the *Bhe* case’.⁵⁰

WLC was ready to take more risks, and the courts in the years since WLC began perhaps were ready to listen. There had been some promising signs that the courts in South Africa might be receptive to the issues WLC wanted to raise and there had been supportive decisions in Canada and in other countries. As if to encourage future decisions, the outcome in *Bhe*, which invalidated the Customary Law rule of primogeniture, delivered a major victory for women.⁵¹

‘Before 2002 we were more concerned about being sure we had a winner. We still are, but I think I have learned there is no perfect case. Don't hold out. It's not gong to happen.’.

WLC cases come from referrals, from learning of cases already begun, from WLC's own solicitation and from people who telephone or just walk in. WLC is part of the gender, human rights and university law communities from which it receives referrals and to which

⁵⁰ *Nonkululeko Bhe and others v Magistrate, Khayelitsha and others* 2004 (2) SA544 (C); 2004 (1) BCLR 27 (C); CCT 49/03

⁵¹ *Ibid* Discussed 29 & 41-44 ffg

it can turn when looking for a case. Each case under consideration has to offer more than the relief sought by the individual or group of individuals. For each potential case, O'Sullivan and the staff attorneys together ask 'What is the impact? How is it going to help other women?' Impact and precedent-setting are not synonymous. WLC is receptive to cases that are not going to set a legal precedent, but would have a significant impact.

The precedent-setting and impact criteria are high standards to meet. WLC does bring cases to court that do not meet either standard. They are advanced because they raise important issues that are not moving in the executive agencies or in Parliament. 'We have this constant dilemma,' O'Sullivan explained.

'On the one hand, there are some issues that, it is clear, are not ... going to be won in the court, but are also not being engaged at a policy or legislative level, and so there's going to be no improvement. Sex work is one of those areas, domestic partnerships-- recognition of those domestic partnerships, is another. We might not win the Robinson case in the Constitutional Court-- I hope to God we do -- but there's a chance we won't.... We get to a point where we have no choice but to litigate. If you look at the delays in the law reform process, and I think that was also [a consideration] in *Bhe*. We felt the law reform process that we tried to engage in was going nowhere. And that's often the sort of final determination.... We look at an issue and we think, "How can we best intervene to facilitate this and resolve it?" Sometimes there's no other avenue apart from the court. This is often the last resort'.

Whatever the merit in taking a case, its initiation does not always begin with WLC.

In *S v Jordan*, for example, O'Sullivan commented,

'We didn't think it was the right case to deal with the sex worker issue, but once the case was there before the Constitutional Court, there was no choice but to intervene'.

In *Jordan*, WLC intervened as the attorneys for Sex Worker Education and Advocacy Task Force (SWEAT) and other *amici curiae*. SWEAT was focusing on another sex worker case at the time the Jordan case emerged in the High Court. SWEAT, too, felt it had to support Ellen Jordan before her case got to the Constitutional Court.

WLC may intervene as an *amicus curiae* at the request of an organization with an interest in the case. At other times WLC takes the initiative.

‘Sometimes we’ll hear about a case. We’ll find out more about it, and approach an organization with which we have a long- term relationship. “Do you know about this case? We think that this is of concern to you. Would you be interested in intervening as an applicant? “...Our preference is to intervene on behalf of an organization that specializes, but it ‘s not always possible because there aren’t always organizations, or the time constraints may mean that the organization ... can’t get the authority together to intervene. This happened to me recently in an abortion case’.

When WLC intervenes through another organization, that organization in effect becomes the client. This presents some advantages, one of which is that the NGO can attract public attention in a way that WLC cannot and can make statements in the press that are not appropriate for the litigating attorney to make.⁵² But there are also disadvantages. It is common for WLC and the client organization to have differing purposes in formulating the issues.

‘When you’re representing an organization, when they’re your client, there’s less latitude. You have to negotiate everything with them, and they have a vested interest in your submissions’.

WLC—technically the Women’s Legal Centre Trust, also appears as a direct party, as it did in *Bhe*. ‘We are doing that in quite a few of our cases now,’ O’Sullivan reported.

‘This gives us the opportunity to introduce additional evidence that wouldn’t be there otherwise. ... It’s information from other cases that we can use to demonstrate that there is a pattern, that there is a large group of women ... affected. It’s not just Tozama Bhe.... We bring cases in the public interest. That’s why we are involved. We work with issues much broader than those issues that just affect Tozama Bhe and her children. We can set out issues broader than the client’s issues’.

An additional benefit is that the case lives on if the client disappears—and clients do disappear or cases get settled. ‘If that happens, we’re still there,’ as are the public interest issues WLC wants to raise.

⁵² Comment by O’Sullivan in Speech delivered in Moscow, Russia (March 2003) ‘Public Interest Litigation of the Rights of Women in South Africa’ 9

(c) Contextualizing legal issues

WLC understands and presents legal issues in the social and economic contexts within which the vulnerable, marginalized women it represents live. The staff is in touch with the reality of its clients in part because of its engagements with direct service organizations, in part because its attorneys get out into the communities, in part because of the duty queries, in part because of their intellectual familiarity with women's issues, but in large part because, as one attorney expressed what all of the attorneys said:

'We go beyond what lawyers usually do. We get to see and understand in all of these cases that there's an intersect between the [legal] problem and the social factors. We take account of all of these factors that work against women's achievement of full equality. We are contributing to a jurisprudence that takes into account all of these factors. We're looking at the individual, but at the same time we don't only see the individual'.

The attorneys' engagement in helping clients with transportation fares, school fees, housing construction costs, and other non-legal problems are evident in the account of WLC in action.. All WLC attorneys remark about the large extent

'to which we go beyond what lawyers usually do and to which we have to straddle between being lawyers and social workers... You have to be a counselor when you sit there with the client, sometimes you have to open up your pocketbook. But you get to understand in all of these cases the social factors that intersect with the issue. It contributes to a jurisprudence that takes into account all of these factors that militate against women's achievements of full equality'.

*(d) WLC in action**(i) A consideration of two cases*

A list of WLC cases, advocacy activities and education efforts fail to convey WLC at work. For this, it is helpful to look at WLC in action. Two cases are randomly selected for

this purpose; viz, *Bhe* and *Daniels*.⁵³ Both reveal that WLC's attorneys 'go beyond what lawyers usually do'.

Bhe and *Daniels*, respectively, raise concerns about the rights of women in customary marriages and in Muslim marriages. WLC had advocated changes in the laws that would accord women in these relationships important rights. In its first year it commented on regulations for the Recognition of Customary Marriages Act. Once the regulations became law, it organized an annual workshop held in a different province each year regarding the Act to disseminate information about how the Act would assist those in customary marriages.⁵⁴ Further, it wrote a pamphlet, available in four languages. In 2000, it made two submissions to the South Africa Law Commission regarding Islamic marriages and presented a paper at the University of the Western Cape Law Faculty family law conference entitled 'Muslim Marriages: Update on the South African Law Commission Process'.⁵⁵

WLC continued its efforts to press the Law Commission forward on its customary law work. In 2002, WLC prepared detailed proposals, presented its arguments to the parliamentary Committee on the Quality of Life and Status of Women and made presentations at the International Family Law conference and the Muslim Youth Movement conference.⁵⁶

The experiences of Mrs Bhe and Mrs Daniels show that law reform, as WLC later stated, is

⁵³ *Supra* n 50 & *Daniels v Campbell NO and others* CCT40/30

⁵⁴ Act 120 of 1990

⁵⁵ Women's Legal Centre Funding Reports to the Ford Foundation, 1 September 1999 to 28 February 2001, np.

⁵⁶ *Ibid*

'often a very slow process in the terrain of women's rights, particularly those laws required to deal with the customary law of inheritance, recognition of Muslim Personal Law marriages and domestic partnerships. Draft Bills as suggested by the South African Law Reform Commission are pared down radically in the parliamentary process to a minimalist legislative framework.... The provisions removed from bills during the parliamentary deliberations are... sometimes provisions, which if properly implemented, afford the greatest protection to women.

Our sense is that prior to an election it is easier for government to leave controversial women's rights issues to the courts in order that they are not perceived as making decisions where there are competing constituencies, such as traditional or religious leaders.

Women's rights issues, which should be dealt with through law reform, may as a result of delays [have to] be decided by the courts'.⁵⁷

(ii) *Bhe and SAHRC cases joined*

Nontupheko Maretha Bhe or Tozama, as she is known to her friends and family, came to WLC after the Magistrates' Court in Khayelitsha ruled that her father-in-law was the rightful heir of her husband's estate. She and her husband had obtained a state housing subsidy which they used to acquire property. Their plan was to improve the property and replace their temporary shelter with a house, which they would build— appropriately, her husband was a carpenter. He died without a will in October 2002 before they could carry out their plans. When he died, the estate consisted of the parcel of land, the temporary shelter and some building materials. The father-in-law, who lived in the Eastern Cape some distance from Khayelitsha, intended to take the children and sell the property.

Tozama was concerned that her father-in-law would by customary law become the rightful guardian of her two daughters, 1-year old Anelisa and 8-year old Nonkululeko and that they would lose their home. The Magistrates' Court considered the question as to whether Mrs. Bhe and her husband were married, but the central determinant in giving the

⁵⁷ Womens' Legal Centre, *Annual Report (2003)* 3&4

estate and guardianship to the father-in-law was that these had to pass on to a male. The children were barred from inheritance because they were girls.

During her husband's final illness, her father-in-law told Mrs Bhe that she would have to leave her home. Threatened by homelessness and loss of her children, believing that she had a right to the house and to her children, she appealed to the Street Committee in Khayelitsha. The Committee responded favorably, but it was without formal authority and its sympathy had no effect.

After the Magistrates' Court decision, Tozama , accompanied by her brother, went to a local trauma centre in one of the community organizations. The social worker there telephoned WLC and arranged an appointment for Mrs Bhe.

On her first visit to WLC she was told, as she recalled, 'We want to help you. But your case is too hard'. What was hard was that there was no jurisprudence on which to build her case. WLC later that day telephoned her—she was staying at her sister's house where there was a telephone-- and asked her to come to the office. She didn't have the R 20 for transportation.

'They said " Borrow the money and when you come here, I will give you the money and you can pay back your sister" '.

She got to the office about four in the afternoon and it was after midnight before they were finished for the day. The WLC attorney took her back to Khayelitsha by taxi.

WLC was now representing Mrs Bhe and her daughters. Mrs Bhe's interest was in assuring the home for her daughters—at some point her father-in-law withdrew his insistence on taking the children. She was an applicant in the case in order to protect her children, who were minors. WLC launched an application to the Cape High Court within a week of the first meeting with Mrs Bhe.

WLC had two initial applications to prevent the land and house from being transferred, to prevent them from being evicted and to keep the hostile family member away. WLC structured the papers so that they could be amended to include the whole story with a detailed affidavit and an additional affidavit. The additional affidavit was from the chairperson of the Khayelitsha Street Committee. He said that had it been at his discretion and had he had the authority to make a ruling in regard to the deceased's estate, he would have found for the girls and not for the grandfather; and he thought that was consistent with the current practice.

WLC also brought a formal application, which the Court approved, to bring the Women's Legal Centre Trust in as an applicant in order to represent the public interest. Mrs Bhe's case was also a public interest case, O'Sullivan pointed out.

'She is also saying "I'm bringing this case on behalf of the people beyond me." The Women's Legal Centre Trust is intervening to say we're bringing this on behalf of everyone who is in the same position as Tozama, Anelisa and Nonkululeko, and we're bringing in our experience as the Women's Legal Centre over the years in trying to deal with estates of the deceased: these are the experiences we've had; these are the common difficulties that people experience. We're trying to bring in evidence beyond that of Analisa and Nonkululeko to demonstrate that there is a pattern; and we're trying to say that the impact of this is much broader than for just the number of people here. There are lots of people affected in all kinds of relationships-- polygamous wives, all kinds of families.

If anything happened or for whatever reason they couldn't proceed with the hearing, we could have gone on with the case as the Women's Legal Centre Trust'.

WLC was the fourth applicant in the *Bhe* case. Its interest and the interests of Tozama and her children were convergent.

'We were the lawyers for Tozama and her children and for the Women's Legal Centre Trust--that is, for ourselves, as well. They were all our clients and we had one set of submissions'.

The case went to the Cape High Court. The High Court declared the offending sections of the Black Administration Act unconstitutional and invalid; declared the

regulation regarding the distribution of estates of deceased blacks consequently invalid; and declared the offending section of the Intestate Succession Act also unconstitutional and invalid to the extent that it relates to section 23 of the Black Administration Act.⁵⁸

South African Human Rights Commission and Another v President of the Republic of South Africa and Another was another straight public interest case litigated on the same issues.⁵⁹ It broadened the scope of the constitutional challenge to cover all people who are potentially affected by S 23 of The Black Administration Act.

The Constitutional Court heard *Bhe*, *SAHRC*, and a third case, which also involved succession, at the same time.⁶⁰ The applicant in the third case, Charlotte Shibi, an African, sought to inherit the estate of her brother. The Magistrates' Court appointed the closest living male relatives, two cousins, as the heirs.

Almost two years passed between Tozama Bhe's first meeting at WLC and the Constitutional Court decision. The WLC attorney for the case recalled some of the many difficulties: One of girls was with the grandfather. Though he had dropped his guardianship claim, he refused to send his granddaughter back to Mrs Bhe. The WLC attorney arranged the return of the girl, raised money to cover her school fees, and provided for Christmas deliveries.

'[The Cape High Court] took four months. While our clients were living in this temporary dwelling made of corrugated iron—it leaked, the roof was collapsing... The Cape winters are terrible; there's flooding. The period of waiting was going into winter. We needed to know if we had to remove them to another place or if they were going to get a judgment so we could start building the house.

Eventually, I went to the other side and said, "Would you do a joint letter? We need a judgment because they are going to get flooded. We are talking about a 2- year old and a 9- year old. Let's ask

⁵⁸ Black Administration Act 38 of 1927, S 23

⁵⁹ *South African Human rights Commission and Another v President of the Republic of South Africa and Another* 2004 CCT49/03

⁶⁰ *Charlotte Shibi v Mantabene Freddy Sitole and Others* 2004 CCT 49/03

the Court when they are going to get the judgment". We wrote this letter and they gave the judgment quite soon after'.

The Cape High Court judgment was delivered on 25 September 2003 and the Constitutional Court's the following year , on 15 October 2004.

Through the two years that Tozama Bhe was represented by WLC attorneys, she said she was no longer 'scared' because 'I could see they want to help me'. If she despaired, her older child comforted her with the reminder that the WLC attorneys were working for her.

The Constitutional Court decision, she said,

'was not for me alone; they were fighting for all the other ladies. That's why I am so happy; and other people give me respect when they see me'.

O'Sullivan describes Tozama Bhe as an amazing woman, resourceful and incredibly strong. She is now training to be a sangoma—a witch doctor. When the Constitutional Court judgment was reported, there was a celebration at WLC.

We had a party and we sang Nandi Kuwe , happy birthday in Xhosa. The little one, the whole day, was singing Nandi Kuwe'.

After the judgment, WLC continued its work on extending inheritance rights to women. It sent a communication to all the Masters Offices and Magistrates' Courts advising them of the decision. Later it did a circular to the magistrates explaining the implications of the decision and offering assistance in implementing the decision.

'What does it mean for a property to be transferred? Does it mean the actual transfer in the deeds registry office? All these sorts of complex details are raised in that court order'.

O'Sullivan wrote a proposal for money to develop community radio stations and tapes in different African languages so that WLC could get the message out about the decision to people in rural areas where deceased estates are often resolved informally.

WLC is also trying to raise the money so that Tozama Bhe, who is now living with a neighbour, can build a permanent house for herself and her children.

(iii) Mrs Daniels

Juliega Daniels came to WLC in 1999 after unsuccessfully claiming the right to her house and the right to maintenance after her husband died without a will. She was represented by an ineffective legal aid lawyer —so ineffective that the Cape High Court judge told her if she managed to find lawyers who could raise her constitutional rights properly, she could come back to court.⁶¹

Mrs Daniels married Mogamat Amien Daniels in 1977. Because she was married only by Muslim rites, she was not recognized as a spouse under the Intestate Succession Act.⁶² Since she was not considered Mr Daniels' spouse, she was not entitled upon his death in 1994 to inherit his estate; nor was she entitled to maintenance under the Maintenance of Surviving Spouses Act.⁶³ The main asset of the estate was a house valued at less than R 50 000. She brought this asset in the form of a lease agreement into the marriage. Though irrelevant to the legal issues before the Court in her case, this perhaps added illumination to the injustice of being denied occupancy of the house which she had rented and in which she had lived for almost thirty years. She and her husband each had children by previous marriages and she and her children were living in her house when she married Mr Daniels. She was employed as a domestic worker, but supplemented that income by selling goods in front of this house, so that the house was also her business site. When she married Mr Daniels she informed the City of Cape Town of her marriage and submitted a copy of her marriage certificate. Mr Daniels was then given tenancy because it was the policy at the time to transfer ownership to the principal breadwinner.

⁶¹ Information from interview

⁶² Act 81 of 1987

⁶³ Act 27 of 1990

When the Cape High Court judged that she was not a spouse entitled to the estate or maintenance, she believed that she had exhausted all possibilities for advancing her claims and lost hope. Mrs Daniel's employer knew of WLC through a resource centre in Cape Town where she worked as a volunteer. The resource centre maintained a directory of available services and the organizations providing them. Among the organizations listed was WLC. She urged Juliega to seek WLC's help and assisted her in doing so.

Mrs Daniels came to WLC in 1999—five years after her husband had died. She met with an attorney who got the information needed about the case, explained WLC's purposes and told her the staff at WLC would talk about her situation. WLC decided to take her case. About two months later she met with O'Sullivan, whose case it now was. With her previous legal aid lawyer, she recalled.

'I felt nervous. I wasn't able to talk to him. But with the Women's Legal Centre I am able to speak, to take them into my trust and confidence. ...When I got to the Women's Legal Centre I felt I could hope again and that one day I am going to get it right'.

WLC had much to do before launching her case. First, WLC had to assure that the executor, lawyers and accountants were appointed. WLC went to work to get attorneys and auditors who would contribute their services to the respondents *pro bono*. This was necessary because without *pro bono* services there would be charges against the estate and the entire estate consisted only of the house. If she won the judgment, there might not have been anything left of the estate to inherit. There was another lengthy process to try to resolve the dispute informally. WLC attorneys met with those who stood to benefit under the laws as they then were. These were primarily adult children from Mr Daniels' former marriage. WLC's preliminary efforts were concluded in 2001. WLC proceeded to launch the proceedings in the Cape High Court.

WLC sought an order declaring that Juliega was Mr Daniels' spouse and his survivor. In the alternative, the WLC asked that the Acts be declared unconstitutional on the ground that they discriminated unfairly against Muslim marriages.

The Cape High Court decided the case in Mrs Daniels' favor in 2003. The decision went to the Constitutional Court for confirmation and in March 2004, the Constitutional Court held in Mrs Daniels' favor. The decision came nine years after the death of her husband.

Juliega Daniels is a small woman-- shy, diffident and uneducated (she signs documents with an X). But, she had believed she would 'get it right' and stayed the course once WLC charted it. As a consequence, she gained the right to inherit the house. But, before transferring the property to her there were and continue to be outstanding issues. There is an outstanding cost order from the first badly represented case. O'Sullivan explained.

'We don't want the situation where Juliega has the right to own the property but can't transfer it because of the cost order. The moment she transfers the property, the cost order will be executed'.

The cost order is in favor of her daughter-in-law. WLC will negotiate on Juliega's behalf for the daughter-in-law to leave once there is money to cover the cost order and also to cover relocation costs. The WLC is trying to raise this money. When Juliega expressed concern about how the daughter-in-law might spend the money, O'Sullivan assured her that they could stipulate in the agreement with the daughter-in-law some restrictions on the use of the money.

Mrs Daniels expresses appreciation to WLC – without it 'I wouldn't have known what more I could do'. The nine year struggle has cost her a lot, but now, she says, she feels she can stand.

'Everybody in my community is happy for me, but they understand that the case wasn't just for me. It was for other people, too'.

The people in her community understand, she said, that Islamic people who are married by Muslim rites did not have this right before. She has been on television and on the radio and interviewed for the newspapers. When she goes to work in the morning, they tease her on the bus because now she's a celebrity.

(e) Litigation record

O'Sullivan and the Trustees are clear that WLC's interest is in quality, rather than quantity. Committed to quality, it has, nevertheless, advanced a significant number of cases. From 1999 through 2003, WLC litigated almost 60 cases. In the following year it litigated an additional seven. WLC invested a good deal of time in additional cases that were settled or, for a variety of other reasons, did not move forward, and in cases it decided not to take. It reached the Constitutional Court in seven cases in the period from 1999 to 2003.⁶⁴

In five of the seven cases, the Constitutional Court handed down favorable, ground-breaking decisions. The Court in:

Bhe and *South Africa Human Rights Commission*, which were heard together, invalidated the Customary Law rule of primogeniture.

Daniels held that women married under Muslim rites are spouses entitled to inheritance under the Intestate Succession Act.

Moise invalidated the 90-day notice requirement in claims against the state as an infringement on the right of access to courts. The case involved a father's action on behalf of

⁶⁴ *Bhe supra* n50; *Daniels supra* n53; *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici curiae)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC);

Moise v Greater Germiston Transitional Local Council 2001 (4) SA 1288 (CC); 2001 CCT 54/00; *Moseneke and Others v Master of the High Court* 2000 CCT51/00; *Robinson & Another v Volks NO & Others* 2004 (2) ALL SA 60 (C) ; and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2004 CCT49/03

his minor daughter who had been injured when boarding a municipal bus. He sought damages. WLC was the only respondent, other than the State, to the Constitutional Court's call for interested parties to make submissions.

Moseneke invalidated Section 23(7) of the Black Administration Act and Regulation 3 (1), based on WLC's argument that subsequent legislation was more protective of the rights of African women.⁶⁵

In *Robinson* the Cape High Court ruled that the provisions of the Maintenance of Surviving Spouses Act which precluded the surviving domestic partner from obtaining maintenance was unconstitutional.⁶⁶ The Constitutional Court in February 2005 decided not to confirm this decision.⁶⁷ *Robinson* and *Jordan* which upheld the criminalization of sex work, are WLC's two unfavorable Constitutional Court decisions.

WLC's record in a larger number of cases that were concluded in the Supreme Court of Appeal, the Labour Court of Appeal, High Court and other tribunals mirrors its record of success in the Constitutional Court:

State v Abrahams Cape Magistrates' Court increased, on appeal, a minimal sentence handed down in a rape conviction because the accuser was the rapist's 14 year old daughter.⁶⁸

Dada v Minister of Home Affairs reversed the refusal to register a marriage without the husband being present. WLC's client wanted to register the marriage in order to be able to divorce her abusive husband.⁶⁹

⁶⁵ Black Administration Act, Act 38 of 1927

⁶⁶ Act 27 of 1990

⁶⁷ *Volks NO v Robinson and others* 2005 CCT12/04

⁶⁸ 2002(1)SALR 116 (SCA)

Anita Ferreira supported Ferreira's position that her husband's abuse constituted substantial and compelling circumstances sufficient to justify a lesser sentence than the life imprisonment imposed on her for killing him.⁷⁰

State v Krause struck down the requirement that a Magistrate in a sexual offenses case was not competent to hear the case because she didn't have an LLB degree. As a result, women in many cases in Wynberg Sexual Offences Court did not have to go through the trauma of testifying again.⁷¹

Bongiwe Ntsabo, in which the Labour Court accepted Ntsabo's claim of sexual assault, constructive dismissal and damages when her employer failed to take action after she told him of sexual harassment by her supervisor. The Labour Court acknowledged an employer's liability in sexual harassment.⁷²

Phindile Queen Sikhosana and others held that a tribal court does not have jurisdiction to hear matters involving the dissolution of a customary marriage. The client moved out of her home because her husband was abusive. The tribal court held she dissolved the marriage when she moved out and ordered her to forfeit the house and the custody of her child. The High Court ruling aligned customary practices with new legislation recognising customary marriages and helped protect women from arbitrary tribal court jurisdiction.⁷³

⁶⁹ WLC position accepted in terms of agreement reached with Department of Justice and Constitutional Development and Department of Home Affairs ; WLC did not proceed further in court

⁷⁰ *Ferreira and others v State* SCA (2004) 245/03

⁷¹ 2001(2)SALR 506(1)

⁷² CC(2004) 1 BLLR 58 (LC)

⁷³ Not reported

Marie Stopes v African Christian Action Group successfully opposed a complaint on appeal that a clinic's advertisements of safe terminations of pregnancy are misleading and offensive.⁷⁴

Van Eeden held there is state duty of care toward women who are survivors of sexual violence when the violence is a direct result of the state's negligence.⁷⁵

Esme van Zijl v Hoogenhout held that the clock starts ticking for purposes of bringing a complaint of childhood sexual abuse when the adult realizes the connection between the abuse and the damaging consequences in her life.⁷⁶

When Parliament fails to reform the laws,

'it is imperative that we persuade courts in appropriate circumstances that they should decide the issue before them and shouldn't wait for law reform'.⁷⁷

WLC has succeeded in persuading the courts.

(2) *Duty queries and other direct services*

Women telephoned or came to the WLC offices once they were established asking for help with their gender-related legal problems. In 2000, the WLC received 498 such requests—referred to at WLC as duty queries.⁷⁸ The numbers grew—in 2001 they were up by almost 50%.⁷⁹ WLC saw the value added by the duty queries to its advocacy efforts and configured its computer system to capture this information.⁸⁰ The following year, WLC created a permanent position for responding to the duty queries.⁸¹ Previously, handling duty

⁷⁴ *African Christian Action Group v Marie Stopes*

⁷⁵ *Van Eeden (2002)4 All SA (SCA)*

⁷⁶ SCA (2004) 348/2003

⁷⁷ Women's Legal Centre *Annual Report* (2003) 4

⁷⁸ *Ibid*

⁷⁹ *Ibid* 2001) 6

⁸⁰ *Ibid*

⁸¹ The Women's Legal Centre *News* (January-June 2002) 3

queries was incorporated into an attorney's job description. By the end of 2003, WLC had dealt with almost 3100 of these requests.⁸²

Most of the inquiries were referrals from other organizations and did not fall within WLC's litigation priorities. When there is an inquiry, the procedure starts with a meeting between the legal advisor and the applicant. The legal advisor listens to the woman's problem. If she determines that the problem is not one with which WLC will assist, she refers the woman to an appropriate agency or court or to a *pro bono* attorney when possible, or tells her WLC cannot help. The law societies require that attorneys give *pro bono* service each year. WLC will try to use that requirement to help the duty query women it cannot assist.

When the problem falls within an area that WLC wants to litigate, the legal adviser, who is familiar with WLC's priorities through her participation in the monthly staff meetings, consults with a staff attorney. If it doesn't appear promising as a test case, she and the attorney may try to assist without litigating. For example, one duty query involved a domestic partnership maintenance claim that was in Magistrates' Court. WLC had already identified a girl friend's right to maintenance as a matter it wanted to advance. This query came from a woman who had a twelve-year domestic relationship, during which she and her partner had a child. He encouraged her to stay at home and not work. He left her, after which she put in a maintenance claim for herself and the child. The Court responded that girl friends are not entitled to maintenance. A WLC attorney wrote the Court stating why WLC believes the Maintenance Act does cover this woman's claim. If the response is negative, WLC might still decide to take it to the High Court.⁸³ Or, it might end there. Attorneys do from time to time take on cases that have no impact because they want to help a woman who is, as one attorney expressed it, 'at her wit's end, at the end of the road with nowhere else to

⁸² Women's Legal Centre *Annual Report* (2003) 4

⁸³ Speech delivered in Moscow, Russia op cit n52

go'. The issue she brings is not ground breaking but the attorney believes it can be resolved with a small investment of time.

WLC, through its duty queries, provides a direct service. Duty queries serve WLC, as well. They provide useful advocacy data and whether by intent or not, the duty query service, like close collaboration with women's organizations, helps keep WLC in direct touch with the realities in the lives of the women whom it is dedicated to help.

More recently WLC provided another direct service. Working with the Treatment Action Campaign (TAC), it held a draft- a- will day in Kayelitsha, a township where TAC is well known. Through the law society, WLC recruited attorneys to work *pro bono*, oriented them as to the law, and set up computers at a community hall. WLC advertised in the community newspaper, distributed posters and flyers all over Khayelitsha and appeared on radio programs.⁸⁴ Following the rule of parsimony where every action must produce more than one result, WLC in providing a service was tightening its bond with TAC and, in addition, activating the profession.

(3) Advocacy .

The second strategy announced at WLC's founding was to be advocacy. Effective advocacy is, as one Trustee summarized, 'a lot about your network; it's a lot about whom you know'. The pre-WLC experience of O'Sullivan and the Trustees enabled them from the outset to approach executive office holders and members of Parliament. Their approaches were impressively successful. One of their early successes was

⁸⁴ The Women's Legal Centre *News* (Vol 8 2000) p

‘ in persuading Parliament not to introduce regulations on notification of HIV/AIDS. Karrisha Pillay, one of our Trustees, and I worked on that. We had just come through the constitutional assembly process. We worked very closely with members of Parliament, and two years before that I had worked in Parliament, with several ministers in government. So, at that stage we still had access’.

WLC used advocacy in relation to regulations and legislation. They did so in coordination with their litigation efforts. WLC integrated these two strategies around the issues it had selected to advance.

Advocacy could be a first step that might make litigation unnecessary; or, if necessary, the advocacy efforts could enable WLC to claim in court that it had exhausted the possibilities of administrative or legislative remedies. If a litigation challenge to legislation were successful on constitutional grounds and if the Court mandated Parliament to enact new legislation, then WLC would hope to assist in shaping the new legislation. ‘It is often essential’, O’Sullivan noted in a talk in Russia, ‘to put as much energy into the development of the new legislation...that follows the case as [into] the case itself’.⁸⁵

When Parliament has not enacted desired legislation, judgments in successful cases can advance the enactment of new law. The intent, when that happens, is that WLC would help guide the legislation’s development. When the law reform energy evident in the first years of the new government flagged year after year, as it did regarding customary law reforms, WLC developed a litigation strategy. It wanted to bring a number of cases to court. It sought to get the court to declare the existing legislation governing customary inheritance invalid on constitutional grounds, and to mandate a time frame for a new law. At the same time, it was bringing cases that sought to develop customary law rules concerning inheritance to provide guidance for developing the new law.⁸⁶

⁸⁵ Speech delivered in Moscow, Russia op cit 8 n 52

⁸⁶ *Ibid* 11

These are approaches for litigation to assist advocacy. But when the case outcome is undesirable, the decision can then obstruct effective advocacy. This happened following the *Jordan* decision, in which the Constitutional Court held the provisions of the Sexual Offences Act which criminalized sex work to be constitutional.⁸⁷ According to a SWEAT spokesperson, the decision has made it more difficult to amend the Act, and its effect, in addition, has been to encourage police harassment of sex workers.

An examination of WLC annual reports reveals the range of issues and advocacy methods adopted. A look at just its first year shows it took initiatives to oppose discriminatory mandatory requirements that family and care givers be notified when persons are diagnosed with AIDS. It dealt with issues of equality; Muslim personal law; and African customary law regulations. It worked with other organizations, including Socio Economic Rights Project at the Community Law Centre of the University of the Western Cape, the Equality Alliance, the Community Law Centre, and the Legal Resources Centre. It commented on regulations, drafted or assisted in drafting submissions and briefed Advocates in the preparation of their submissions. It presented written and/or oral submissions to the ANC Study Group on Health, to the Portfolio Committee on Health in Parliament's National Assembly; as part of the Equality Alliance, to the Equality Legislation Drafting Unit, to the Department of Justice, and to the South African Law Commission Project Committee dealing with Muslim Personal Law. It initiated an inquiry into the skewed gender representation on the Law Commission's Muslim Personal Law Committee – there were two women and eight men and requested that the under-representation of women be remedied.⁸⁸ This was WLC's record in but its first year.

⁸⁷ *Supra* n64

⁸⁸ Women's Legal Centre *Annual Report* 10-13

It's advocacy increased in the following years, as did the number of organizations with which it collaborated. The strategic plan adopted after concluding its fifth year provides evidence that advocacy has been well established as an ongoing strategy. The plan for its advocacy agenda lists commitments to:

- monitor, participate in deliberations and assist in developing regulations regarding the Sexual Offences Act;
- seek amendments to the Recognition of Customary Marriages Act;
- develop a Code of Good Practice in handling sexual harassment complaints; and
- comment on South African Law Reform Commission papers, if released, on Muslim Personal Law, Domestic Partnerships and Sex work if released.⁸⁹

(4) Information and education strategy

(a) Integration with litigation and advocacy

WLC's 1999 Annual Report reveals the interconnections among litigation, advocacy and education characteristic of WLC's efforts toward advancing women's rights. It reports on a seminar which it hosted and for which it prepared a discussion paper. The seminar focused on the gender implications of the Recognition of Muslim Personal Law, a subject which WLC had targeted for litigation and advocacy.⁹⁰

(b) Conferences, workshops, seminars, presentations and community outreach

WLC during its first year tried to reach an audience larger than that reached through litigation and direct advocacy. But after completing its first year, the importance of outreach broke the barrier from implicit assumption that it was worthwhile to conscious awareness of its importance. It became a third category of activity. WLC's public interest strategy, referred to here as a public information and education strategy, was added to litigation and

⁸⁹ *Supra* n48 np

⁹⁰ *Loc cit* 11

advocacy. It included systematic and more frequent media contacts, workshops, seminars, conferences, publications, and training.

Its Annual Report for 2001 showed that WLC had :

- offered alone or in cooperation with another organization eight workshops and seminars that dealt with issues such as violence against women, discriminatory practices against women farm workers, domestic partnerships, public interest gender litigation,

Recognition of Customary Marriages Act, and sexual harassment.;

- offered training that included a program for aspirant judges regarding women who kill abusive partners;

- offered a pilot project for police officers on domestic violence, and a program for para legals on gender issues;

- made presentations at twenty conferences, meetings and courses—one of the presentations was to women factory workers on Muslim personal law and domestic violence and another to female members of the South African Defence Force on domestic violence and maintenance laws;

- participated in the meetings of six other organizations;

- attended an additional nineteen meetings; and

- published, in addition to its bi-annual newsletters and annual reports, eleven articles.⁹¹

The 2001 record illustrates WLC's commitment to reach the audiences of other organizations and to reach people who themselves are directly affected by women's rights issues. WLC went out to communities to meet and talk with the people about the latest rights they have succeeded to advance. It published a pamphlet on women's rights in matters of domestic violence. The pamphlet, *Legal Letta*, demonstrates WLC efforts to assure

⁹¹ *Loc cit* 10& 11

information accessibility. The pamphlet provides a step-by-step narrative told through photographed women whose words are captured, cartoon style, in balloons.⁹²

WLC has also tried to reach and educate lawyers, judges and those involved in implementing laws. One of its 2001 education efforts was a pilot training course on gender litigation, the purpose of which was to develop public interest litigation skills. In attendance were about twenty-five specialists, most of whom were women lawyers. Among the topics covered in the two-day program were equality litigation, jurisprudence regarding unfair discrimination in employment, social and economic rights, *amicus* and other forms of intervention, and exclusion of domestic and seasonal workers from unemployment insurance coverage.⁹³ This outreach continued in the following years; for example, WLC presented a paper on pregnancy-based employment discrimination to the South African Association of Labour Lawyers and a paper on the sex worker industry at the annual Labour Law Conference.⁹⁴

(c) *Media and direct dissemination*

WLC's media releases, and subsequent coverage by newspapers, magazines, radio and television are extensive. One WLC attorney pointed out

'Every single one of our cases makes front page news, gets on every radio station across the country, gets on the television news, the evening news'.

That WLC cases push against the boundaries of existing law is her explanation of the media coverage obtained. The importance of substance is not, however, sufficient. What does lead to coverage are the care given to each press release to assure that it contains the kind of information the media want and can use, and a significant number of established and maintained relationships with people in the print and electronic media. WLC assures that the

⁹² *Loc cit* published 2002 with funds from an award given WLC

⁹³ The Women's Legal Centre *News* (July-December 2001) 7 & 8

⁹⁴ *Ibid* (July- December 2002) 11 & 14

media get the information at the moment it is news. Press releases are sent out the day before the case is decided or on the day of the judgment. "That makes a huge difference".

WLC does not confine itself to mass media for communication. It disseminates information directly to targeted audiences. It tries to send out a summary of each decision to interested parties. For example, after a Constitutional Court decision regarding traditional law, WLC sent a message about the decision to all traditional leaders in South Africa.

All of WLC's reports and submissions are available on its web site, launched in 2000. WLC welcomes people to use its library at the Centre's Resource Room. The same year the web site was launched, WLC initiated a biannual Amazon Award, recognizing individuals who are fighting 'to protect women's rights and to build a South Africa where women's access to justice is a reality'.⁹⁵ The first person honored was Investigating Officer Roux who works at the Atlantis Police Station. He was honored

'for being genuinely interested in and caring about solving a rape case and doing all he could to ensure that the case would be thoroughly finalized'.⁹⁶

Subsequent award winners have all been women. Among them have been Barbara Rass, who runs a shelter for battered women in Atlantis; Gwen Phillip from Macassar Maintenance Forum, 'who assists others to realize their maintenance rights'; and Joanie Fredericks of the Sexual Harassment Education Project for her service to women in rural areas.⁹⁷ The Amazon Award winners collectively suggest WLC is in touch with community-based women who are working to advance women's rights.

(d) Beyond South Africa

⁹⁵ *Ibid* (January-June 2000) 8

⁹⁶ *Ibid*

⁹⁷ *Ibid* (July – December 2000) 12, (July- December 2001) 12, (July- December 2002) 12

WLC's outreach extends beyond the Republic of South Africa. WLC has developed knowledge, skills and strategies from which organizations in other African countries want to benefit. Organizations have invited WLC attorneys to teach what they have learned. The Legal Assistance Centre Namibia invited WLC attorneys to their conference which was called to inform the Namibian legal process in its drafting of a domestic violence act.⁹⁸ Attendees included Namibian parliamentarians, NGO representatives, and members of the Namibian Law Commission.⁹⁹ The African Partnership for Sexual and Reproductive Health and Rights invited WLC attorneys to make presentations at their retreat, attended by participants from all over Africa. In Uganda, the WLC taught a five-day course to women from three African countries, most of whom were lawyers, on the gender litigation that it had piloted in South Africa.¹⁰⁰ Regional engagements such as these have led to relationships and partnerships and the formation of an African network of organizations.¹⁰¹

VI RECORD SUMMARIZED

WLC over its first five years pursued a strategic approach to advancing women's rights that integrated litigation with 'alternative lawyering' activities. Litigation, advocacy, collaboration and cooperation with other organizations, legal advice, assistance to government agencies and parliamentary committees, education, and information dissemination were purposefully intertwined. Each added strength and increased the likelihood of achieving substantive goals. Its record shows, too, that WLC took on a substantial number of issues significant to women, was successful with a good number of them in its advocacy and litigation efforts, and achieved a broad geographic and demographic reach.

⁹⁸ Act 116 of 1998

⁹⁹ The Women's Legal Centre *News* (July- December 2001) 8

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid* (January – June 2001) 1

WLC's record exceeds the expectations of its founders, of those who later became Trustees and of its launching funder-- which considers WLC its flagship program. That WLC has advanced the cause of women's rights the way it has, in the words of Trustees, is 'phenomenal,' 'extraordinary,' 'fantastic,' 'outstanding,' 'amazing.' One Trustee remarked that had WLC only won the *Bhe* case, it would have been satisfaction enough.

'That a 4- year old boy could inherit and an adult woman could not has been an issue ever since I was in law school. The highest court has finally changed that because of WLC'.

One Trustee even saw the Court's rejection of WLC's arguments in *Jordan* as an achievement because it showed incredible 'guts' to have gotten involved in the case. 'WLC gets 50% for just having the determination and willingness to do it', and O'Sullivan pointed out there was more media coverage of *Jordan* than of any other of its cases and that the coverage was critical of the Constitutional Court's decision.

WLC's record has been achieved despite what could be dispositively discouraging difficulties, some of which come from the women whom WLC serves. Clients, as one attorney expressed it, 'bring a whole lot of negativity'. Many come having been scarred by abuse and poverty and already distrustful of the legal system. The attorneys witness their clients' pain and suffering and 'it is damaging to watch'; and, as Tozama Bhe and Juliega Daniels illustrate, clients' stressful non-legal problems are woven into their legal problems. It is common for clients not to keep appointments

'They disappear. They don't have telephones; they don't have money to phone that they are not coming; they don't have money for transportation. Most of my clients get lost—not forever, but for periods.'

The scope and magnitude of the injustices with which WLC deals is also discouraging. Facts about employment, housing, available medical services, violence, new HIV/AIDS infections reported by gender bear down heavily. The evidence that the socio-economic realities of

women's lives have not improved since 1994 does make it sometimes feel 'like sweeping an ocean with a broom'.¹⁰² .

Government delays and inaction-- resulting not from inertia but from the complications of opposing interests and political priorities, also carry 'a whole lot of negativity'. One of the issues which WLC took to court, after working hard to get parliamentary action, involved the requirement that a husband be present to register a marriage. One of the Trustees recalled:

'Women MPs said "We can't do anything. The ANC is going to push through the traditional leadership bill, period--before they even look at issues related to women, before they look at inheritance, before they look at customary law." This was before the election and obviously they wanted the support of the traditional leaders and their communities. The few voices of reason inside are struggling against a sea of patriarchy and it comes across as not caring.'

One of South Africa's important NGO funders sees signs of indifference and even hostility to civil society demands and predicts an increase in government inaction.

'The government [now] considers all that [civil society] "chirping" to be unpatriotic. In the first five years, nation building was very strong. Civil society went in to help set up the new democracy, and a lot of civil society people also took government jobs. There was a receptivity in government. The honeymoon period with government is over'.

Despite these discouraging realities, WLC's attorneys are pleased to be where they are. One attorney expressed what all had differently indicated:

It is an amazing opportunity to be part of law reform... It's an immense honor and equally immensely humbling It reminds me of the value of being human and the power of humanity... There is that sense of collective conscience. And then there's the courage of our clients. Being at the Women's Legal Centre continues to be extremely valuable and full of frustration—but positive. I wouldn't want to be anywhere else.'

¹⁰² C Albertyn and S Hassim, Draft of article, 'The boundaries of democracy:gender, HIV/AIDS and culture' (2004) 14-5. .

The shared pride is not self-centered. It grows from the belief that WLC's striving is 'for the country' and 'for all those women out there who have nowhere else to turn'.

VII IMPACT

The staff and trustees, while proud of WLC's record, are aware that their successes bring restricted benefits. 'You succeed in making changes in duty of care in the police service in one area, but it hasn't changed in the next'. 'People keep coming back and are saying "I'm not benefiting"'. 'I ask myself "What am I doing here? What am I celebrating?"

'Victory has been won in court but these people are still living under the same circumstances. If you get someone a piece of land, unless the person knows how to cultivate it, knows how to make it economically viable [nothing has changed]'.

The discrepancy between the legal principles won and the reality of women's lives is troubling. 'We struggle with this all the time'. For many it leads, at times, to questioning the impact of their achievements. But, there are sustaining beliefs. The WLC attorney who said her efforts sometimes feel like 'sweeping the ocean with a broom' also spoke about the inspiration she gets from 'the vision of social justice', from the belief that 'another world is possible if you keep on doing the work'.

Another sustaining belief is WLC's foundation credo that law is important. 'I am one of those people," a Trustee stated,

' who has an undying faith in what we can do through the law. . . . I have faith in what can be effected through the rule of law'.

It is a faith shared by her WLC associates, all of whom are encouraged when they consider the 'huge impact' a favorable decision can have. Constitutional Court decisions affect future court decisions, but they also have a multiplying affect when they enable WLC to go to Parliament and to administrative agencies to make changes. WLC's efforts also have an

impact on other organizations working to advance women's rights. 'It has made the environment more favorable for them to do their work, for them to do a better job'.

WLC's favorable self-assessment is shared by others. Saras Jagwanth points to 'how effectively [WLC has] used the courts as an avenue to further women's rights. Particularly in a country like South Africa where access to justice is so limited for so many, ... the WLC [has] been crucial in ... facilitating access to justice for many women; ... bringing strategic cases on gender equality to the courts, thereby building a body of women's rights jurisprudence which has been important for understanding the scope and ambit of constitutional rights of women ; and... using the courts and building the legal system as an important new site of struggle for women's rights - a function often normally reserved for the elected branches of government in democracies.

In simple terms, I think many cases would ...never have made it to the courts had the WLC not been around. So they have helped women (who lack the resources) get to the courts and simultaneously helped build an important body of law and jurisprudence for lawyers, activists and academics alike on women's rights in South Africa'.¹⁰³

Jagwanth added that WLC has been an important source of law and jurisprudence for courts in other parts of the world, as well.¹⁰⁴

WLC has ensured, in Penelope Andrews' assessment, 'that there is an ongoing dialogue about women's equality in South Africa.... In so doing it reinforces the hard-fought for notion that the quest for sexual equality is of the same urgency as the quest for racial equality. WLC has ensured... that the project of women's equality remains central to the transformation project in South Africa.

In its litigation [it]...has strategically intervened to influence the courts, particularly the Constitutional Court, in generating a substantive equality that will comprehensively alter the lives of black women.'¹⁰⁵

It is appropriate here to reiterate that WLC is the only civil society organization in the Republic of South Africa carrying out its integrated strategy of public interest litigation,

¹⁰³ E-mail correspondence (11 January 2005)

¹⁰⁴ *Ibid*

¹⁰⁵ E-mail correspondence (21 February 2005)

public policy advocacy and public information on behalf of women's rights, and to report the assessment of a major funder in South Africa that WLC is helping to consolidate law reform and to build democracy.

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