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## Taking on the State: An African Perspective

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In this piece, have organized my response under three heads. First, in reading Cooper and Emerton's paper, I am struck by how the project is framed as a 'not yet proposal'. For those of us involved with critical and reflexive law projects, FLaG's methodology reverses our expectations. It opens with a proposal for change when we have instead come to expect that our proposals for law reform are made, if at all, at the end of a project or study. FLaG sets out to reverse this methodology and to ask that we think of 'prefigurative law reform'.

Related to this is a second point about locating law reform projects as primarily directed at legislative reform placed in some future time. I think here it is important to consider the full range of legal engagement and how we might insert the sorts of claims we want to make in other wider legal strategies. Again, I will elaborate below.

Third, I want to pick up on the paper's suggestion that one of its aims is to establish a distance between state law and social gender and in this way to think about how and whether to withdraw state authority from propping up gender. Here I would like to know more about the project's conception of the state and our engagement with it.

It might be useful in relation to this last point, to say something about my own socio-legal, law reform and area interests in responding to Cooper and Emerton's paper. In the relatively young African Feminist Judgments project led by feminist litigators in Eastern and Southern Africa we are working to draft and disseminate alternative judgments for important African landmark cases on a range of legal issues. At the heart of the project are

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the following questions – what might we mean by a landmark case in the African context? What is feminist judicial practice in Africa and what might we want it to be? How might alternative feminist judgments contribute to African jurisprudence, legal practice, and judicial decision-making? What are the specific constitutional and historical contexts within which the project must be understood?

When we gathered for our first meeting to discuss our judgments and the commentaries that will accompany them, we debated how we approach the legal form of the judgment in our judgment writing – should we stick closely and loyally to the recognizable form of a judgment with all the conventions of judgment writing that that entails, so that our project allows us to speak directly to the feminist judges and lawyers whom we hope to persuade and support as they attempt to deliver more progressive judgments on women’s rights to property, reproductive rights and sexuality, social and economic rights and so on (see Munro et al, 2020)? Or should we be giving up on the state and by extension the judiciary and, if so, should we rather use the judgments and our imagined courtrooms more subversively? The example I have in mind is the recent Brechtian use of the courtroom by the feminist Makerere University academic Stella Nyanzi. When she appeared before a Kampala court charged with using offensive communication insulting the president of Uganda and his mother in explicitly sexual terms, she used her court appearance to use vulgar language and words to expose the absurdity of the state’s case (Nyanzi, 2020). Should we – dare we – as an African Feminist Judgments project take on the state and its institutions in this way or do we wish to cleave to a liberal legal model that makes use of widened grounds of standing and new possibilities offered by the *amicus curiae* mechanism to bring our project into conversation with the judiciary?

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I have also been involved for some years in studying the work of constitutional lawyers in Kenya seeking to litigate a range of social issues through the courts, relying on a reformed and strengthened judiciary and the new, transformative, Constitution of 2010 (Mutunga, 1999). What is critical here is the extent to which this Constitution is based on south-south conversations – the global north is most definitely not an obligatory partner in the conversation. Indian, South African and Kenya lawyers have forged a constitution and used its innovative legal strategies in ways that have opened up space for law reform in the broadest possible sense (Cottrell and Ghai, 2007). Just as important is the contribution that other disciplines might make to thinking about the sort of state with which we are engaging. For this, we have much to learn from literary theorists, historians and political scientists and their reflections on the nature of the state.

So, to return to each of my points.

First, law reform's temporality and why it is interesting to think through a proposal that is manifestly not yet on the table. For the authors, the project is not one that is necessarily future oriented in the way that law reform is normally understood. Instead, a prefigurative approach allows us to formulate and then pose a law reform question before it is viable or perhaps ever likely to be. I found thought provoking the suggestion that prefigurative law reform projects are less concerned with current possibilities than with exploring what it might mean to desire a given change and, in that way, to hear demands that might otherwise be silenced.

Let me merge this first observation with my second point about why we tend to locate law reform projects, as this project seems to have done, as primarily directed at legislative reform placed in some future time. If legislative reform is foreclosed for now, that

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shouldn't prevent us from thinking about the full range of legal strategies through which we might effect reform, albeit very slowly and in the face of significant risks of pushback against the wider political project as a whole.

I think it is important to consider the full range of legal engagements that might be possible and to think about how we might insert the sorts of claims we want to make in other wider legal strategies. This is because we have open to us in the form of a new generation of African constitutions, ways of inserting claims creatively into the court that we wish to have heard even if we think they are not ready to be heard or addressed (Bassett, 2014). The mechanism in the 2010 Kenyan Constitution for broadened grounds of standing – taken from India via South Africa – and the mechanism of joining *amicus curiae* to actions has provided considerable space for creativity. Indeed, successful challenges to section 164 and 165 in Botswana – the section of the Penal Code criminalizing homosexuality – in the 2019 case of *LM v Attorney General of Botswana* has been attributed by some to excellent use of *amicus* briefs to persuade the court in concrete terms of the harms caused by a colonial era provision (see <https://theconversation.com/botswana-recognizes-lgbtq-rights-leading-the-way-in-southern-africa-119277>).

All of this is in order to say that in reading Cooper and Emerton, I wanted to know more about the present project's conception of law reform. And I wondered what to do when 'not yet on the table' is neither an option nor desirable as a political strategy, when an issue cannot wait and harm is being done. Put another way, we are sometimes faced with urgent issues – over women's reproductive rights, for example – when we might not want to wait to reach the table but have to launch a fundamental challenge about who gets to make the table? This urgent standpoint is an interesting one from which to engage with the

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decertification project which does not assume that it is either possible or desirable to persuade the state to decertify, but aims instead to enable us to think about what conditions would need to be in place for this to come about. In other words, the project's methodological intention is to offer decertification as a lens to explore our conceptions of gender and how it is regulated and to think about our investment in it.

My third point is about the project's theory of the state. Here we learn that law reform may not be on the table given the current climate. Even if the project is prefigurative, it is built on certain assumptions about the sort of state with which you are dealing. Your prefigurative labours are taking place in the assumption that you can drive a wedge between the state and legal gender, that you could persuade the state to decertify. I wanted to know more about the project's conception of the state and about how we assess the state's investment in legal gender. Can we assume the state's willingness to withdraw its authority from the project of certifying gender?

This is important because a prefigurative project would have to think carefully about state violence and state sponsored violence in its colonial and post-colonial manifestations (Manji, 1999). African states have been both actually and symbolically coercive to women in both the colonial and postcolonial eras. Indeed, literary theorists and others have written of Kenya that it is itself gendered, characterizing its various regimes as both gerontocratic and phallogocentric (Musila, 2009). It is arguable that the entire edifice of the African state is built on gender violence, whether in the form of everyday acts of physical assault or the exclusion of women from political power – even when progressive feminist law reform projects are actually on the table. The Kenyan Constitutional provision that no one gender should account for more than two-thirds of parliamentarians is a case in point. It has simply been

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ignored and ridiculed by what is in effect an unconstitutional parliament (see <https://theconversation.com/kenyas-parliament-continues-to-stall-on-the-two-thirds-gender-rule-79221>). This provision in the 2010 Constitution came about as the result of considerable struggles by Kenyan women but its non-implementation demonstrates that even legislative and constitutional reform which is on the table cannot be relied upon to bring about gains. My point is to ask how a prefigurative project is embedded in wider gendered structures of state oppression and longstanding patriarchal practices.

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