South Africa: Fighting for gender equality

Wednesday 1 November 2006, by MANJOO Rashida, SURIN Jacqueline Ann (Date first published: 12 October 2006).

Interview with WLUML networker Rashida Manjoo about her experiences of the Gender Equality Commission of South Africa, conducted during the recent conference in Malaysia on 'Mechanisms and Legislation to Promote and Protect Gender Equality'. (the Sun - Malaysia)

When South Africa became a new democracy in 1994, it set out to develop a non-racist and non-sexist society. Among others, the state set up a Gender Equality Commission to promote and protect women's rights and gender equality.

In August, at the Mechanisms and Legislation to Promote and Protect Gender Equality International Conference in Petaling Jaya, Penang-based Women's Crisis Centre tabled a proposal for a Gender Discrimination Act, that includes the setting up of a Gender Discrimination Commission, for Malaysia. JACQUELINE ANN SURIN speaks with Dr Rashida Manjoo on the sidelines of the conference about the experiences of the Gender Equality Commission of South Africa.

theSun: Why did South Africa decide to set up a Commission on Gender Equality?

Rashida: I think there were two reasons, largely. One was, we had come out of a very oppressive, discriminatory system, broadly, and the notion of democracy was completely new to this country. So, what we set up in the Constitution, in Chapter 9. are six state institutions that will assist in strengthening democracy. It is one way that the government recognises that, in an emerging democracy, you need structures and mechanisms that will help to strengthen democracy. The six institutions included a separate Human Rights Commission and a separate Gender Equality Commission (the others are the Public Protector, the Auditor-General, the Electoral Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities).

The reason for the separate gender commission is, there was recognition that the struggle from gender oppression in South Africa had taken a secondary role during the struggle for liberation from racial oppression. So, in as much as there was awareness about the intersectionality of race, gender and class, the biggest struggle that people engaged in was to try and get rid of racial oppression. And so, the recognition that gender had been on the backburner meant that we needed special mechanisms and measures to ensure that we could deal with the systemic, structural problems of gender discrimination and inequality in a specialised way.

The other reason was that in many countries, gender equality and women's human rights get marginalised in mainstream human rights commissions. Also, the international framework, including the Beijing POA (Platform of Action) recommended that specialised gender machinery at a domestic level is a good way for countries to go - to ensure the promotion and protection of gender equality and women's human rights. This was the debate in the UN, from a while back. From about 1975, there have been discussions about mechanisms and structures to promote and protect women's rights and eventually in 1995 you have the Beijing Platform of Action (adopted at the 1995 Fourth

World Conference on Women in Beijing). Gender mainstreaming at a UN level was also encouraged and promoted through different policies.

So, it's a twin-track approach, where although you mainstream gender equality, you also realise that there are certain violations and obstacles that women face. Hence, you need to look at women-specific initiatives, but you also need to look at gender mainstreaming initiatives.

South Africa was part of those larger international debates that were going on. The women of South Africa throughout the process of drafting a Women's Charter for Effective Equality (produced in 1994) spelt out demands of what they wanted in a new democracy. Recognising that they needed formal equality but also substantive equality, they included socio-economic rights issues to be dealt with. There was also a recognition that a Women's Charter is an aspirational document: in an ideal world, these rights are what we would like all women to have access to. But in terms of formalisation, one needed laws, policies, structures, mechanisms. And so, we pushed for the establishment of a separate Gender Commission (which we got).

Taking advantage of a very fluid political negotiation period we were able to push for the structure to be an independent structure which is an organ of state, but independent of the state. It has the same independence as the judiciary which really helps in terms of oversight and accountability. The commission tries to be effective at holding both government and the private sector accountable.

How has it helped in real ways address issues of gender discrimination?

The Gender Commission has a sort of four-pronged approach which includes public education and training, legal interventions in court, parliamentary submissions and research.

First, public education is targetting groups and individuals for training, but also using the different media to do training and education. This ranges from development of posters, to radio and television participation on different issues, to engagement with media entities. The commission is visible in the media, around cases that come up, for example, sexist adverts, and gives its opinion on such adverts.

Second, our legal department has engaged in litigation. So, besides advising clients on cases that come to us on an individual basis, we also track whether it is a systemic problem. Is this a problem that we've seen a large enough number that warrants a bigger enquiry? So, for the commission, it's one way of identifying what are the deeper systemic problems in society that arise out of individual cases.

Also, we've taken part in litigation in court where we've been able to bring to the court's notice, particularly in amicus interventions (i.e. as a friend of the court) information that's not necessarily within the knowledge or the purview of the court. And as an independent body, the courts have been really receptive to hearing us, and have thanked us for bringing that perspective to the court's notice. We are not taking the side of either litigant in this instance - but we come in with the perspective of, 'Here's the reality that the court doesn't necessarily know about'. It doesn't influence the court one way or the other. It's just another body of knowledge that's accessible to the courts.

The third thing we do is we keep track of legislation in Parliament to make sure that it meets our international and domestic obligations in terms of women's rights and gender equality. The Parliamentary submission process also helps us to get the voices of communities that Parliament doesn't necessarily see or hear, into a submission. So, we do that by holding workshops on draft legislation in communities, educating the communities as to what this particular legislation means, getting their input, putting their input into the submission, and tabling that in Parliament.

Due to limited resources, you're not able to target everyone in the country. So, we look at a piece of

legislation and see which community it will impact on the most. And we would then go in and do workshops in provinces where (these communities predominate).

The South African state post-democracy, considers that we have a participatory democracy, and participatory democracy means the hearing the voices of the people, it has to be a peoples' Parliament. And that Parliament needs to do more about attracting those voices into Parliament. But, as we know, Parliament sits in one city of the country and people don't necessarily have access. So, the commission has contributed to getting those voices into Parliament via submissions.

The fourth thing we do is research. And the research would emanate either because we see a pattern of systemic problems coming through from the individual complaints or we've identified that there's a lacuna in the law, or someone has said to us, 'We think this area needs to be investigated.'

Research reports are very useful for the commission itself to figure out, whether the problem is in the law, or in the implementation of the law, or, is the problem lack of training or skills for people who are supposed to be implementing the law. And then, we're able to make inputs or recommendations to whatever the forum is. Research also helps civil society, because they don't necessarily have resources to be doing the kind of research we do. So it helps civil society with information to have someone do relevant research reports. But it also helps Parliament as they do not necessarily have the resources to be doing this research.

And so, our research agenda has been pretty extensive because we realise the widespread contribution it makes and of course, you know, the inadvertent consequences of such research is that you get local students, foreign scholars etc accessing it. We put our research reports on our website so that it's accessible to people. We also put our submissions to Parliament on the website so people can access our views. The use of technology to spread this knowledge is an excellent resource.

Lastly, in terms of our work, we recognised that we need a presence in all provinces. We need to be visible because there's no point having a structure that sits in one city that people around the country can't access. So, in terms of our work, we realised, partly work reasons, partly visibility, legitimacy, credibility issues that if you want to be in touch with local issues, you ought to have your foot on local soil. So, progressively, over the years, we pushed and managed to get extra funding every year from government to set up offices in each province. So, I think at the moment, we have offices now almost set up in all nine provinces of the country, including a separate central head office.

But, it's been a nine-year process and it hasn't been easy. I think that there is a recognition by government that it's important for these structures to be there for the community to know not only in theory that we have a Human Rights Commission, a Gender Commission, etc, but to know in practice there is this office, that it is present at a provisional level.

You mentioned in your presentation earlier (during the conference) that the right to equality in the South African Constitution trumps the right to culture, tradition and religion?

No. It's not in the Constitution.

The Constitution doesn't create a hierarchy of rights. But the courts have interpreted the right to equality as trumping other rights.

Thanks for that clarification. How has the commission dealt with issues of cultural rights

when they end up in discrimination against women?

If we have individual complaints, then we go through the whole investigation process within the commission, and conciliate, mediate or we refer the matter to court.

For example, we had one case where under African customary law, because of the primogeniture rule (i.e. inheritance down the male line), a woman could not inherit either property or title of chieftainship. And so, we realised that that's not something we could successfully conciliate or mediate and the tribes did not want to give way on this issue of succession to title for women.

So, we helped this woman to go to court, to get a court to decide on the discrimination and the remedy. We couldn't come up with a remedy through mediation that could be enforced. And so, that case went to court. That's one example where we intervened in a cultural issue through a legal intervention process.

The other way we've intervened is through a parliamentary process where the practice of virginity-testing became a huge, visible problem. And it seemed as if the rates were rising as well, and the practice was being flouted as a cultural practice. And so, we did an investigation around virginity-testing and we knew that part of the visibility and the manifestation was due to the HIV/AIDS epidemic.

So, we found an opportunity when the Children's Bill was tabled in Parliament. We approached the committee in Parliament that was dealing with it to ask them whether they had considered criminalising practices like female genital mutilation, virginity-testing, etc. We assisted in drafting a clause which outlawed discriminatory and harmful practices like female genital mutilation and virgin-testing. And it was highly contentious once people found out that we were asking for this. But, strategically, we tried not to use emotive language like, 'harmful and degrading cultural practices', because we realise that culture, tradition, religion are very important to peoples' identities in the country.

But, what we argued was that it is non-negotiable in our Constitution (in Section 28) which entrenches the best interests of the child - that deals with rights of children. And so, we were able to use 'the best interests of the child' to argue that the legislature had a duty to actually act on practices which violate the dignity, privacy, equality rights (because it is girl children who are being tested for virginity).

The draft law passed the first house of Parliament, then we saw sensational media coverage and of course, all sorts of groups came up and argued that it was an interference with culture. Fortunately, the second house of Parliament also passed the bill. So there is now a provision in the Children's Bill which criminalises virginity-testing for children under the age of 16. Between 16 and 18, testing is subject to informed consent.

So, you know, it's one, sort of, small victory of using the parliamentary process in the area of culture.

Also, we have intervened in a Constitutional Court case, the Bhe case, which concerned the right of two young girls to inheritance of property belonging to their father. We intervened as an amicus, as a friend of the court, to argue that the primogeniture rule was discriminatory, that we felt that the Constitutional Court had a duty to try and develop customary law to bring it in line with the Constitution (because customary law is important to peoples' identities). People live under these systems. People subscribe to these systems. How do we recognise but also reform these systems? And we felt that the court had a role. Unfortunately, the court felt that it was too difficult in this

instance to develop customary law. We're hoping next time that, you know, there is a case concerning culture, that the court applies its mind and develops it in a way (that brings customary laws in line with the Constitution).

But, what the court was very good about this time was that it recognised that the rule of primogeniture was un-Constitutional but it also recognised that we had a system of polygamy, so applying the civil law of intestate succession to inheritance would not take care of all the wives in a marriage. So, in its judgment, although it says the civil law would apply to future estates where customary law applies and where there is no will, there was a recognition that it needed to take into account polygamy, which is not necessarily addressed in civil law.

Which brings me to my next question as well about syariah laws and the perceived incompatibility of Muslim practices such as polygamy with gender equality? How has the commission tried to address these issues then?

At the moment in South Africa, we don't have legislation dealing with Muslim personal law. The Law Reform Commission finalised a report and a draft bill, about two years ago, and handed it to the Minister of Justice. The gap in the law is that religious marriages are not recognised and so the Law Reform Commission drafted a piece of legislation after consulting people in the affected community. This draft law essentially codifies aspects of the syariah, including practices which have not passed the test of Constitutionality. But it isn't law as yet. The Gender Commission (after participating and trying to influence the Law Reform Commission) decided that there was no other way for us but to draft our own legislation.

In terms of the powers that we have, both in the Constitution and our enabling legislation, we have the power to recommend new laws to Parliament. So, we drafted an alternative piece of legislation which is a secular piece of legislation, it's generic and it's called the Recognition of Religious Marriages Bill.

The Commission for Gender Equality (CGE) basically took note that there are other religious marriages that are not recognised in the country. So, to avoid starting with one religion and then find there's a problem with another religion, the CGE law takes care of all the religious marriages. We have a Baha'i community in South Africa, we have a Rastafarian community, we have Hindu marriages, we have Jewish marriages, all sorts of religious marriages.

So, we tabled our bill with the Minister of Justice in 2005. The minister has to study it and then make recommendations, and then pass on to Parliament whichever bill she thinks is most suitable for South Africa.

The challenge is that, we are a secular democracy. We have a minority Muslim community whose marriages are not recognised. So, for the Gender Commission, the problem is the lack of recognition of the marriages. And one can recognise marriages without codifying the syariah, in our view. So, what we're aiming for is recognition of the marriage.

What the Law Reform Commission (has drafted), includes aspects of the syariah and this is worrying on many levels. First, it opens the door to courts interpreting the syariah - to the disadvantage of the Muslim community. Secondly, it privileges one religion, because we have not passed special laws for any other religion in our country. And there's a third aspect which is worrying, that is, when you codify religious law, you basically ossify it. So, you don't allow it to develop, you know.

And you presuppose when you do this that you have a homogenous Muslim community that interprets the (holy) texts in the same way. This is not true. The South African Muslim community is

not a homogenous community. It follows different schools of interpretation. There isn't one interpretation for the whole community. But, the Law Reform Commission bill basically assumes that everyone interprets the syariah in the same way and hence it includes provisions that not everyone lives by.

But, I think a more, difficult issue for me, personally, is that I think all systems of law, whether it's customary law, traditional law, religious law, they evolve. They become time and place specific. I don't think that law or policy remains static. And so, if you codify it, then you basically ossify it, you know. You're putting it into a form that's harder to change. And you're making assumptions (about) what's going to be the same for every time and every place. So, that's something we also argued that the bill shouldn't be doing.

But if the commission is recommending legislation that recognises religious marriages, then does that mean also recognising polygamous marriages?

We took a very pragmatic approach. We recognise the existence and reality of polygamous marriages but we argue that they must be regulated. So, we built in a system of court application, where if you want to marry a second spouse, you have to make a court application. Basically, you have to show the court that this (the second marriage) is going to work, and will not adversely impact on the existing spouse.

In African customary law, we also recognise polygamy but we regulate it. So, it's the court application which can lead to the wife saying, 'I do not want to be involved in a marriage with a second spouse coming in.' She can then seek a divorce. But, if she agrees, there's a provision in the African Customary Marriages Act that says that there must be a division of the property at the time that the husband makes this decision. So, you divide the property before you enter into a subsequent marriage, so that the first wife is not deprived. When his new spouse comes in, she takes half his property, not half of the joint property.

So, we've regulated it and we're following a similar line in terms of regulating the Muslim marriages. It goes through the court procedures, essentially, so that the first wife is not disadvantaged in any way, and she has this choice because they go to a court forum.

You know, you try in law to build in safeguards. But, law is not a panacea for social evils and social ills. And so, one way you hope is that the law would be a catalyst for change. So, if you're going to make subsequent marriages more difficult because it's regulated, and you've got to go through a court process, you hope that the community will say, 'This is just too much hard work. I don't want to do this.' So, it's one way that the law tries to modify social behaviour but the law can't do more than that.

What kind of public education, including for the courts, has the commission conducted to raise awareness? How has this education been critical in ensuring women's rights are protected?

Well, I've been largely involved in training judges and clerks of the courts. The impact of this I don't know - on the one hand one hopes that the good judgments we see are a result of people having gone through training and educative processes through formal educational initiatives. The informal education part that takes place through the commission is, of course, through our general sort of media stuff but also when we receive individual complaints. If the complaint is about either the court system or the clerk of the court, our staff engages with them. And so, that itself on a one-on-one dialogue is an educative process.

The sensitivity about the commission going into government departments to do training is a two-fold sensitivity. One is that you're going to be interfering in the government departments because they have their own internal education and training component. Secondly, we are a commission that is an oversight body. So, we have oversight over these departments. If we see something that's wrong, or where we feel that the staff are not skilled in handling these sorts of issues, as an oversight body, our role is to give a report to the relevant government department and the Office on the Status of Women, which is the other structure I spoke about, which is an administrative body within the presidency.

The role of the Office on the Status of Women is actually to make sure that there is an ongoing gender sensitivity training/diversity training for people in government departments. So, our job is to do the oversight, pick up the problems, do the recommendations to the Office of the Status of Women, to the relevant government department and then it is for them to figure out where the needs are and what they need to do. The Commission for Gender Equality is not a service provider. We're an oversight watchdog body. And we try not to conduct training. But at an individual level, a few commissioners have intervened and assisted because of their own skills and expertise. I used to work in a judicial education project and so, I still get involved in judicial education.

What kind of lessons can Malaysia learn from South Africa in this area? As you know, there is an initiative from this conference to propose a Gender Discrimination Bill and a commission for Malaysia.

I think one lesson is that we need to accept that these specialised structures and laws are necessary to achieve the promotion and protection of gender equality. It's not enough to accept that if you've got gender equality entrenched in your Constitution, that that is enough. It isn't enough.

I think that legislation, specialised legislation, is important because it fleshes out the core equality rights in more detail. I think mechanisms and structures are important because they then assist in enforcing that right. They act as the watchdogs; they put out reports and recommendations which serve both an educative as well as enforcement function.

The second reason is not to play politics with gender. The politicisation of gender issues is a universal problem, and politicians all over the world do it. I think the one thing is that we need to avoid politicisation at any level including the appointment processes, etc. I think in every structure, we need properly qualified people who can do the job. When civil society starts the process of wanting specialised laws and structures, it's because they see a need - and that can only be filled through appointing suitably qualified people. They work on the ground, they see a need, and governments need to respect this.

The third thing is the involvement of civil society, you know, to have a very transparent process so that people are not able later on to accuse government, that all the appointees are political appointees etc. So, if you have an open, transparent process of how you appoint people into these positions and you appoint them on merit, you appoint them because they represent the community, you appoint them because they have the skills to do the job - this leads to giving legitimacy and credibility to such institutions. These are important criteria that you have to put in place. Those are some of the lessons that I can share from South Africa. As you know, we've had some of our own challenges with such issues.

And specifically as well, when people use 'cultural rights' or 'religious rights' as a way to say, 'No, we can't grant equal rights to women', what is South Africa's experience? What are some of the methods or strategies which the commission has used which would also be helpful in the Malaysian context?

One example is the kind of dialogues that we've had, especially with traditional authorities. The majority of our population is of one-race group, and many of them live under traditional African customary law in some form or the other. And so, we've had dialogues where we unpack this notion of 'women are inferior to men' under any culture. So, the one strategy has been the dialogues that you have with them to challenge the myths and stereotypes, the prejudices - that is challenging whether this is really culture or is this practice on the part of individuals or communities?

Secondly, we also use the Constitution - especially the right to equality - as the supreme law of the land. Our Constitution recognises the right to equality but it also recognises the right to culture, religion and tradition. We've been very fortunate in that our courts have gone one step ahead and said the right to equality trumps the right to culture, religion and tradition. That's a major tool for us in our work on issues of equality, culture and religion. So, it's not us saying this. It's our courts which have already ruled on it. But, that doesn't mean the practice is going to change.

So, education efforts are ongoing. One of the things that was discussed in the conference was about indigenous communities. And what we've realised is that the only way to change those social dynamics is giving them education, as a tool, so that they fight sexist battles on their own. We don't do it for them. They do it. But it's more valuable for us to give them the tools to do that, to raise the arguments, to bring up the arguments about 'Is this culture? Is this religion?' or 'Is this a practice that has evolved due to patriarchy and power?' And so, we empower the people with education.

We go into really marginalised areas, people who don't have enough of a voice. We've gone the route of trying to find the most vulnerable groups and doing education in those communities. We have access to information which we share with them, the usual public education materials where we demystify the law. Around equality, we basically started off with just trying to get people to understand what equality was, why it is important and necessary, what kinds of discrimination one can suffer, etc. And then, we went into, the substantive areas. So, for example, we looked at equality and domestic violence. Do they have a relationship? We did the same with equality and culture, religion and tradition. Is there a relationship? We also did the same with equality and governance. So, we broke it up so that people could see the link between equality and the factors which are a barrier to achieving it.

You can't assume that someone at the grassroots level understands what the link is between equality and domestic violence. And so instead of doing a lot of top down work, working in the same constituencies, in the urban areas that have more access to education and information etc, we try to work from the grassroots upwards, the rural women, the grassroots movement. That's been one of our strategies; it's to target and give women the tools that they need to fight their own battles.

Is that also kind of laying the groundwork for customary law to change and evolve, rather than as you said in the conference, to strike down customary law?

Yes, you get the people who are affected by it pushing for the change and the reform rather than a constitutional commission doing it alone. And I think it has more sustainability if you allow that process by affected people to try and change it. They need outside assistance, but they don't need us to go do it for them. And then of course, when you do educational work, you can identify where there is a potential for strategic litigation. So, if there's a systemic problem and you think litigation works, then you're able to because you know the community and can ask 'What if we brought a class action suit?' or 'We recommended to an NGO to bring a class action suit?', to get the courts and or the legislature to intervene to change things.

So, I think it's giving tools to people who are most affected instead of some bureaucrat or some civil society organisation doing everything. It's the empowerment that I think the developing countries

need.

P.S.

* From theSun. Jacqueline Ann Surin. Reproduced on WLUML website.

* An academic and lawyer. Dr Rashida Manjoo was a commissioner for five years until April, and is currently a fellow at Harvard Law School’s Human Rights Programme.