

Rhetoric and gender mainstreaming in South African Justice

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“As long as women are bound by poverty and as long as they are looked down upon, human rights will lack substance. As long as outmoded ways of thinking prevent women from making a meaningful contribution to society, progress will be slow. As long as the nation refuses to acknowledge the equal role of more than half of itself, it is doomed to failure”.¹

The South African ‘miracle’ and the new democratic State was applauded by the International Community and came into being burdened with a variety of inequalities and imbalances which it had to overcome in order to achieve the entrenchment and consolidation of democracy. Women realized they had to promptly find their voice and carve out an identity at the dawn of the new democratic political order. Since most African nations have thanked women for their participation in liberation² and promptly sent them back to the kitchen, South African women have had to work hard to actualise the promises made by the male leaders of the democracy movement. Indeed, they have continued to redefine³ leadership, feminism and power on their own terms and in their own cultural contexts. First, they are fighting *alongside* their male counterparts⁴ to gain freedom and democracy for their nation. Second, they are struggling *against* their male counterparts to gain acceptance and equality and to challenge the restrictive conditions of patriarchy. The presence, identity, and the loud voice that women created for themselves, allowed them to win recognition within the process of the transition to democracy. This power led to the development of a multiparty coalition⁵ focused on securing a place for gender equality in the national constitution and ensured the pursuit of affirmative-action measures in the recruitment of women for national office. This paper examines the issue of gender mainstreaming in a three-fold manner, firstly; the professionals in the justice profession, legal practitioners such as attorneys and women on the bench, are gender quota’s being met and do these women have successful satisfying careers. Secondly, the paper looks at women and their engagement with the justice system. Thirdly the paper will examine the role of the regulatory, advisory, and monitory and watch dog bodies which preside over

¹ Speech by Nelson Mandela on SA Women’s Day, Pretoria, 9 August 1996: <http://www.anc.org.za/ancdocs/history/mandela/1996/sp0809.html>

² H.E. Britton, *Women in the South African Parliament: From Resistance to Governance* (USA: University of Illinois Press, 2005): 27.

³ Britton, *Women in the South African Parliament*, 27.

⁴ Britton, *Women in the South African Parliament*, 27.

⁵ Britton, *Women in the South African Parliament*, 32.

the Justice system. These three angles will be explored by unpacking the concept of voice, active voice, passive voice, the voice of women within the justice system, and the voice of women engaging the system. The issue of how women's advocacy groups use the persuasive tools of political nostalgia and collective memory to champion their cause will also be explored. The paper will examine the issue of Rhetorical Performances and the Burkean concept of ordinary and pure persuasion. Finally the paper will briefly touch on the architecture of the Constitutional Court building known as Constitutional hill and the issue of visual rhetoric.

**Voice, political nostalgia, collective memory, ordinary & pure persuasion:
professional women within the justice system**

The recognition of anti-gender discrimination legislation in any new political dispensation should be firstly evident in the influence women have on the election legislation. However, Britton states that the first piece of legislation that women showcased their influence in South Africa was on the Constitution.⁶ South Africa's Constitution has one of the broadest and most inclusive anti-discrimination clauses in the world. Their voice echoes loud throughout the Constitution. The justice system, in a democracy can be viewed as a body that provides a voice to members of society deemed voiceless, thus it becomes imperative to explore if those operating within the system have a voice.

According to the National Survey of the Attorney's Profession Final Report⁷ conducted in 2008, women constitute forty percent of the Attorney's in private practice. However, only thirty-two point two percent (32.2%) of the equity partners and thirty-six point nine percent (36.9%) of the salaried partners are women. On the other hand more than half of the Senior Associates and Associates are women. Similarly, more than ninety percent (90%) of attorneys' practices are owned by either men only or women only. Two thirds, sixty-seven percent (67%) are owned by men only and only twenty four percent (24%) by women. In the nine percent (9%) of firms with male and female ownership, men hold on average sixty percent (60%) of the shares. The report was also able to identify that female lawyers do not practice in the more lucrative fields of law. The report was unable to explore why this is so. The report was able to bring to light that there are a significant number of women in the private sector in the justice system; however, there

⁶ Britton, *Women in the South African Parliament*, 40.

⁷ Frederico Freschi, 'Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court', *National Survey of the Attorney's Profession Final Report* (South Africa: Law Society of South Africa, 17 September 2008): vii.

is an attrition of these women from the profession. The women who are practicing in the public sector, being state prosecutors, attorneys from the Legal Aid Board, and the Judiciary, still continue to be under-represented. Within the Magistracy⁸ the situation is even direr at the senior echelon and particularly at the regional and superior court levels. These professionals are prevented from having successful and fulfilling careers by budget shortages which affect the effectiveness and efficiency of the legal process.

The National Survey on Attorney's brings to light that Women working within the Justice system do not have a voice. The attrition of women in the profession is as a result of the lack of gender mainstreaming and of avenues allowing their voices to be heard. Those who successfully enter the profession face additional obstacles with regard to finding sufficiently challenging and rewarding work, not only to sustain their practices, but to help them grow financially and professionally.⁹ Bodies such as the Law Society of South Africa, the various provincial Law Societies located in each province, the South African Law Reform Commission and the Chapter Nine Institutions such as the Commission on Gender Equality, whose mandate is to transform, empower, regulate, and ensure development within the profession often operate in isolation from each other. A synergy needs to be created, facilitated, monitored and evaluated between the above mentioned institutions in order to ensure that gender mainstreaming indeed takes places.

The voice of South African women in the justice system can be categorised into two forms, the active voice and the passive voice. Through both forms, women's advocacy positions are constantly clear and persuasive. Advocacy groups make use of political nostalgia and collective memory to evoke emotions by referring to the Women of 1956, who challenged the previous regime by demonstrating against pass laws by organizing a peaceful march to the seat of administration at the Union Buildings in Pretoria. Collective memory is by definition partial and material in its communication and demarcation of the past. Collective memory is pieced together like a mosaic with some memories having greater or lesser resonance than others.¹⁰ Those memories moreover have material consequence as they are expressed by narratives and embodied in particular individuals or objectives. This use of political nostalgia is persuasive, as the memory of the women of 1956 is a shared and collective memory, which evokes a sense of patriotism.

⁸ Mr. Andries Nel, South African Deputy Minister of Justice and Constitutional Development, address during the debate on budget vote 23: Justice and Constitutional Development, National Council of Provinces, Cape Town, 25 May 2010: www.info.gov.za/speeches/2010/10052812051002.htm

⁹ Mrs. P. Mlambo-Ngcuka, Deputy President of South Africa, speech delivered at a Gala Dinner for the Launch of a Training Programme for Aspirant Women Judges, Johannesburg, 16 August 2007: www.info.gov.za/speeches/2007/07081717151002.htm

¹⁰ Shawn J. and Trevor Parry-Giles, "Collective Memory, Political Nostalgia, and the Rhetorical Presidency: Bill Clinton's Commemoration of the March on Washington", *Quarterly Journal of Speech* 86, 4(2000): 418.

Advocacy groups also ensure that their public deliberation and texts used utilized the ethos carried by the slogan “*Wathinta’ Abafazi, wathint’ imbokodo*” loosely translated as “*you strike a woman you strike a rock*”. The use of this phrase was carefully thought out, owing to the symbolism of the *imbokodo*, a grinding stone used to grind and crush mealies. The slogan is a powerful collective memory, as it symbolised a turning point for women and how they viewed their role in the liberation struggle. The active voice, echoed loudly with the elections in 1994, the Interim Constitution in 1995, the Beijing Declaration in 1995, the Constitution in 1999 and the Gender Policy Statement in 1999. The advocacy positions were clear and persuasive. The active voice of women in the public sector in the justice system is loud within the lower courts whereby there is a significant number of women as State Prosecutors, Legal Aid Attorney’s, and Magistrates. The passive voice is found mainly in the private sector of the justice system where women form a significant group but their voices do not echo loudly enough.

The regulatory bodies, the Law Society South Africa, the various provincial Law Societies located in each province, the South African Law Reform Commission and the Chapter Nine Institutions such as the Commission on Gender Equality, the South African Women in Law Association, for professionals within the justice system can be viewed as rhetorical interventions. The paper will explore the concept of rhetorical interventions by applying the Burke notion of ordinary and pure persuasion. Burke’s definition of persuasion and rhetoric was broad, he believed that whenever there is persuasion, there is rhetoric, and wherever there is Meaning, there is persuasion.

If Burke’s definition of rhetoric and persuasion is applied, it can be stated that the gender mainstreaming agenda in the South African Justice system utilizes the ordinary and pure persuasion categories of persuasion as rhetorical tools through the regulatory bodies found in the profession. The Law Society for example, is the mother body of all provincial law societies with which all attorneys, whether in the private or public sector are registered. It seeks to empower Attorneys through training and professional development and to ensure that the profession is ethical and competent. Yet this entity falls short of protecting women from pursuing successful satisfying careers, by ensuring that there is not a continued attrition of women in the profession, and that women’s salary packages are equal and on a par with their male counterparts’. The South African Women in Law Association seeks to achieve empowerment and gender equality for women in the legal profession and to ensure that and that the work they conduct is rewarding, yet within the Judiciary women still continue to be in the minority. The Commission on Gender Equality aims to expose gender discrimination in

¹¹ Parry-Giles, *QJS*, 418.

society, yet it has received great criticism for its lack of clear objectives, on setting achievable timeframes and for its lack of visibility on advocacy issues affecting women. This paper argues that the presence of the above mentioned bodies serves as rhetorical interventions which are both ordinary persuasion and pure persuasion in their presence in the justice system. According to Burke,¹² ordinary and pure persuasions are not categories by which to distinguish or evaluate specific rhetorical acts, they are coexisting dimensions of a rhetorical act that are simultaneously available to its users. According to Burke, both forms of persuasion are different and coexist in any rhetoric act. The above mentioned regulatory bodies are acts; created to provide a sense of security and they are persuasive in their presence as entities. Their presence is ordinary persuasion, owing to the fact that it denotes the goal-oriented, symbolic pursuit of extra-textual achievements, advantages or correctives.¹³ These entities as legislative frameworks for gender equality are pure persuasion, this based on the fact that pure persuasion is present as a motivational ingredient in any rhetoric, no matter how intensely advantage-seeking such rhetoric may be.¹⁴ The above mentioned regulatory bodies provide a false sense of security with no real tangible achievements.

Women and their engagement with the justice system

Women are constantly engaging with the justice system, and thus the justice system has to be conducive to women as a category of people who engage the system often as a vulnerable group. This vulnerability is evident when women engage the system through courts under these categories; firstly as applicants of maintenance seeking to fulfill their nurturing role by seeking maintenance for their children and themselves and as applicants in divorce proceedings. Secondly, through legislation, namely through the Domestic Violations Act 116 of 1998, which they utilise to attain protection from abusive partners, and also through the Sexual Offences Bill as complainants in regional and high courts, which also allows them to seek protection from abuse or as victims or perpetrators of crime. Women are hindered from engaging with the justice system effectively and efficiently owing to the following factors; firstly the courts: a significantly high percentage of women utilise the services of the family courts and lower courts. These courts need to be user friendly, efficient, well resourced, well staffed with translators and geographically accessible to all communities. Often these courts have massive backlogs, are slow, dockets get lost causing more delays, and the budget they receive is not sufficient for the courts to be adequately resourced. (These are the courts that handle maintenance and divorce matters which largely affect

¹² Kathryn M. and Clark D. Olsen, "Beyond Strategy: A Reader-Centered Analysis of Irony's Dual Persuasive Uses", *Quarterly Journal of Speech* 90, 1 (2004): 22-52, [27].

¹³ Olsen, *QJS*, 27.

¹⁴ Olsen, *QJS*, 27.

women). In the rural areas local courts only handle criminal matters and family courts which handle maintenance and divorce matters are located in nearby cities and women have to travel long distances to access them. Often when women engage with the justice system and the Department of Justice and Constitutional Development (DOJ & CD) they are powerless, are seeking a voice and are vulnerable. This is especially so for services such as maintenance, domestic violence, sexual offences and divorce. Often during cases involving these matters women are voiceless and the state is their voice.

The legal process which takes place becomes a series of performances of acts of ordinary and pure persuasion. The courts and the justice system becomes the principle dancer in a performance whereby the women engaging in the system are the audience. The courts and the system seek to provide a persuasive performance, seeking to provide the audience, the women with the finale of achieving a voice through the attainment of justice. According to Burke, persuasion includes all mean-making via symbols, whether communicated to others or practiced for oneself.¹⁵

The Department of Justice and Constitutional Development needs to ensure that it brings about institutional changes for entrenching gender equality and it needs to streamline the Justice system in order to ensure that services affecting women are easily accessible, these would be: maintenance, domestic violence, sexual offences and divorce matters.¹⁶

The Constitutional Court building – a visual rhetoric

The Constitutional Court is the highest court in all constitutional matters, it has the power to adjudicate disputes between organs of state concerning the constitutional status, powers or functions of any of those organs of state or that may decide on the constitutionality of any amendment to the Constitution or any parliamentary or provincial bill.¹⁷ Thus its building and its location symbolise South Africa's new identity, and is a beacon of hope for the people. It is of paramount importance to explore the ideas and thinking behind the architecture of the building. Locally and internationally, Constitutional hill, as it has come to be known, has been hailed as a symbol of the human-rights culture that informs South Africa's democratic Constitution — effectively a remarkable feat of architectural daring and hope. The architecture of the building itself had to embody the country's history and

¹⁵ Olsen, *QIS*, 26.

¹⁶ P. Parenzee P, *Investigating the Implications of ten years of Democracy for Women: The Role of the Department of Justice and Constitutional*, (South Africa: Institute for Democracy in Africa (IDASA), 2004): 8: www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=542, Pdf accessed 05.08.2010.

¹⁷ D. Burger, *South African Year Book*, (South Africa: National Democratic Convention (NADECO), 2006/7): 388: www.nadeco.org/.../Executive%20Summary%20of%20The%20Justice%20System.doc, Pdf. accessed 05.08.2010.

future.¹⁸

Academics have argued that one is able to learn much about a political regime by observing closely what it builds.¹⁹ With this link in mind, (we) can gain insight into a political regime's ideological agenda by scrutinizing how it *decorates* what it builds. Thus the decorative features as well, had to reflect the ideology of the new regime. The significant aspect of its symbolic function is conveyed entirely through its decorative program, which in turn is driven by the need to establish a visual rhetoric of a "community", united in its diversity.²⁰

Although the decorative aspect of the building was highly significant, it was important that the building was not imposing or intimidating to the ordinary South African on the street. In the words of Constitutional Judge Albie Sachs: "it was important from the outset that the court should be gentle rather than imposing; inviting rather than forbidding; entrancing rather than monumental; human rather than austere; a building of the highest ideal for the humblest of persons".²¹ Finally the Constitutional Court had to be a structure that symbolises the notion of redemptive over repressive justice (that is, the privileging of the rights of the individual over those of the state), and be at the heart of South Africa's democratic constitution.²²

Conclusion

This paper began by looking at the issue of voice, collective memory, political nostalgia, and ordinary and pure persuasion by exploring the justice system, and gender mainstreaming. This was achieved by firstly exploring whether women legal professionals (attorneys and others on the bench) have successful and satisfying careers and whether or not gender quota's are being met. Secondly, the paper looked at women and their engagement with the justice system. Thirdly the paper will examined the role of the regulator, advisory, monitory and watch dog bodies which preside over the justice system. These regulatory bodies were examined in order to deduce if they are indeed performing their role. The paper proceeded to look at how women engage the Justice system and the services which affect them. The paper also explored the issue of rhetorical performances by looking at the court system and how women engage the courts. The paper came to a close by focusing on visual rhetoric by looking at the architecture of the Constitutional Court building and the thinking behind this beacon of hope of the South African people.

¹⁸ Freschi, *National Survey of the Attorney's Profession Final Report*.

¹⁹ Freschi, *National Survey of the Attorney's Profession Final Report*.

²⁰ Freschi, *National Survey of the Attorney's Profession Final Report*.

²¹ Freschi, *National Survey of the Attorney's Profession Final Report*.

²² Freschi, *National Survey of the Attorney's Profession Final Report*.