



DRAFT CONCEPT NOTE

Women's socio-economic rights litigation institute

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Theme:
protection of
women's land
and property
rights

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1. BACKGROUND

1.1. Introduction to ISLA

The Initiative for Strategic Litigation in Africa (ISLA) is a feminist and Pan-African organisation with a mission to protect sexual and women's human rights through litigation and capacity strengthening. We use the law to hold state and non-state actors accountable for human rights violations based on gender and sexuality. Using a rights-based framework, we endeavour to improve the lives of women, girls, and people whose rights have been violated based on gender, sexual identity, and orientation. We highlight positive developments and emphasise cross-learning from various countries on the continent. We also surface gender bias by centering women's voices and experiences in the jurisprudence and highlighting and asserting women's leadership and contributions in the African human rights system.

At ISLA, we believe that strategic

litigation, from a feminist point of view, is a critical tool for changing historically gendered exclusion i.e. the exclusion of women, on the basis of sex, which impairs women's ability to fully enjoy their human rights and fundamental freedoms, to the same extent as men, in all spheres (political, economic, social, cultural, civil etc).¹ Gendered exclusion manifests in multiple forms, including the failure to understand, contextually frame and reframe, and claim entitlements under the law. Currently, strategic litigation to address historically gendered exclusion is underutilised, and, with this context in mind, we aim to create an enabling environment for strategic litigation addressing gendered exclusion.

Our work challenges the patriarchy, class and power relations by centering women's voices and women's agency. Working alongside our networks of lawyers, social movements and other civil society institutions that work on strategic litigation, we carefully select cases and use them to change the law, practice, and public awareness. We believe that a sustained investment

¹ Definition adapted from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 1.

in local institutions and individuals is key to creating a critical mass of domestic lawyers who can engage in strategic litigation, hence our focus is on strengthening the capacity of our networks. With these capacities, we anticipate our networks will respond more effectively to threats and attacks that weaken civil space and human rights broadly, harness political or social opportunities to advance gender equity and equality; and develop feminist jurisprudence through the courts to hold state and non-state actors accountable.

1.2. The Feminist Litigation Network (FLN)

At its core, the FLN is a pool of African feminist litigators who actively and effectively undertake strategic litigation on women's human rights. We established the FLN as an investment into developing a pool of expert strategic feminist litigators. Its model centres on two strands: continuity and sustainability. We invest in strengthening both individual and organisational capacities in strategic litigation with the goal of creating an enabling environment for strategic litigation on women's human rights domestically and regionally. Our strategy has been to work with the same organisations and feminist litigators over a period of time to achieve the desired outcome.

A **t ISLA,** we believe that strategic litigation, from a feminist point of view, is a critical tool for changing historically gendered exclusion

2. THE LITIGATION INSTITUTE

2.1. Previous Iterations

Previously, we hosted the Litigation Institute (the Institute) as a two-week series of capacity strengthening activities, twice a year. The Institute coincided with the three-year period of partnership and implementation of the FLN curriculum. The curriculum's overarching goals were to develop the FLN's knowledge and skills on strategic litigation in various fora, to provide the FLN with sound knowledge on the use of comparative and international law in strategic litigation, to endow the FLN with skills on using different human rights mechanisms, and, to enhance the FLN's understanding of feminist legal theories and their utility in advancing litigation on women's rights, specifically on Violence Against Women (VAW), Women's Socio-economic Rights (WSER), and Practices and Procedures (PP).

The faculty comprised both academic and legal practitioners with expertise in various thematic areas while the Institute incorporated both theoretical and practical components. The curriculum

focused on developing knowledge and skills on using comparative law, human rights methods, contextual feminist legal theory and strategic litigation on women's rights. We drew participants from FLN partner organisations to align with our objective to generate continuity and sustainability in our work model.

The Institute required full engagement, in-depth interaction with the readings and presentations provided by the experts and included one-on-one contact sessions with members of the faculty. The practical aspect of the Institute included a moot court competition at the end of the two-week period where participants worked in teams on a hypothetical case from the beginning of the Institute and presented submissions before a panel of judges at the end of the Institute.

2.2. The Current Institute

The current Institute is modelled on the old, with substantive alterations, based on a newly developed FLN Curriculum. This Institute falls into the first year of implementation of the new Curriculum. It is focused on introducing key aspects of strategic litigation on Women's Land and Property Rights (WLPR) and accompanying State obligations from which the rights to litigate derive.

The Institute will proceed for two

weeks from 18th November to 29th November 2024 with the overall objective to impart knowledge and skills to members of the FLN on strategically litigating WSER at national, regional, and international levels. Similar to previous institutes, the WSER Institute will incorporate both theoretical and practical components, guided by a faculty comprising academic and legal practitioners with expertise in the specific areas of each module.

The Institute will draw participants from FLN partner organisations, in alignment with our objective to generate continuity and sustainability in our work model. The Institute requires full engagement, in-depth interaction with the readings and presentations provided by the experts and includes one-on-one contact sessions with members of the faculty.

The curriculum for the Institute emphasises knowledge and skills on using comparative law, human rights methods, contextual feminist legal theory and strategic litigation on women's rights. The Institute consists of three key parts.

The first part focuses on practice and procedure, with the primary objective of introducing participants to the key theoretical frameworks that inform

ISLA's approach to strategic litigation. It offers a comprehensive exploration of the African Human Rights System, examining its historical context and key factors necessary for effective engagement. Additionally, it covers Constitutional Litigation, emphasising the critical rules and procedures of national constitutional courts, including the admission of *amicus curiae*.

The second part focuses on the substantive thematic area of concern, WSER, and provides a comprehensive introduction to WLPR. It will thoroughly examine the division of matrimonial property, offering a contextual analysis of its development across the pre-colonial, colonial, and post-colonial periods. Additionally, it will explore succession and inheritance, providing an overview and contextual analysis of these issues, as well as examining international, regional, and comparative human rights systems and the particular challenges women face in relation to succession and inheritance. Moreover, it will explore opportunities for feminist strategic litigation in WLPR.

The third part of the Institute is about assessing the levels of knowledge of the participants given that the strategic focus of the Institute is

capacity strengthening. Assessments will include written assessments, oral assessments, a drafting exercise, and a moot court. The moot court will be based on a hypothetical case designed by ISLA staff. Participants will draft cogent arguments in favour of, or against, the motion proposed in the case and make submissions before a panel of judges.

The modules, detailed in sections below, expand on the substantive content of each area.

The curriculum's overarching goals were to develop the FLN's knowledge and skills on strategic litigation in various fora, to provide the FLN with sound knowledge on the use of comparative and international law in strategic litigation, to endow the FLN with skills on using different human rights mechanisms, and, to enhance the FLN's understanding of feminist legal theories and their utility in advancing litigation on women's rights, specifically on Violence Against Women (VAW), Women's Socio-economic Rights (WSER), and Practices and Procedures (PP).

3. WOMEN'S SOCIO-ECONOMIC RIGHTS(WSER) LITIGATION INSTITUTES

3.1. The Rationale

ISLA's WSER thematic area prioritises using the law to achieve policy and legal outcomes that advance socio-economic rights. Such rights may relate to women's legal rights to material resources such as land, housing or property, access to fair and non-discriminatory working conditions, the recognition of human and sexual rights within diverse zones of labour (including wage-based, informal, casual and reproductive sectors), as well as women's access to healthcare and education. The current focus of ISLA's work under this area extends from the lack of equal rights to inheritance; laws excluding or restricting women's access to property rights; property rights of women who are cohabiting; exclusion of women in the processes and laws governing the administration of deceased

estates; and gendered impact of the activities of the extractives industry on women's access and use of land. It is the latter of these issues that shall be the focus of this institute.

Global evidence suggests that while men obtain benefits of extractive industry projects, women often bear a disproportionate share of social, economic, and environmental risks. The World Bank, in its 2009 publication, 'Gender in the Extractives Industry', for example, has noted that those extractive industries – mining, oil and gas, are seen as contributors to economic growth, and can transform lives by creating jobs, reducing poverty and access to revenues especially for women.²

However, the assumption that extractive industries are inevitable and good for development has been debunked through research that show it remains unclear how both the positive and negative effects of extractives are distributed within host communities.³ For poor, marginalized communities, extractive

2 Eftimie A., K. Heller, and J. Strongman, 'Gender Dimensions of the Extractive Industries: Mining for Equity (Washington, DC: World Bank, 2009).

3 See, for example, Catherine Macdonald, 'The role of gender in the extractives industries (WIDER Working Paper 2017/52, UNU-WIDER, 2017) < chrome-extension://gphandlahdpffmccakmbngmbjnjjiahp/https://www.wider.unu.edu/sites/default/files/wp2017-52_0.pdf> (accessed 11 June 2022); The World Bank, 'Mainstreaming Gender into Extractive Industries Projects: Guidance Note for Task Team Leaders' (World Bank Guidance

industries are known to exacerbate more vulnerabilities than benefits.

Even where extractive industries results in benefits for the host communities, often women's needs and their relations to land, biodiversity and the ecosystem in general are ignored in planning, implementation and closure of extraction.⁴ The loss of land or conversion of land use either for extraction itself or for support infrastructure such as roads, ports, housing, clinics and offices adversely affects women who depend on agriculture for their livelihoods.⁵ Women face health and safety risks, and excluded from meaningful participation in processes, are predisposed to gender-based violence in the context of resource-based conflict and exploitation. In addition, patriarchal social structures and traditional gendered division of labour mean that women often bear a greater proportion of the stress associated with mining-induced economic, social and environmental changes.

3.2. The Modules

3.2.1 Introduction to the African Human Rights System

This Module offers an in-depth exploration of the institutions, history, and challenges involved in promoting and protecting human rights in Africa, with a focus on women's rights. The African Human Rights system plays a vital role in human rights litigation and State accountability. This module provides guidance on engaging with the system, which has been instrumental in advancing feminist jurisprudence in Africa. Its objectives include analysing the components of the African Human Rights System, comparing it with other international human rights frameworks, discussing standards for women's rights, and understanding the challenges of addressing gender issues within the system. Furthermore, the module situates ISLA's ideological approach to foster a deeper understanding of the African Human Rights system to promote strategic litigation as a tool for achieving social justice and advancing human rights across Africa.

Volume, 2009).

4 Lahiri-Dutt, K., and G. Burke (2011). 'Gender Mainstreaming in Asian Mining: A Development Perspective'. In K. Lajiri Dutt (ed.), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (Canberra: ANU Press, 2011);

5 Ibid.

The purpose of the module is to provide participants with a foundational understanding of the African Human Rights System, encompassing its history, key institutions, and legal frameworks. It aims to examine how the system interacts with national legal contexts and addresses critical human rights issues, particularly in relation to gender equality. Additionally, it highlights existing challenges and barriers to realising human rights in Africa, especially concerning women's rights, while exploring strategies to overcome these obstacles. The Module is crafted to deepen the participants' understanding of the African Human Rights system while equipping them with the essential skills and knowledge for effective advocacy and strategic litigation. Ultimately, the module is designed to empower participants to actively engage with the African Human Rights system and make meaningful contributions to the promotion and protection of human rights across the continent.

By the end of this module, participants are expected to have a comprehensive understanding of the key institutions responsible for implementing and monitoring human rights within the African Human Rights System. They will be able to analyse how this system interacts with national

legal frameworks and institutions, and articulate notable cases or decisions that have significantly impacted human rights across Africa. Additionally, participants will be equipped to critically examine how the African Human Rights System addresses issues of gender equality, enhancing their overall grasp of the complexities involved in the promotion and protection of human rights on the continent.

3.2.2 Introduction to Constitutional Litigation

This module provides a comprehensive overview of how constitutional claims are litigated as part of strategic litigation. It covers the historical development of constitutional principles, methods of interpretation, and other doctrines that protect fundamental rights. The module delves into the unique procedure and rules of national constitutional courts, focusing on how they handle human rights violations. Topics include admission of amicus curiae, standing, joinder, and intervention, all of which are crucial for building successful constitutional cases. Additionally, it contrasts constitutional litigation with traditional litigation by highlighting how constitutional cases often have broader societal implications, especially in challenging executive actions, promoting policy

change, and defending the rights of marginalised groups.

The objectives of this module are to introduce participants to the practice and procedures of litigating constitutional issues within their jurisdiction, while providing solid understanding of their country's constitutional history, doctrines, and principles. It aims to develop and refine participants' critical thinking skills with respect to key aspects of constitutional law, including an in-depth understanding of locus standi in relation to amicus curiae participation. Additionally, the module encourages participants to critically analyse remedies in constitutional litigation, equipping them with the tools to effectively engage in constitutional advocacy.

Upon completing this module, participants will have developed the capacity to think strategically and tactically about advancing constitutional issues and remedies. They will possess the ability to plan, design, and construct a constitutional case, applying and advancing procedural rules in a strategic manner. Participants will also be equipped to engage courts effectively, particularly in relation to amicus curiae participation. Additionally, they will become familiar with key precedents that have shaped

constitutional litigation and gain an understanding of important post-judgment implementation factors. Ultimately, the module aims to equip participants with the tools to engage effectively in constitutional law and human rights advocacy.

3.2.3 WLPR: An Introduction and Contextual Analysis

This module primarily explores the legal frameworks, historical context, and evolving dynamics of human rights in Africa, with a significant focus on WLPR. It provides an analysis of how colonialism, legal pluralism, and gender inequality have shaped land tenure systems and their impact on women, particularly regarding property rights, tenure security, and forced evictions. The module also emphasises how WLPR relates to broader socio-economic issues like food security, economic empowerment, and gender equality within the African context.

The objective of this module is to provide participants with a comprehensive understanding of the evolution of human rights in Africa, particularly in the context of WLPR. It aims to equip participants with the knowledge to analyse the historical and ongoing gender inequalities that impact women's access to land, and how statutory, customary,

and religious laws interplay to shape this issue. The module also focuses on deepening participants' understanding of international legal frameworks, including CEDAW and the Maputo Protocol, and how these can be applied to promote gender-sensitive policies. Additionally, participants will explore strategies for improving legal protections and advocating for the empowerment of women in land and property ownership.

By the end of this module, participants will have a well-rounded grasp of the challenges and rights surrounding women's land ownership in Africa, with the ability to critically assess how different legal systems impact WLPR. The participants will be empowered to engage in discussions on legal pluralism, development policies, and gender equality, contributing to efforts that address systemic discrimination and promote the rights of women in securing land and property rights across African communities.

3.2.4 WLPR: Division of Matrimonial Property

This module explores the historical, legal, and cultural dynamics that have shaped land tenure systems in Africa, highlighting the challenges that

women face in securing land rights. The module examines the impact of colonialism, legal pluralism, and gender biases on property rights and looks at how statutory, customary, and religious laws intersect to affect women's access to and control over land.

The objectives of this module are centred on enabling participants to critically analyse the evolution, content, and application of matrimonial property laws and policies across Africa, spanning the pre-colonial, colonial, and post-colonial periods. Participants will appraise key international and regional human rights frameworks, such as CEDAW and the Maputo Protocol, that promote women's matrimonial property rights, while gaining insight into the intersection of legal pluralism, statutory laws, and customary practices. The participants will evaluate national legal rulings and jurisprudence to assess their impact on securing and promoting women's matrimonial property rights.

This module is designed to build participants understanding on the socio-economic and legal dynamics that influence the division of matrimonial property in the African context. It is expected that at the end of this module participants will be able to analyse human rights

frameworks at international and regional levels, recognising how they contribute to advancing women's rights to matrimonial property. Participants will also appreciate the broader link between property rights and the economic justice of women. Through this understanding, they will be better prepared to contribute to policy reforms and advocate for the protection and advancement of women's property rights.

3.2.5 WLPR: Succession and Inheritance

This module provides an in-depth exploration of women's land, property, succession, and inheritance rights within the African context. It highlights how patriarchal structures, colonial legal systems, and customary practices have systematically marginalised women in matters of property and inheritance. The module examines case law and jurisprudence across African countries, showcasing both progressive and regressive decisions on women's inheritance rights. The module is designed to provide participants with a nuanced understanding of the socio-economic and legal challenges women face in securing inheritance rights and offers insights into the necessary legal reforms and advocacy needed to advance these rights across the continent.

This module aims to assess the normative human rights frameworks at international and regional levels, such as CEDAW and the Maputo Protocol. In this module the participants will critically evaluate the formal laws and the ways they are applied in practice, focusing on the realisation of women's rights. Participants will explore national jurisprudence to understand its impact on securing and advancing women's rights in matters related to inheritance and property.

By the end of this module, participants are expected to have a comprehensive understanding of the socio-economic and legal dynamics affecting women's succession and inheritance rights in Africa. They will be able to analyse and apply the normative human rights frameworks at the international and regional level that seek to promote women's succession and inheritance rights. Participants will also be able to appreciate the connection between succession, inheritance, and the realisation of women's economic justice, allowing them to apply the acquired knowledge in practical situations to advance women's succession and inheritance rights in interest jurisdictions.

3.2.6 Opportunities for Feminist Strategic Litigation in the Area of Women's Land and Property Rights

This module stems from an understanding that efforts to advance women's rights are often hindered by systemic failures. The module outlines how strategic litigation can be a powerful tool for exposing legal failures and driving societal change. These systemic failures are owed to States failure to uphold their responsibility to protect WLPR, particularly due to the influence of patriarchal norms, discriminatory legal systems, and the persistence of legal pluralism.

The objectives of this module are to provide participants with a deep understanding of how women's lived experiences regarding land and property ownership require responsive and robust legal recognition and remedies. The module seeks to equip participants with the knowledge to conceptualise strategies for feminist strategic litigation, focusing on advancing women's rights in land ownership and property. This module is designed to ensure that participants gain an insight into the key legal rights at stake in context of WLPR and develop an understanding of transformative remedies that can bring about systemic change.

By the end of the module, participants will have internalised the importance of women's lived experiences in matters of land and property ownership and the critical need for legal protections. They will be able to critically evaluate the ways in which States have failed to protect women's rights in this area and conceptualise strategic approaches to feminist litigation. Participants will also be able to identify, and articulate key legal rights involved in WLPR and apply the knowledge gained in real world contexts to advance women's land and property rights within various legal jurisdictions. This module prepares participants to engage in practical efforts aimed at challenging systemic discrimination and promoting gender equality through the law.

3.2.7 Litigation Institute Assessments

Oral and Written assessments

The purpose of the assessment process is to understand the learning progress of the participants and to assist them in strengthening their knowledge, skills, and confidence. This process allows participants to track their progress and encourages them to gain knowledge in areas that need strengthening. Before the Institute commences, we will provide participants with relevant reading

material that will feed into the tasks participants are to undertake during the litigation Institute. The idea of the assessment is not to award a pass or fail mark but rather to offer clear and concise feedback on what areas participants need to improve on. The assessments will comprise a written assessment, and a brief oral assessment.

The Moot Court

The moot court provides participants with an opportunity to put into practice, the skills and substance accumulated in the initial parts of the Institute. Mooting plays an essential role in legal education by honing legal research skills, logical organisation and legal reasoning in writing and preparation of documents, and oral presentation skills. The moot court will simulate a hearing of the African Commission on Human and People's Rights, where participants must demonstrate their understanding of the Rules of Procedure for African regional systems. The participants are required to show their process of legal research, analysis, and problem-solving skills for the issue at hand by writing clear statements of facts and arguments effectively, accurately, and concisely. After that, the participants will be evaluated by at least three judges.

4. Conclusion

In a world in which those with political power shape life outcomes for those without it, feminist strategic litigation represents a fighting chance to shift rules, processes, behaviours, and outcomes that impact women's lives. Our work, to develop a pool of feminist lawyers with the knowledge, tools, and expertise to litigate women's human rights, including WSER, remains critical to upending these unequal power hierarchies, one case at a time. This Institute will kickstart the process of building FLN lawyers' capacities to do this work.

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ISLA'S

existence is a response to the skills deficit and institutional limitations within organisations, within the framework of strategic human rights litigation. Despite continuing human rights violations, based on gender and sexuality, legal efforts to hold states accountable for these violations have been scant. For instance, in over 30 years of the African Commission on Human and Peoples' Rights there have only been two decisions handed down for violations of women's human rights, and none for sexual rights. Similarly, the African Court has only had one case on women's human rights and none on sexual rights.

Strategic litigation is often under-explored as an instrument for social change, promoting rights and seeking effective redress when those rights are violated, due to institutional limitations within non-governmental organisations (NGOs) and a skills and experience deficit. These challenges hamper the submission of well-chosen and well-argued strategic cases. As a result, even in cases where litigation is carried out, the overarching goal of developing feminist jurisprudence is often never reached.

ISLA believes in the power of strategic litigation to bring about significant social change by taking carefully selected cases to court and using them to change the law and legal practice and to bring about public awareness. The transformative change enabled by litigation can only happen as a result of investing in local institutions and individuals. The right investment contributes to sustaining momentum, strengthening social movements and expanding the pool of lawyers who can conduct successful strategic litigation on cases related to gender and sexuality