
**Legal discourse: a postmodern feminist approach to
legal and residually illegal sex, with particular
reference to transactional sex**

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‘Every word is a prejudice’ (Nietzsche)

Linguistic relativity hypotheses hold that language influences thought to such an extent as to create the world-view of the users of each specific language.

We are familiar through commonsense with the seemingly opposite notion that it is thought that influences language – but perhaps we could usefully see language as ‘plastic’ in the original sense of the word – meaning capable of moulding or of being moulded; pliable; capable of change. (From Greek *plassein* to mould.) We see individual words moving back and forth in time and usage, constructing meaning; shifting denotation and developing connotation. For example, words connected with social and sexual mores are in continual flux, opening up to different interpretations, but also retaining traces of past prejudice, past pre-judgements. They are ‘loaded’.

Take the word ‘sex’. In many parts of the not-yet-global post-colonial world, we still await:

‘...the ultimate liberation of sex from the prison in which patriarchal, puritan, still-haplessly-Victorian, spoilsport, killjoy and hypocritical society held it’ (Bauman, 2003:46).

In a world governed by patriarchy and religion, sex is a dirty word, only acceptable for reproductive ‘purpose’. In anthropology sex is, however, acceptable ‘language’, particularly in relation to kinship systems and vetoes. Women are categorized by this language as suitable or not suitable for co-habitation. *Volens nolens*

Feminisms have proliferated in the last fifty years. There are liberal feminists who seek to eliminate negative discrimination in order to obtain equal rights and treatments alongside men, albeit from the prototype legal subject’s norm, which is also legally used as the ‘objective’ standpoint – that of the reasonable *man*. (Substituting the word ‘person’ for ‘man’ does not automatically confer male-female equality.) Women seeking equal status with men are characterized as wanting to be the same as men, if not in the sense of precisely equal treatment, at least in the sense of being treated as equals. The equality is a neutrality – a sex-blind non-discrimination. But this approach does not adequately deconstruct the social constructions that led to the inequalities in the first place; it just fails to highlight them.

There are feminists who seek equity (with males), but emphasize the difference between the sexes to secure positive discrimination, albeit at the risk of underlining dichotomous and essentialist affective and sexual differences that breed the ‘stereotyped’ characterizations of women’s natures and needs. A dominance model goes beyond the sameness/difference approaches to a radical focus on men, and the ways in which male domination is effected. Sexuality is the core of women’s subordination – their sexuality, which they perform as a gender role. Greenberg summarizes the dominance approach:

‘It is through women’s sexual characteristics that men define women, and having defined them, forcibly and legally subordinate them’ (Greenberg in Frug, 1992: xv).

MacKinnon goes as far as to say that:

‘.. there is no such thing as a woman as such, there are only walking embodiments of men’s projected needs’ (MacKinnon in Frug,1992:132).

The pop icon Madonna might well have been one such ‘walking embodiment’ – but she felt she was in control of her chameleon images:

‘The feminist point of view? Well, I’d like to point out that they are missing a couple of things. Because, you know, I may be dressing like a typical bimbo. Whatever. But I’m in charge, you know. I’m in charge of my fantasies. I put myself in these situations with men, you know... Aren’t I in charge of my life?’ (Madonna in Frug,1992:132).

Then there are numerous variations and combinations of the basic stances and several other dimensions of *difference* in the sense of differences between and amongst women – at the micro level: heterosexual, bisexual, homosexual and professional sex-working women, do not necessarily have the same liberation priorities. At the macro level, geographic, political, socio-economic, cultural, class, racial and religious differences enjoin different demands.

Western feminism is not necessarily relevant to the liberation needs of various groupings of women in developing countries whose problems and frameworks differ. There is no unitary form of feminism, the only common factor or motivation, apart from the obvious bio-physical community, is that women intend to be free from certain forms of male domination. The postmoderns are possibly the most fluid, flexible interpreters of the female situation in whatever era or place, and run critically and analytically between and beyond the sameness, difference and dominance positions. Greenberg distinguishes:

‘Postmodern feminists investigate the legal, cultural, and political discourses through which our identities are constituted. Whereas MacKinnon claims to describe the realities of women’s situations, postmodern feminists emphasize the interpretative nature of all descriptions. (women’s experiences ..) are constituted by the discourses in which we think them. These discourses will be interpreted differently in different historical, political, and social contexts. While MacKinnon seeks to present the reality of women’s lives, postmodern feminists demonstrate that reality is never present. It can only be (re)presented through language’ (Greenberg in Frug, 1992: xix).

Mary Joe Frug’s work is concerned with the ‘language’ of law in particular. Her posthumously published book *Postmodern legal feminism* reveals:

‘...a careful study of the ways in which legal discourses construct the various meaning of ‘women.’ Simultaneously, it uncovers the ways in which the discourses are, in turn, constructed by gender’ (Greenberg in Frug, 1992: xi).

Greenberg, in an extensive introduction to Frug’s work, indicates Frug’s approach:

‘Her work pursues two reading strategies. For each legal or law related text she reads, she asks how our understandings of gender affect our understandings of the law. ... Her second, simultaneous strategy is to read the law for the meanings it assigns to the body and to gender identity. Her methodology throughout is postmodern in its concern for the multiplicities of language and meaning’ (Greenberg in Frug, 1992: xxiii).

In the section entitled ‘Postmodern feminist legal manifesto’, Frug stated two principles, indicating her position in relation to certain other feminist stances. One principle looks at the liberal equality doctrine which is:

‘...often understood as an engine of liberation with respect to sex-specific rules. This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit, through critical scholarship, litigation, and legislative campaigns. Examples of these efforts include work seeking to strengthen domestic violence statutes, to enact a model anti-pornography ordinance, and to expand sexual harassment doctrine.

‘The postmodern position locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. ... This is not a proposal that we try to promote a benevolent and fixed meaning for sex differences. Rather, the argument is that continuous interpretive struggles over the meaning of sex differences can have an impact on patriarchal legal power’ (Frug, 1992:126).

Another principle is concerned that both radical and cultural legal feminisms:

‘...depict male and female sexual identities as anatomically determined and psychologically predict-

able. This is inconsistent with the semiotic character of sex differences and the impact that historical specificity has on any individual identity. In postmodern jargon, this treatment of sexual identity is inconsistent with a decentred, polymorphous, contingent understanding of the subject.'

'Because sex differences are semiotic – that is, constituted by a system of signs that we produce and interpret - each of us inescapably produces herself within the gender meaning system, although the meaning of gender is indeterminate or undecidable. The dilemma of difference, which the liberal equality guarantee seeks to avoid through neutrality, is unavoidable' (Frug, 1992:126).

Applying her principles, Frug examines socially constructed sex differences between women and men in relation to legal sanction (both senses of the word 'sanction'). Her use of the term 'sex differences' in this context does not mean male, female, transsexual, intersexual differences, but refers to gender differences, caught up in stereotyped roles. ('stereo' comes from the Greek word; solid, unchanging.). Frug challenges the 'solidity' of stereotyping: she reads potential fluidity.

Frug claims that it is legal discourse which supports the following 'meanings' of the female body:-

1. 'Legal rules permit and sometimes mandate the *terrorization* of the female body. This occurs by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity. One meaning of 'female body', then, is a body that is 'in terror', a body that has learned to scurry, to cringe and to submit.
2. Legal rules permit and sometimes mandate the *maternalization* of the female body. This occurs by provisions that reward women for singularly assuming responsibilities after childbirth and with those that penalize conduct – such as sexuality or labour market work – that conflicts with mothering. Maternalization also occurs through rules such as abortion restrictions that compel women to become mothers and by domestic relations rules that favour mothers over fathers as parents. Another meaning of 'female body', then, is a body that is 'for' maternity.
3. Legal rules permit and sometimes mandate the *sexualization* of the female body. This occurs through provisions that criminalize individual sexual conduct, such as rules against commercial sex (prostitution) or same-sex practices (homosexuality) ... Sexualization also occurs – paradoxically – in the application of rules such as rape and sexual harassment laws that are designed to protect women against sex-related injuries. These rules grant or deny women protection by interrogating their sexual promiscuity. The more sexually available or desiring a woman looks, the less protection these rules are likely to give her. Another meaning of 'female body', then, is a body that is 'for' sex with men, a body that is 'desirable' and also rapable, that wants sex and wants raping' (Frug, 1992: 129-130).

This sexualization of the female body explains an experience many women have:

'.. a fear of looking like a whore ... (and explains) ..the shadow many women feel when having sex for unromantic reasons – to comfort themselves, to avoid a confrontation over some domestic issue, or to secure a favour – a fear of acting like a whore' (Frug, 1992:132).

Official legal discourse concerning women's rights

Article 26 of the United Nations Covenant on Civil and Political Rights states that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Zimbabwe is a member of the UN).

The Convention on the Elimination of All Forms of Discrimination against Women article 2 indicates precise areas of legal concern that states parties (jurisdictions who have ratified the convention, Zimbabwe being one of them) should tackle:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (probably to be ratified by Zimbabwe) states in Article 4, 1:

'Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

The Zimbabwean Constitution, recently altered by Constitution of Zimbabwe Amendment (No. 17) Bill, 2005, now appears to be curtailing certain rights and practices, but nonetheless has a protection against discrimination clause (article 23) which, with the notable exception of 'sexual orientation', includes sex and gender categories as indicated by international and regional instruments.

The Zimbabwean National Gender Policy, issued by the Ministry of Youth, Development, Gender and Employment Creation, but now (2005) administered by a new stand-alone ministry, the Ministry of Women's Affairs, Gender, and Community Development, conforms to International standards and terminology and regional development.

There is an excellent Zimbabwean Prevention of Domestic Violence and Protection of Victims of Domestic Violence Bill, 2003, an almost verbatim copy of the impeccable, on paper, South African Act; bearing more testimony to expedient electronic scanning (of appropriate terminology derived from politically correct International Instruments), than to reality. But this Bill, enacted and in force, should prove an asset for all classes of women in Zimbabwe.

The major piece of legislation in Zimbabwe affecting women is the Criminal Law (Codification and Reform) Act [Chapter 9:23] Act 23/2004. This was not yet in force at the time of writing (2005) but it will amend the Customary Marriages Act [Chapter 5:7], the Marriage Act [7:11], and repeal the Concealment of Birth Act [Chapter 9:04], the Infanticide Act [Chapter 9:12] and the Miscellaneous Offences Act [Chapter 9:15]; and it will amend the Sexual Offences Act [Chapter 9:21], and the Termination of Pregnancy Act [Chapter 15:10]. However, I will be referring to the above Acts as they are still current in the minds of the legislature and in the

public acceptance. It should also be noted that written and unwritten customary laws still obtain in Zimbabwe, and often conflict with any version of the received, common law.

What, then, are the contemporary rules and ‘meanings’ for women?

Using Frug’s methodology, I will attempt to read the ‘language’ of law in a Zimbabwean context, current and past, to assess how legal discourse shapes gendered meanings of women.

Legal sex: tight embrace

In a jurisdiction with a plural system of patriarchal laws, everything endorses marital union. In Zimbabwe a woman can become a wife in terms of customary law, whether the marriage is registered or unregistered. (Customary Marriages Act [Chapter 5:07]). Customary law also still encourages polygamous marriage.

In the (civil) Marriage Act [Chapter 5:11], marriage of minors is allowed, providing they have the permission of guardians or parents or a high court judge, or the minister. There are multiple possibilities and incentives for a woman to marry, and all kinds of laws, rules and benefits to support and monitor her reproductive life. The incentives to be recognizably married and to bear and raise children, supported by legal embrace, are tantamount to injunctions. Should the woman jeopardize the institution of marriage, divorce is not easy, not traditionally (socially) acceptable and is seen as punishment. If she takes a lover, she is automatically guilty of the social sin of adultery. Customarily, if not still legally, a woman’s adultery is bound to her marital status. An adulterous male’s own marital status was not important: he was just required to compensate the offended husband for trespass on private property. By this unequal token, the lawful wedded wife is more tied to her husband than he is to her. Her sexuality is his property, because she has given her forever consent. The notion of unconditional consent was also the reasoning behind marital rape being impossible – the contradictory juxtaposition of marital (lawful) and rape (unlawful) being unthinkable up until recent times.

Should the wife (or husband) avoid lawful wedded sex, this is a legal ground for nullification of the marriage, and a cancelled marriage is almost as shameful as a divorce. See s13 in the Zimbabwean Matrimonial Causes Act [Chapter 5:13]:

‘... a marriage shall be voidable on the ground :

(a) that the marriage has not been consummated owing to the wilful refusal of the defendant to consummate the marriage; ..’

If the woman has performed her sexual duties but wishes to terminate a pregnancy, the conditions for legal termination are strict and the punishments for abortion, concealment of birth, infanticide and child abuse can be severe. Most often women committing these serious offences are not married – which is one ‘forced’ socio-economic reason why they do not want the ‘embarrassment’ of children. (In Spanish – the major language of millions of repressed South American women – the word ‘embarazada’ means pregnant.)

If the wife wishes to delay or space her children, she may well be seen as ‘suspect’ by her husband and entire family. Female contraception is still not acceptable to most husbands. (Voluntary contraception means the wife could have sex with another man, with no tell-tale pregnancy.)

In the case of a fruitless marriage, the woman is still likely to be the one interpreted as infertile. She may nonetheless be so ‘maternalized’ by a lifetime of coercive discourse, that she will commit the crime of stealing a baby and pretending it is her husband’s progeny. Legal sex, as with sex blessed by the church, is expected to be productive. The woman has been ‘bought’ for this. The custom of *lobola* or *roora*, meaning bride price in Ndebele and Shona, is existent – even in modern civil marriages.

The legal sexual rights of the male are often a pretext for domestic abuse. Many women's bodies are the site of 'terrorization', showing the signs of the 'battered wife syndrome'. These women are not given much help by the state. Traditionally, abused women take their problems to family members, or to the elders, and/or to traditional healers. The police and subsequent magistrate's courts are not the first port of call. This is partly because the legal discourse involved is alienating and further terrorizes the female complainant, making her feel as though she is the guilty party.

Meanwhile, many women continue to be terrorized by and in their legal sexual obligations and associated reproductive consequences. In the home, in public, wives are embraced by all of the legislation that promotes legal sex, and since legal sex is fully expected to lead to motherhood, this equates to the maternalization of a woman's life. In this way the laws endorsing the penile legal sex of monogamous marriage, and those that penalise the women who resist, together legally 'construct' the meanings of the female body, and attempt to keep the occupant of the body under patriarchal control.

Residually illegal sex and stigma

Lawful, legal sex only allows a woman to have two temporary but frequent organic occupants lodging in her body – the husband's penis, and the husband's progeny. When a woman commits adultery, a possible ground for divorce, it is socially condemned because it is outside the marriage. But what about women who do not necessarily wish to go down that bumpy, routine-humping road?

A woman could contrive divorce as a deliberate escape from (l)awful sex.. But society stigmatizes 'voluntary' divorcees even more than the unwillingly divorced. A woman might also find escape in widowhood – but not for long in Zimbabwean tradition, as it is allowed, and indeed often socially required (levirate system, widow inheritance), that the woman be (re)married off to a brother or other close relative of the deceased.

A woman can become a nun. No sex at all is not 'wrong' unless unreasonably withheld within marriage. At the societal level, nuns are single, unmarried, but there is some social censure for this state of affairs. There is a Latin term used to refer to someone who has become a monk: 'civiliter mortuus' which means 'civilly dead'. A reminder of the importance of civil, meaning marital, status. (Women who do not serve their marital, procreative purpose may merit the sexist epitaph on an old maid's tomb: 'returned unopened'.) However, whether nuns are civilly dead or alive, they could be said to feature in the maternalization aspect. I reason this because nuns are understood to be Christ's brides in the Christian religions or the wives of some other representative of some other similarly omnipotent and polygamous God. The point is that they consider themselves to be married. And because the non-human dimension in their marriage partnership leaves them institutionally chaste, they do not (usually) fall pregnant after this 'marriage'. A postmodern reading/deconstruction of the sexuality of nuns, compared to the 'norms' of ordinarily married women, puts nuns in the category of transgressors.

A woman could choose homosexuality but female homosexuality is not taken seriously by patriarchal men (and women) in Zimbabwe, and therefore does not feature in legal discourse except as indecent assault. Not taking lesbianism seriously is highly demeaning to some feminists but perhaps preferable to the official Victorian attitude which was that lesbianism was such an abomination it did not deserve (legal) consideration at all.

Male homosexuality does however feature in Zimbabwean legal discourse. Sodomy was considered an offence even between consenting adults. Supposedly considered a rare, bewitched activity (*huroyi* in Shona), homosexuality is not in fact rare at all. Just highly censured. A 'good' example of discourse constructing gender was the public statement made by the current President of Zimbabwe to the effect that homosexuals are 'worse than pigs and dogs'. (GALZ archives, 1996).

That leaves prostitution, which is not always a 'force of circumstances' choice, but sometimes a deliberate

choice of sexuality. (I prefer the term ‘transactional sex’ because it denotes what kind of bi-lateral activity is involved. But since the rules rely on the connotations of the word ‘prostitution’, this is the term that appears most frequently.)

Recalling Frug’s claim that law constructs women as terrorized, sexualized, maternalized, she uses the law of prostitution to expose the way in which these meanings are formed:

‘Prostitution makes certain acts illegal; since usually these are women’s acts, women’s sexuality is understood to be the subject of prostitution. Thus, women must constantly question their sexuality. ... Prohibiting prostitution makes each of us potential prostitutes. We are constantly checking ourselves to see if we are prostitutes; our sexuality, regardless of whether we are or not prostitutes, is constituted by the law’s ban on prostitution. The anti-prostitution regulations also terrorize the female body. This occurs because of the relationship between prostitution regulations and other cultural practices such as the infection of sex work with drugs, AIDS, or the inadequate police protection for crimes committed against sex workers. The regulation of prostitution also results in the maternalization of female bodies. Illegal sex is that which is not legal sex and legal sex is tied to reproduction and the legitimation of the products of sex. Thus, anti-prostitution laws construct women’s bodies as maternal, at the same time as they construct them as sexualized and terrorized’ (Greenberg in Frug, 1992: xxv-xxvii).

Anti-prostitution rules and the legislation concerning sexual crimes are by now mostly gender-neutral – they sexualize male as well as female bodies. In the Zimbabwean Miscellaneous Offences Act (amended by Act 22 of 2001) the wording relating to the penalty for loitering for purpose of prostitution is ‘neuter’ – but this does not fool anyone. The loitering laws are mainly warning female sexuality to keep off the streets. The relevant part of the Act reads:

- (1) Any person loitering or being in any public place for the purpose of prostitution or solicitation shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.
- (2) The court convicting a person of a contravention of subsection (1) may order that that person shall not, during such period not exceeding three years as the court may specify in the order, loiter in or on any road, street, thoroughfare, lane, footpath, sidewalk or pavement between the hours of six o’clock in the evening and six o’clock in the morning.
- (3) Any person who contravenes or fails to comply with an order made in terms of subsection (2) shall be guilty of an offence and liable to the penalties referred to in subsection (1).”

With the heading: ‘Instead of targeting sex workers, police harass all women’, Wilson Johwa reported in 2004:

‘BULAWAYO –It is retold so often that the account of how an embarrassed government minister rescued a female relative, who had been caught in a police sex worker crackdown he sanctioned, has become something of an urban legend.

Some say it is surprising that the woman’s embarrassment – not to mention that of the official – did not lead him to entertain the possibility that police may have acted too arbitrarily when they set out to banish the world’s oldest profession in the 1980s.

Officers’ methods included accosting – and even arresting – any ‘suspicious’ woman walking around after dark, especially if she was daring to move about unaccompanied.

Only after outcries from women’s lobby groups did police action cease. Sadly, though, it had already resulted in some ‘respectable’ women seeing the interior of police stations without any justification for their being detained.

Recently the arrest of suspected sex workers has again picked up. This is due to periodic enforcement of the Miscellaneous Offences Act, which makes it a crime for a woman to ‘loiter’ for ‘purposes of prostitution’...

... Another law, the Sexual Offences Act, makes it an offence to live on earnings from a brothel. In effect it seeks to suppress sex work without actually making the act of having sexual intercourse with a sexual worker illegal.

One of the primary areas targeted by the police is the ‘Avenues’, a district of Harare popular with young professionals and sex workers. In the late evening hours the locale’s leafy splendour provides ideal cover for scores of scantily clad figures who make brief, albeit well-timed, appearances aimed at attracting the attention of passing motorists.

It is this soliciting police say they want to eradicate. Police spokesman, Assistant Commissioner Wayne Bvudzijena, says the operation is double-pronged. It is aimed at sex workers as well as illegal immigrants, many of whom survive by selling the only product they have – their bodies.

But human rights campaigners are not convinced this is the best way to deal with a problem they say is increasing, partly because of widespread hardships. ...’

(Inter Press Service News Agency (IPS), 5 April 2004, reprinted by Kubatana Trust).

So, who is a prostitute and what does this mean?

The Zimbabwean Sexual Offences Act [Chapter 9:21] did offer a neutral-seeming but otherwise precise definition of a prostitute:

“‘prostitute’ means a person who for money or reward –

- (a) habitually allows other persons to have extra-marital sexual intercourse with him or her; or
- (b) solicits other persons to have sexual intercourse with him or her;’

However, the following persons are alternately ‘any’ or ‘he’:

‘The following persons shall be deemed for the purposes of this Act to be keepers of a brothel –

- (a) any person who manages the brothel or assists in its management;
- (b) the owner of the brothel, if he uses the place as a brothel or knowingly allows it to be so used;
- (c) any person who knowingly receives the whole or any part of any money taken in the brothel;
- (d) any person who resides in the brothel, unless he proves that he was ignorant of the character of the place;
- (e) any person found in the brothel who wilfully refuses to disclose the name and identity of the keeper or owner thereof.’

The Criminal Law Act, sections 81,82,83, still considers soliciting, living off facilitating prostitution and procurement, as crimes. The effects of the anti-prostitution rules – the moulding that this discourse entails – reach far beyond the realm of avowed prostitutes. This is because of stereotyped notions affecting all victims of sexual assault whose ‘word’ like the prostitute’s, or even the reputedly respectable woman’s ‘cry of rape’ is not necessarily taken as the truth, and the cautionary rule of corroboration is prompted, if not actually applied.

These notions stem from the patriarchal belief that a prostitute or a woman who can be exposed as such, cannot

really be raped, since sex is her job and she is therefore bound to be consenting. Originally, rape was a crime a man committed against a virgin: once a girl had been deflowered, the territory became 'open ground' – a footpath that could become public. Similarly, a wife cannot be raped by her husband, since she is his sexual property. And the (adult) unmarried woman's cry of rape likewise was not taken seriously if there was the slightest doubt that she was, like a prostitute, 'asking for it' and did in fact consent to the sexual activity she then alleges as rape. Complainants in sexual assault cases, predominantly female, have always been a little suspect, especially when they have accepted some favours from their alleged abusers.

An XY case

Complainant X, who denied consenting to a marital situation with an abusive male, Y, had indeed received favours (money, food, alcohol and so on) from Y over a period of time. When X's allegations of sexual abuse finally reached the appropriate court, there were the usual doubts as to the 'non consensual', 'sole witness' and no 'immediate reaction' aspects of X's putatively subjugated role in the sexual activities. Since self-corroboration is impossible, and there had been no medical evidence advanced, X's lawyers had to find other ways to prove there had been both *sexualization* – in the sense that X had unwillingly been used for sex by Y - and *terrorization*, in that Y was socially extremely powerful, and was also X's employer. Although X reported problems of harassment to an aunt and to a number of people in positions of authority, and tried by all means to change job location, no-one was willing to seriously consider the complaints.

Eventually, after several others had come forward with similar complaints about Y's sexual proclivities, Y was convicted on several counts of indecent assault. Y appealed on various grounds, including challenging the veracity of the complainants' reports. X had in the meanwhile committed a crime. The victim-turned accused shot a police constable dead, because the policeman uttered an absolute insult, or rather added insult to injury, by *referring to X as Y's wife*. In Frug's terms, the maternalization aspect was now manifest. In this case the very mention of the word 'wife' triggered a fatal shot. When X was due for sentence, the insult related was not considered sufficiently serious as to warrant the provocation defence. The only extenuating circumstance taken into account was that X had been traumatized as a (long- time and long-term) consequence of being the victim of repeated abuse by Y.

We could interpret this story as a familiar scenario of a repeatedly abused rape victim whose complaints are not clearly heard, because the law is still disinclined to believe the stories of persons in the 'suspect' category of story-tellers – women or minors. And when the victim turns criminal, as a result of years of abuse and attendant trauma, the motive is not adequately understood.

The real case was: *Canaan Sodindo Banana v The State*, Supreme Court of Zimbabwe, 2000. Person X in my narrative was Jefta Dube, a non homosexual male, who claimed he was repeatedly sodomized by the first (non-executive) President of Zimbabwe. Dube was one of Banana's guards, who was getting nowhere with reports of the sexual abuses he claimed he suffered through both fear and force. When given the ultimate insult – taunted by a fellow police officer for being 'Banana's wife', Dube shot the policeman. When sentenced for murder, he appealed on the grounds that he had been suffering from severe traumatic stress, after his lengthy period of abuse in the form of intra-crural sex and (alleged) sodomy at the hands/penis of his former august employer. He had not enjoyed being 'treated like a woman', in other words, having a sexualized, terrorized, maternalized body.

Change the discourse: change the interpretation

Prostitutes aware of the ways in which legal discourse has compromised them, reject the laws. They deconstruct the discourse. They do not necessarily aim at legalization – that would lock them into another level of the 'system' but they do demand decriminalization.

‘Abolition of prostitution laws would:

- End the criminalization of prostitute women – we are being punished for refusing poverty and/or financial dependence on individual men;
- End legal, economic and civil discrimination against prostitute women and our families, and remove the stigma attached to prostitution;
- Make it possible for sex workers to be recognized as workers, with human, legal, economic and civil rights, including the right to police protection, employment and health benefits, pensions, to form co-operatives and trade unions, and so on;
- Redirect police time and resources now being used to arrest sex workers (and sometimes clients);
- Increase safety for all women – rape and other violent crimes could no longer be dismissed on the grounds that the woman was ‘asking for it’ because she was ‘loose’ or a prostitute;
- Demystify prostitution, break down the division between ‘good girls’ and ‘bad girls’, and make visible the sex work other women do gratifying men’s egos and sexual demands, and make it easier for all women to refuse this work or charge more when we agree to do it;
- Undermine the need for red-light areas as sex workers would not be prevented by law from advertising and working together indoors;
- Separate consenting sex between adults, which should have nothing to do with the law, from offences of nuisance, which should be dealt with on the basis of what the nuisance is rather than who the person is;
- Stop governments profiteering from prostitution through fines;
- Undermine profiteering by employers, landlords and others who take advantage of the illegal or semi-legal status of sex workers;
- Allow prostitute women to dispose of their income as they choose without the worry that husbands, boyfriends or even sons may be arrested for living off our immoral earnings;
- Allow sex workers to come out, speak publicly and challenge media stereotypes.’

(Extracts from international Women’s Forum: ‘All women count’)

Traces: old prejudices die hard

‘Postmodern feminist work embraces multiple meanings because the words through which identities are fashioned carry within themselves traces of past usage. Meaning is built upon the instability of these past usages’ (Greenberg in Frug, 1992: xxi).

It is important to note, in modern forensic vein, that even abolished, reformed, or otherwise amended laws still enclose previous discourse: traces remain and even if a prejudicial practice is being called up for the purpose of *eliminating* it, it is re-vived by mere mention. For example, Olivier’s words are often cited:

‘In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused person beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule’ (Olivier

JA, in *S v Jackson* 1998 (1) SACR 470 (SCA)).

This is one of the many ways we are reminded of the stereotyped unreliable woman. Going much further back, we recall the long-time subordinate status of women: Sir Matthew Hale's opinion was:

'...(but) the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract' (*History of the pleas of the crown* (1736), vol 1, ch. 58:629).

Mind the gap

There are gaps between when the law is or was conceived, when it is written and when it is applied. Even when the gap is narrowed by an efficient legislature, there is vast presumption involved in such processes – what legislature can guess at future definitions of people's views and needs? Neither women nor men have reliable crystal balls.

There is also a 'gap' in the sense of *difference*, the insidious difference between the intention and the contemporary application of the law. Difference is by nature a dicey concept, ancient or (post-)modern. Nicola Lacey warns of a feminist pitfall in this direction:

'For without an elusive mix of courage and caution, of audacity and subtlety, it may be that in seeking to imagine difference, in pursuit of its ultimate inclusion or recognition, we may not so much make a difference, as reproduce, as it were, the same difference. In doing so, we inevitably lend weight to its misinterpretation as fixed. Only if we are constantly aware of this double pitfall will we have any hope of developing strategies for stepping around it' (Lacey, 1998: 219).

A gap, as something to be stepped over or around, can be experienced as a pitfall, a danger, an occupational hazard, or as a *lacuna*. It can also be seen as creative interface, seething with possibilities for change, for re-interpretation. Change by means of judge-made law, or by litigation strategies, or by some kind of revolution... The international human rights instruments and other regional guiding tools are in place; Domestic law is promising, but women are *still* more constructed than constructive in the orbit of such discourse. One of Frug's objectives was:

'To provide an analysis of the legal role in the production of gendered identity that will invigorate the liberatory potential of the social construction thesis' (Frug, 1992: 128).

This means we *can* change the gendered images we have uncomfortably lived in – what has been constructed can be deconstructed. However, Lacey adds realism to the project:

'Strategies which seek to mitigate the injustice of particular instances of law's coercive power as it applies to women will always be an important part of the feminist project, particularly for practitioners. But there is a need for realism about just how much can be changed by legal means' (Lacey, 1998: 218).

What other means are available? The agency of time? Perhaps it is a question or rather an action of repeatedly re-interpreting the pre-judged words that bind (or liberate) women in each of their many contexts, in their multiple meanings.

'Interpretation discloses space for change within established discourses' (Greenberg in Frug, 1992: xxviii).

Perhaps the gap **is** this operative space.

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Other

GALZ – Association of Gays and Lesbians of Zimbabwe, info@galz.co.zw.