

# *Pandora's Box*

INTERNATIONAL HUMAN RIGHTS

2001



A publication of the Women and the Law Society  
UNIVERSITY OF QUEENSLAND



# Pandora's Box 2001

International Human Rights



**Editors**

**Nicky Jones**

**Sarah McCosker**

**Tiffany Stephenson**

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T C Beirne School of Law  
The University of Queensland  
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# Editors' Note

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We are thrilled and proud to present *Pandora's Box 2001*.

This year *Pandora's Box* extends its horizons to have a transnational focus: international human rights. We worked hard to obtain contributions covering a wide variety of topics but found that there was no shortage of ideas or excellent contributors. Human rights issues, particularly those relating to women, transcend borders and are of universal and international concern.

*Pandora's Box 2001* draws together contributions from women in diverse sectors of society, including the judiciary, the diplomatic corps, the police service, academia, non-governmental organisations and politics. The journal provides a forum for women's reflections on a range of local and national issues: women and policing in our community, legal aid, justice for women in Australia, and even some nostalgic reminiscences of UQ law studies long past, making us thank our lucky stars for the determined and courageous women who have blazed trails for us here today.

We consider Australia's international human rights obligations: the responsibilities of our companies overseas, our treatment of vulnerable groups in the community such as Australia's Indigenous peoples, and our relations with international organisations and the human rights treaty body system. The articles pose the question: "Does Australia protect human rights?" before attempting to answer it.

*Pandora's* has also turned her gaze overseas, towards New York, Burma, Pakistan and other countries, where many women are battling incredible obstacles with great courage to make a life and a future for themselves, their sisters, their daughters and their families, sometimes just to survive. These articles consider our relationships with women overseas and the interconnectedness of national and international issues affecting women.

We have included the winning entry from the WATL Student Paper competition, as well as abstracts from the other entries – congratulations to the winner and to all the entrants for your interesting ideas!

Many thanks to the Executive of WATL, particularly our endlessly hardworking and helpful President Zenovia Pappas, for all their support.

Finally, we must warmly thank the people who gave their time, their wisdom and their words to us to store in *Pandora's Box 2001*. We hope that the contributions will stimulate discussion and provoke thought and, most of all, we hope that you enjoy them!

Editors  
*Pandora's Box 2001*

Nicky Jones

Sarah McCosker

Tiffany Stephenson

# Foreword



Ms Cheryl Kernot was the keynote speaker at the Professional Women's Legal Breakfast at which *Pandora's Box 2001* was launched. Ms Kernot is the Member for the federal seat of Dickson and Shadow Minister for Employment & Training.

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Thank you to the organisers and the members of the Women And The Law Society for inviting me to participate in the Breakfast and in *Pandora's Box 2001*.

We find ourselves meeting this year in very challenging circumstances enveloped by uncertainty.

This is a time to draw strength from the commonsense and resilience of women everywhere; a strength and support which has always sustained me in difficult times.

Although I am not directly involved in the legal profession, the law and human rights issues touch all our lives, and this is brought home so well by the articles in *Pandora's Box*.

I congratulate the editors of *Pandora's Box* for a very timely collection of articles and their contribution to our collective voice.

As in previous publications, the excellence lies in the treatment of such poignant subjects and in the humour appearing in a number of the articles. It is always encouraging to see women in the community raising the significant issues, and *Pandora's Box* is a worthy leader.

I join with others from previous years to congratulate the editors in providing another year of worthwhile articles! It is an honour to be part of such a publication for women.

Cheryl Kernot, MP.





# The Myth of Pandora's Box



**Dr Suzanne Dixon is a Reader in Classics & Ancient History at the School of History, Philosophy, Religion and Classics at the University of Queensland.**

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The Judaeo Christian tradition has Eve; the Graeco Roman tradition has Pandora. Each culture can comfortably blame women for its misfortunes. “*Pandora*”, “all gift”, was endowed with a gift (beauty, charm, skill in working wool) by each of the gods of Mount Olympus. But Zeus, king of the gods, had commanded her creation for the specific purpose of punishing mankind for the theft of fire from his heavenly domain. Beneath her beautiful, virginal surface Pandora was the means of bringing misery to men. Moved (like Eve) by a lethal curiosity, she opened the forbidden box and released the evils which men had never known in their earlier state: diseases, manual labour and unnamed miseries. But she put the lid on the chest before Hope could escape. So humans still have Hope. Just as well. In today's economic climate, young women taking up the law must have it: hope in the future, in their own abilities and stamina, in the system of justice which our society has evolved in bits and pieces over the centuries.

How apt that WATL has chosen to appropriate the Pandora myth and to see the opening of the box as a liberating, subversive and exciting act. Pandora's rehabilitation is long overdue. The seventh century BC Greek poet Hesiod portrayed her as a deceptive lure for men, the untrustworthy female principle. Shades of modern “men's rights” groups and the so called backlash. But when you look at Hesiod's account (*Works and Days* 42 105), you find that Pandora had quite a cluster of interesting qualities. In obedience to his father Zeus, Hermes, god of thieves and merchants, gave Pandora his particular gift: “lies, tricky speeches and a thieving heart”. Hermes' varied job description included the role of herald, so he also blessed her with a strong voice. Many would argue that these gifts constitute a fitting combination for a promising barrister.

It's all a matter of perspective. We don't regard curiosity as an evil these days indeed, an inquiring mind and a disregard for mindless prohibitions (“Don't, whatever you do, open that box, Pandora!”) can open the way for great things. Do open that box, Pandora, never mind what the fusty old men tell you. The box might release all sorts of things which they regard as ills: Mabo, anti-discrimination legislation, an end to the husband's “right to chastise” and the beginning of consumer rights.



Go for it, Pandora.

# Improving the Relationship Between Policing and Women in the Community - A Logan River Valley Perspective



Sergeant Maree Foelz is a police officer with the Logan Police department working in District Crime Prevention Co-ordination and was a District Community Liaison Officer in 1999. Sergeant Foelz presented this paper at the Second Australasian Women and Policing Conference in 1999.

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We are members of the Police Services of Australia. We are members of the community. Most importantly, we are women, and as such, we have a unique opportunity to improve the relationship between police and women.

However, this does not diminish the responsibility of our male counterparts in assisting us to provide a service which takes into account the needs and rights of women in our communities.

As noted in the Women's Advisory Group Network Action Plan 1997 - 2000, one of the aims of policing in the community is to increase the involvement of women in all aspects of community policing. To this end, strategies which span the increase of selection and recruitment of female officers, the increased involvement of female police officers in the community, and ensuring involvement of community women in policing activities, present enormous challenges to the service. Such as not minimising the complexities of increasing the number of women in the service, and the engagement of officers in the community.

In this short presentation I have chosen to focus on the challenges of engaging community women in policing activities. Placing these challenges in context, I will first present an overview of the Logan Police District, its residents and the role of the District Community Liaison Officer.

The Logan Police District, the area referred to by the community as the Logan River Valley, had a population of 261,038 as at 30 June 1998. It covers three local Government areas including Logan City, Beenleigh and Beaudesert, with a diversity of rural, remote and urban communities. It also includes the fastest growing growth corridor in Queensland.

Logan has 45% of its population between the ages of 12 and 25 years and no fewer than 106 different cultural groups represented. Other socio economic factors which influence living in this area are the highest number of domestic

violence protection orders in the State, double the substantiated child abuse cases in the State and high levels of juvenile crime. Therefore the challenges and opportunities presented to police in this area are as diverse as the people we serve.

However, despite this, it takes great guts for women to survive in this place. I am privileged to work side by side with survivors of domestic violence, rape and sexual assault. We have in our time begun the first “Reclaim The Night” march for Logan, and the first Regional Domestic Violence service and now an Integrated Community Response to domestic violence, and together we strive to make Logan a better place for all its citizens.

By listening to the collective wisdom of the women in our communities we can learn to improve our response to the issues that most affect them. By involving women in networks, committees, as support, and in partnerships, with the police and the community working together to provide an enhanced response to the women of our community. The word ‘community’ in Community Liaison means we are from the community serving the community. Included in my role, as a woman I provide a service for women by a woman.

The role of the District Community Liaison Office is to co ordinate crime prevention and community policing activities throughout this area. As part of my role I have involvement with Neighbourhood Watch programmes, Adopt a Cop in schools, Safety Audits, Safety House, Domestic Violence Liaison, Liaison to Lesbian, Gay, Bisexual and Transgender communities, Protective Behaviours programmes, Home Security/Personal and Women's Safety programmes, Cross Cultural Liaison, Community Consultative Committees, Work Experience/Recruiting promotions, V.I.P. training, Blue Light Discos, and various displays and presentations. I have also been and am currently involved with various networks, reference and advisory groups and interagencies throughout the Logan River Valley.

Community policing has been at times perceived as the ‘soft’ end of policing. So how do we improve these relationships when the community is so often distrustful of and disempowered by the uniform?

We can do it in many different ways. It's in the quiet words of advice to a young woman when she is trying to get justice for rape. It's the encouraging words to a young child while they learn how to keep themselves safe. It's in the commitment to increasing women's safety that enhances and maintains appropriate responses to women escaping domestic violence. It's in explaining the role of police to women who have only been in Australia for three months after escaping the atrocities of war. It's having a cup of tea and listening to the wisdom of older women and using this to help them reduce their fear of crime. It's speaking to a group of young people about how to survive the streets of Logan or the Gold Coast or Brisbane.



Whether they be young or old, white or black, rich or poor, straight or lesbian, or from whichever cultural background they come, there exists an opportunity for a meaningful relationship. It is in the nexus of these groups of women that the relationships between the police and women are defined. And it is within this knowledge, experience and beliefs of women's rights that the police and community have a partnership.

In collating information for this paper, I talked to women about their thoughts. These are some of their words.

Several years ago police were seen as a 'security' force, now they are seen as having a much more positive role. Positions like the District Community Liaison Officer (DCLO) put a 'human face' to the police. Once 'humanised' to the services in the community, then it is easier to transfer that to others, especially young people. A big part of that is to know what you stand for, and that you are accessible. It is important for the police to look at the needs and issues relevant to the community. By establishing credibility and a high profile in the community with DCLO positions in a preventative role, it shows integration at work. You are seen not as the system, but as the link, and it is important to have that long term involvement in ground level community.

Particularly in regards to domestic violence, women are still saying they can't rely on police to treat it seriously, that there's 'no point', they take hours to get there and they can't make the police part of their 'safety plan'. Women still see the police as a 'boys' club', the police look out for the women's partners, some partners saying they are 'friends of the police'. They don't think the relationship of trust is built.

Professionally as a worker, positive roles have been seen, such as the Police Liaison Officers (formerly ATSI Liaison Officers) and the Lesbian, Gay, Bi-sexual, Transgender Liaison Officers. The community see this as a sign of good will, even if it's not working as well as it could. The police culture is very strong, so how effective is the training to try and change that. Until women are seen equally and not seen as 'one of the boys', that will continue to alienate women. It is easy to be critical of the Queensland Police Service but people are slow to commend the good things and it's not being done enough.

There have been changes due to the personal relationships with the DCLO. Maintaining strong links has been important and also the availability of the officer in that position. There is a need for more Liaison Officers offering community education out in the community. Rapport is the key. The current professional models aren't working, they aren't building rapport. Why do interagencies, Community Advisory Groups and networks work well? Because there is respect for where everyone is coming from, and all are working in the one direction.

Why is the DCLO being asked to provide individual support and advice on domestic violence, rape or same sex issues? Because of the rapport that has been built. So how do we reach a middle ground in serving the community in the role of police officer and meeting the needs of the community? In times of crisis and need, who do we call – forget the general duties police. This is the stuff that is missing – someone who is friendly; trust; honesty with information; someone who genuinely wants to help with no hidden agenda; and someone who will respond to the need at the time. The Queensland Police Service has established legal paths through the Courts etc., but it is this other stuff that is missing, the links aren't being made.

Any youth agency will acknowledge that young people feel 'victimised' by police whether they have participated in crime or not, so major bridge building is needed. The School Based Police Officer project is a positive approach, but there is a need for more of them. What follow up is there, though, for young people? Can a young person ask for information outside their 'official' capacity? Could there be structured programmes with more contact between the police and young people? Also, what avenues are there in the future for the Police Liaison Officers and increasing their role within the community?

I again acknowledge and thank the women who have allowed me to share their thoughts.

For Community Policing to survive it must be situated in and supported by the community. In our case, in our communities, it is the women who shape its service delivery. They form the committees and networks, they provide safe houses for women escaping domestic violence; they do the chook raffles and sausage sizzles at the local supermarkets raising funds for their local schools. It is these women and those of the silent majority whose voices have been silenced by violence, poverty and isolation. It is time to give these women a voice.

I am proud to be a police officer, serving my communities, supporting their needs, raising community awareness and improving police sensitivities to the needs of women.



# Women and Legal Aid



Ms Vivienne Wynter is Senior Project Officer for Women's Infolink, Queensland. Ms Wynter has written and published a number of articles on contemporary feminism and has been closely involved in many campaigns to stop media advertising which is offensive to women.

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*'Get yourself a lawyer, son. Better get a real good one...'*

The subject of this pop song is male, which is lucky for him, because men have a much better chance of getting legal aid in Australia than women. Co-ordinator of Women's Legal Aid Tracey de Simone shared a few hard facts on women's access to legal aid in a recent seminar at Women's Infolink.

## **The story till now...**

Tracey de Simone runs Women's Legal Aid (WLA) with a brief to improve women's access to legal aid in Queensland.

It's a big ask. A recent survey on women and legal aid in Queensland found that only 33% of approved legal aid grants go to women.

There are many reasons for this, according to Tracey. "The Australian Law Reform Commission (ALRC) Report *'Equality before the law: Justice for Women'* found that while the granting of legal aid is not gender based, in practice, there is systematic discrimination in the allocation of legal aid," she said.

"The report found that the legal aid system strongly favours crime. Most criminal defendants (around 80%) are men, while the majority of female applications for legal aid are in family law matters.

"It found that areas of law that are most likely to involve women, such as family law and civil law matters like sex discrimination, criminal injuries compensation and domestic violence applications, are 'short changed' by the legal aid system.

"Another report, by the Legal Aid and Family Services division of the Federal Attorney General, found in 1994 that women only make up about 40% of applications for legal aid. It did not address the issues deterring women from even applying for Legal Aid."

Funding cuts have also affected women seeking legal aid. The Federal Government cut funding to legal aid by 31% (\$120 million) in 1996. Add to this the fact that a funding increase of \$64 million was needed to maintain real



funding levels of 1992, and the fact that demand for legal aid has increased due to population rises, increased legislation and increased legal costs, and you get an indication of the real impact of these cuts. With fewer Australians receiving Legal Aid overall, women receive even less. "The Federal Government funding cuts affected family law matters – an area where women are most likely to be affected," said Tracey de Simone.

The Commonwealth capped funding for individual family matters in 1998. "A limit of \$10,000 was set on individual family matters but there is no cap in criminal matters. A serious criminal trial can cost between \$50,000 and \$90,000," said Tracey.

"There are also many subjective tests that come into play when women are applying for legal aid for family matters. 'Reasonableness' and 'merit' are assessed by the grants officer, the solicitor and eventually the court – all of whom are most likely to be male.

"In criminal matters the decision on granting legal aid is automatic. So to some extent the legal aid system is skewed towards criminal law, which places women at a disadvantage."

Indigenous women who should be served by Aboriginal and Torres Strait Islander Legal Services have, in the past, tended to be neglected by the ATSI Legal Service's focus on criminal matters. More recently, however, the Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service has begun to address the inequalities in access to legal services for Indigenous women.

"Women are not being provided with a basic level of protection of their rights," said Tracey.

Prominent Melbourne academic and lawyer Jocelyne Scutt eloquently commented on the consequences of this systematic discrimination for women. According to Scutt: *"...the greatest danger and risk for a large proportion of the population lies not in the spectre of prison, but in violence and economic deprivation at home..."*<sup>1</sup>

### **Tackling the problems**

Women's Legal Aid was established as a specialist unit of Legal Aid Queensland (LAQ) in response to the ALRC report. It is staffed by a co-ordinator (a solicitor), one legal officer and one social worker. WLA has a state wide focus and provides policy advice to Legal Aid Queensland. The social

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<sup>1</sup> Scutt, J. 'Access to Law in an Age of Mean Spiritedness', in Linda Hancock (ed.), *Women, Public Policy and the State*, 1999, Macmillan: Sth Yarra, Vic., at 127.

worker is available to assist women with companion issues to their legal problems such as housing and liaison with the Department of Families.

In conjunction with community organisations, WLA has developed a collaborative '*Violence Against Women*' strategy which led to a conference in late 1999 on violence and the service providers who respond to it. One of the outcomes of the conference was the production of guidelines for legal officers working with clients who have been affected by violence. WLA provides training on interacting with clients affected by violence for all Legal Aid Queensland (LAQ) staff and the staff of Legal Aid preferred suppliers (private firms that do legal aid work).

WLA has just released the guidelines: '*Framework for Best Practice Guidelines for working with clients who have been affected by domestic violence*' which include the following suggestions for lawyers and service providers:

- make safety a priority. For example, service providers should not leave women and their partners together in waiting rooms where women may be harassed, they should not have the woman's new contact details on the front of their file where their former partner can see them, service providers should accompany women to court and should also take measures, such as having a silent telephone number, to protect their own safety;
- acknowledge the criminal nature of violence. Challenge the idea that violence in a family relationship is private or acceptable;
- acknowledge that clients from differing cultural backgrounds will have differing needs;
- collaborate with other agencies to ensure that clients receive the best possible service; and
- take a non judgemental approach, encourage clients to make their own choices and respect those choices.

In other initiatives, Women's Legal Aid:

- has produced a gender analysis of women and Legal Aid in Queensland, called '*Gender Equity and Legal Aid Queensland*';
- was recently funded by the Department of Families to provide the Brisbane Court Assistance Service to support victims of domestic violence in court;
- is running a domestic violence project at the Beenleigh Magistrates Court;
- is conducting a Rural Awareness Project involving WLA staff conducting seminars on legal aid for rural women (currently focussing on Filipino women living in rural and regional Queensland); and
- trains Legal Aid grants officers in family law.

In the meantime, LAQ is working on recommendations produced in a report titled '*Unacceptable Risk*' produced by the Department of Families. This report

found that women's experience of the legal system was extremely poor, particularly in cases of extreme domestic violence.

LAQ is also working on an Integrated Indigenous Strategy which aims to improve the access to justice for Aboriginal and Torres Strait Islander women and their families. As part of this strategy, LAQ has recently established a legal advice hotline which will provide culturally appropriate advice to Indigenous people, including women.

Another Legal Aid Queensland initiative, the Women's Justice Network, has been granted funding by the '*Networking the Nation*' project to set up 13 video conferencing centres in remote areas of Queensland for delivery of legal advice to women. The Women's Justice Network works in partnership with WLA and Women's Infolink.

On a positive note, the situation for women now seems to be improving, with LAQ recently reporting that in the 1998/99 period, 46% of contacts were with women and were mainly for family law matters.

**For more information contact Women's Legal Aid on: (07) 3884 7840**

**LAQ's Legal Hotline Number for Aboriginal and Torres Strait Islander  
Queenslanders is: 1300 650 143**





# Women and Justice – Is There Justice for Women?



Justice Roslyn Atkinson has been a Judge of the Supreme Court of Queensland since September 1998. Her Honour is also President of the International Commission of Jurists (Qld), and has a strong interest in international human rights law, as well as in issues concerning women and the law. Justice Atkinson presented this speech at the 'National Women Speak' Conference hosted by the Office of the Status of Women in August of this year.

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We live in a democratic society governed by a constitution and the rule of law. The legal system in such a society is predicated on the assumption that all citizens, whatever their sex, race or religion, or their access or lack of it to wealth and power, are equal before the law and will receive equal and fair treatment by the law. To suggest that this is not true for any individual or social group is to question the very basis of our civil society, our democracy. Each citizen of this country is entitled to expect justice according to law.

Women interact within the legal system in two major ways: as participants within it, and as citizens affected by it. This is because the judicial system is the third arm of government and, like the legislative and administrative arms of government, affects each one of us even if we are not active participants in it. It is necessary therefore to examine the system to determine whether women are treated unfairly or face discrimination within it because of their gender.<sup>1</sup>

It is hardly controversial these days to point out that women, along with many minority groups, have not received equal treatment in the past in our courts. Two questions then require examination:

1. Do the practices of the past which led to injustice to women continue to inform current legal practice and judicial decision making and, if they do, what has been done and what should be done to correct this situation?
2. Are there still laws which need to be reformed before women can expect true equality before the law?

I would like to consider each of these difficult issues in turn.

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<sup>1</sup> Recent research suggests that the confidence that non-users have in courts is affected by their perception of whether there is equal treatment by the courts so that women and minority groups are not discriminated against: S.C. Benesh and S.E. Howell, 'Confidence in the Courts: A Comparison of Users and Non-Users' (2001) 19 *Behavioural Sciences and the Law* 199 at 211.

## Unjust practices

Women participate in the legal system as litigants, victims, defendants or witnesses; or as lawyers, jurors, or much more recently, as judges. The under-representation of women in the judiciary and indeed until the appointment of Roma Mitchell to the Supreme Court of South Australia in 1965, their complete absence, led to women being treated not as equals but as what Simone de Beauvoir referred to as the Other beings with a different, less rational and hence less reliable view of the world. This reflected itself in the type of legal reasoning which was applied to women. Let me give an example.

The evidence of women and children was historically treated with suspicion in the criminal courts. In part this was due to the insidious influence of myths and stereotypes and in part, particularly where they claimed to be victims of sexual offences, it was due to rules relating to the corroboration of the evidence of such witnesses. Why should the evidence of certain witnesses be considered unreliable? If, for example, two people commit a crime together and one gives evidence implicating the other as having greater responsibility, a jury may be entitled to treat the evidence of the accomplice with some suspicion, particularly if that offender has been given immunity from prosecution. Judges therefore often warn juries that it is dangerous to convict on the uncorroborated evidence of an accomplice.

Unfortunately, however, the rule did not stop there. Let me give a reasonably recent example of the way the rule extended, offensively, to put victims of sex crimes in the same category as accomplices. As recently as 1987, the Law Lords who comprise the Judicial Committee of the Privy Council in London held:<sup>2</sup>

“The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as ‘suspect witnesses’.

It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called ‘suspect witnesses’ may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence.”

The generation of judges to whom they refer did not include women. There has never been a female judge in the House of Lords, England’s highest court of appeal. This year a woman, Dame Sian Elias, sat for the first time on the Privy Council<sup>3</sup> which sits in London and hears appeals from some Commonwealth countries, but that was only because she is the Chief Justice of New Zealand and entitled because of her position to sit in the Privy Council. The senior Law

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<sup>2</sup> *A-G of Hong Kong v Wong* [1987] AC 501 at 509, 511

<sup>3</sup> *The Times*, 6 February 2001, p. 9

Lord, Lord Bingham, said on his appointment last month that he expected there to be an appointment of a woman to that court within five years.<sup>4</sup>

It is perhaps little wonder that there was great controversy earlier this year when feminist lawyers argued that the all male Law Lords were an inappropriate body to adjudicate on a test case on rape law to determine whether a woman's previous sexual history should be admissible evidence in a rape trial.<sup>5</sup> The case went ahead.<sup>6</sup>

The rule to which I referred, that the evidence of "victims of alleged sexual offences" had to be corroborated, drew upon various obnoxious stereotypes:

- (a) that women are irrational and unreliable;
- (b) that a woman was either an unwilling participant in a sexual offence or if she was not, she was a whore or an adulterer. A woman could not in law therefore be raped by her husband<sup>7</sup>;
- (c) that, from the male perspective, rape is an easy accusation to make and a very difficult one to disprove.

This rule led to various complex, and once more arguably stereotypical, evidentiary rules such as:

- (a) fresh complaint. A woman is expected to complain of a sexual offence against her at the first reasonable opportunity doing so is said to be expected of a truthful woman who has been sexually assaulted.<sup>8</sup> If she doesn't so complain, the jury would be able to take that in account in deciding whether to believe her;<sup>9</sup> and
- (b) distress. The distressed condition of a woman or girl as observed by third persons was said to be capable of corroborating her complaint of rape. However the rule could be used to further humiliate a female victim. In a Queensland case decided in 1965,<sup>10</sup> at a time when I myself was 16 years old, a number of men were convicted after a 17 year old trainee nurse was pack raped. After the first pack rape, the victim escaped but was then taken by other men to a rubbish dump where she was raped by five more men. She was taken

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<sup>4</sup> F. Gibb, 'The Supreme Sacrifice', *The Times*, 17 July 2001

<sup>5</sup> F. Gibb, 'All-male Law Lords 'Biased Over Rape Case' ', *The Times*, 20 March 2001, p. 4; F. Gibb, 'Law Lords Reject Sex 'Bias' on Rape Law', *The Times*, 21 March 2001, p. 8; M. Stephenson, 'Absence of Women in Highest Court', *The Times*, 23 March 2001, p.23

<sup>6</sup> *Regina v A* [2001] UKHL 25

<sup>7</sup> M. Hale, *Historia Placitorum Coronae*, 1734 at 636 quoted in G. Geis, 'Lord Hale, Witches and Rape' (1978) 5 *British Journal of Law and Society* 26 at 40 - 41

<sup>8</sup> *R v Lillyman* [1896] 2 QB 167; Hawkins' Pleas of the Crown: "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact." A woman was expected to raise a hue and cry as a preliminary to an accusation of rape: *R v Osborne* [1905] 1 KB 551

<sup>9</sup> *Kilby v The Queen* (1973) 129 CLR 460 at 465

<sup>10</sup> *R v Richards* [1965] Qd R 354

elsewhere, again raped by the same men and then abandoned. She was admitted to hospital where she was a patient for eight weeks, emerging from time to time to give evidence at committal hearings. The witness who first saw her after she had been so brutally raped said she was in a dazed and hysterical condition, dishevelled and dirty.<sup>11</sup> The accused each gave evidence alleging she had consented. The court held on appeal:<sup>12</sup>

“I have come to the conclusion that the evidence had no weight as corroboration and that it should not have been left to the jury as corroborative evidence at all ... I [do not] think that in the circumstances of these cases, the evidence tended to show that the crimes charged in the indictments had been committed. It seems to me that the complainant’s dishevelled condition is equivocal; as the Judge suggested to the jury in one of the cases, it may have been caused by rough handling during a succession of acts of intercourse to which she had consented. Her condition of distress could also perhaps have been caused by remorse. The evidence, therefore, lacks both the essential characteristics of corroborative evidence. It did not, in my opinion, in any of the cases, confirm the evidence that the crimes had been committed, or that the accused committed them.”

Is it any wonder that women were reluctant to press ahead with such charges after they were the victims of an offence if they were to be then further victimised by such attitudes?

Parliaments in this country have attempted to change this situation by passing laws<sup>13</sup> saying that a judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of a witness. While a judge is not prevented from making a comment on evidence given in a trial that it is appropriate to make in the interests of justice, the judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses. I am unaware of any other case in which distress following an alleged pack rape has been held to be ambivalent and the authority of the decision I referred to has subsequently been rejected.<sup>14</sup> The High Court has observed that the assumption that a victim of a sexual offence

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<sup>11</sup> (supra) at 360

<sup>12</sup> (supra) at 360

<sup>13</sup> eg *Criminal Code* (Qld) s 632; *Criminal Law Consolidation Act 1935* (SA) s 242(4); *Evidence Act 1906* (WA) s 35; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1971* (ACT) s 76F; *Crimes Act 1958* (Vic) s 61.

<sup>14</sup> *R v McK* [1986] 1 Qd R 476 at 481; *R v Major and Lawrence* [1998] 1 Qd R 317



will complain at the first reasonable opportunity is an assumption of doubtful validity.<sup>15</sup>

How did our laws become infected with these attitudes? As I have said, the first reason was that women were not amongst the decision makers within the system. Secondly, many of the men who were, held biased views about women which went unchallenged. One of these was the seventeenth century judge Lord Hale who is the source of many of the inaccurate observations about women who had been sexually assaulted. It was he who first made the inaccurate observation that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.”<sup>16</sup> His observations about women in other contexts are therefore instructive. Ironically, one of the most notorious witches’ trials of the seventeenth century was held before the same Sir Matthew Hale, who was a fervent believer in witchcraft.

Part of the evidence in the trial of the alleged witches was given by a doctor. He had suggested hanging up a blanket for a night outside the home of the apparently bewitched to see what came to inhabit it. A toad fell from the blanket, which exploded when thrown into the fire. The next day one of the accused women was seen with burns to her face, leading to the inference being drawn that she had disguised herself as a toad on the previous night.

Some of the lawyers involved in the case were still doubtful so an experiment was conducted. The children who were said to be bewitched went into paroxysms when they saw the putative witches. The fits stopped only when the alleged witch touched the children. An experiment was carried out where the accused witch was sent for when the child was in such a state but an apron was held in front of the child’s face so she could not see. Another old lady touched the child. The paroxysm immediately ceased. The doubts of the sceptics were confirmed. But Lord Hale accepted the unlikely explanation given by the father of the children who claimed that this was positive proof of bewitchment since it was obviously further sorcery that led the children into error. The two unfortunate widows were convicted and hung. He was, it seems, as gullible about accusations of witchcraft against women as he was sceptical of claims of rape by women.

Unfortunately, Lord Hale’s adages with regard to rape and the reliability of the evidence of women who claimed to be victims remained as unquestioned axioms of the law long after his deluded views on witchcraft had been forgotten.

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<sup>15</sup> *M v The Queen* (1994) 181 CLR 487 at 515; *Suresh v R* (1998) 72 ALJR 769 at 770; see also *R v Schneider* QCA No 128 of 1998 at [11] – [12] per Thomas JA

<sup>16</sup> S.C. Taylor, ‘ ‘And Now, Your Honour, for my next Trick ...’ Yet Another Defence Tactic to Construct the Mad, Bad and Colluding Mother and Daughter in Intrafamilial Sexual Assault Trials’ (2000) 14 *Australian Feminist Law Journal* 121 at 125; G. Geis, ‘Lord Hale, Witches and Rape’ (1978) 5 *British Journal of Law and Society* 26; G. Geis, ‘Revisiting Lord Hale, Misogyny, Witchcraft and Rape’ (1986) 10 *Criminal Law Journal* 319.

This brings me to the second topic:

Have women achieved true equality under the law?

We have come a long way from the days when women were accused of witchcraft. There are, however, a number of problems suggesting the need for reform remains. Many of these laws affect men as well as women but in practice have a greater impact on women than on men. In other words the discrimination wrought by these laws is indirect rather than direct. They appear on their face to be neutral but have a differential impact on women from their impact on men.

The legal system has for the past decade been endeavouring to deal with the emotional and physical damage suffered by children who are now adults, who allege they were physically or sexually abused in their homes or in institutions where they lived or by other people whom they trusted, and who exercised control over them. Complex directions, such as to the effect of delay, are required to be given in criminal prosecutions of these alleged predators. A trial judge is required to warn a jury that it is dangerous to convict the accused in a case where the prosecution relies on the evidence of a complainant who alleges sexual abuse many years ago.<sup>17</sup> In civil cases, a plaintiff has to overcome the minefield of Limitation Acts<sup>18</sup> which prevent them from having their claims go to trial.

In civil cases, if a woman's husband is killed by another's negligence she is still required to undergo the humiliation inherent in a judge determining how "marriageable" she is and therefore by how much her damages should be reduced.<sup>19</sup> Age and conventional good looks have traditionally been used as markers of the marriageability of women. A man who is economically dependent on his wife finds himself in the same position but such a case is much more uncommon and a man's physical attractiveness has never, to my knowledge, been considered.

Let me simply list a few other examples. I do not suggest these are exhaustive. In personal injury cases where damages are awarded for care provided free of charge, more often than not by a wife, mother or daughter, no mechanism exists for that award to be made to her or held on trust for her.<sup>20</sup> There is also legal uncertainty as to the availability of fertility services regardless of a woman's marital status or sexuality.

In the criminal law, the law has had great difficulty giving effect to the different ways in which women tend to react when provocation or self defence may be

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<sup>17</sup> See eg *Doggett v The Queen* [2001] HCA 46. But note the criticism of McHugh J particularly at [81].

<sup>18</sup> *Limitation of Actions Act* 1974 (Qld); *Limitation Act* 1969 (NSW); *Limitation Act* 1985 (ACT); *Limitation of Actions Act* 1936 (SA); *Limitation Act* 1974 (Tas); *Limitation of Actions Act* 1958 (Vic); *Limitation Act* 1985 (WA); *Limitation Act* (NT).

<sup>19</sup> *Row v Willtrac*, Supreme Court of Queensland, 6 December 1999 at [33]

<sup>20</sup> P.W. Young, 'Fairness and damages for carers' (2001) 75 ALJ 213

open as defences to a criminal charge against them.<sup>21</sup> Aboriginal women represent a disproportionate percentage of the female offenders sentenced to imprisonment.<sup>22</sup>

It is in the broadest interests of the community that law reform in these and many other specific areas be considered.

### **Moves for reform of the law**

The Supreme Court in Canada has been a shining light in endeavouring to redress the balance, to address and reject stereotypes. In *R v Ewanchuk*,<sup>23</sup> for example, the court roundly criticised the mythical assumptions made both by a trial judge who took the view that a woman who said “no” to sexual activity was really saying “yes”, “try again”, or “persuade me” and also by an appeal court judge who said of the woman who was sexually assaulted by the accused in his caravan when she went for a job interview, “it must be pointed out that the complainant did not present herself to [the accused] or enter his [caravan] in a bonnet and crinolines.” He also thought it relevant to mention that she was a mother of a six month old baby who lived with her boyfriend and another couple. As Madame Justice L’Heureux Dubé observed,<sup>24</sup> even though the appeal court judge asserted he had no intention of denigrating the complainant:

“... one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying “no”, she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of “good” moral character. “Inviting” sexual assault, according to those myths, lessens the guilt of the accused ... ”

Madame Justice L’Heureux Dubé is one of three female Justices, which include the Chief Justice, of the Supreme Court of Canada. They represent one third of the membership of the court. Australia, on the other hand, has had only one woman Justice on our highest court, Justice Mary Gaudron who was appointed

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<sup>21</sup> B.A. Hocking, ‘Frightened Women, Angry Men and the Law of Provocation’ (1999) 6(1) PPL 57; ‘Gender Specific Response Patterns in Criminal Defences’ (1996) 20 Crim LJ 185; P. Estel, ‘Reconstructing Reality’ (1995) 20 Alt LJ 108; G. Hubble, ‘Self-Defence and Domestic Violence: A Reply to Bradfield’ (1999) 6(1) PPL 51

<sup>22</sup> E. Baldry, ‘Convicted Women: Before and After Prison’ (1997) 8 *Current Issues in Criminal Justice* 275 at 277

<sup>23</sup> [1999] 1 SCR 330 at [87] [88]

<sup>24</sup> (supra) at [89]

in 1987, who gave generous acknowledgment to the pioneering work of Dame Roma Mitchell on her appointment.

I am a member of a court, the Supreme Court of Queensland, where major inroads have been made into the historic under representation of women as judges. On a wall of the floor of our Court which contains the Judges' chambers, there is a collection of photographs of judges on significant occasions. Every year we hold a two day conference immediately before Easter. The photograph taken at Easter 1998 shows a lone female judge with her 22 male colleagues. By the following year there were four female judges; then by Easter 2000, there were 6 female judges. Now on a court of 24 judges, 7 are female and 17 male. At almost 30% this is the highest proportion of female judges in any superior court in Australia. While 28% of the Family Court judges, 17% of the Northern Territory Supreme Court, 12% of the Supreme Court of Western Australia are female, only 10% of the Federal Court, 9% of the Supreme Court of New South Wales, 7% of the Supreme Court of South Australia and 6% of the Supreme Court of Victoria are female; and there are no female judges in Tasmania or the ACT.<sup>25</sup>

May I suggest that the appointment of women as judges has two linked effects, although neither is easy to quantify. The first is that it demonstrates in a very tangible way that women have a right to take their place, an equal place, amongst those who govern our society, and secondly that justice should be dispensed by, as well as for, women as well as men.

Women as judges should and will, in my view, make a difference to the vindication of the rights of all people. Empirical research in the United States has tended to confirm this. In an attempt to determine the decision making patterns of women judges, research was undertaken into the decision making of state supreme court judges from 1982 to 1998 in two substantive areas of law not generally identified as "women's issues": obscenity and death penalty sentencing. Controlling for other variables, the research found that women judges in state supreme courts tended to make more liberal decisions to uphold individual rights in both death penalty and obscenity cases. Interestingly, and as the researchers said, equally importantly, the presence of a women on the court tended to increase the probability that male judges would adopt a similar position.<sup>26</sup>

The point is not to replace a judiciary which has been perhaps unconsciously biased in favour of a male point of view with one which is biased in favour of a

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<sup>25</sup> Approximations based on the following statistics: Family Court of Australia – 15 female judges out of a total of 53 judges; Supreme Court of the Northern Territory – 1 female judge out of a total of 6 judges; Supreme Court of Western Australia – 2 female judges out of a total of 17 judges; Federal Court of Australia – 5 female judges out of a total of 49 judges; Supreme Court of New South Wales – 4 female judges out of a total of 45 judges; Supreme Court of South Australia – 1 female judge out of a total of 14 judges; Supreme Court of Victoria – 2 female judges out of a total of 31 judges.

<sup>26</sup> D.R. Songer and K.A. Crews-Meyer, 'Does Judge Gender Matter? Decision Making in State Supreme Courts' (2000) 81 *Social Science Quarterly* 750



female point of view but to ensure that the public has faith that the court will be impartial and be able to recognise and therefore eliminate unconscious bias. This can only happen if we do not confuse objectivity as being defined by a male point of view or perspective. A survey recently conducted in New Zealand showed that women who have experience of the civil court or tribunal system were far less confident that they were treated fairly and that a fair result had been achieved than men who had experience of the civil system.<sup>27</sup>

The Senate Committee<sup>28</sup> of the Australian Parliament, which reported on Gender Bias and the Judiciary in May 1994, noted the arguments in favour of the appointment of more women to the judiciary were first that, to maintain public confidence in the judiciary, it must be *seen* to reflect the different parts of the population it serves and to offer role models for women. And second, the appointment of significant numbers of women is likely to affect the nature of judicial decision making through potentially different decision making styles, and by redressing areas of law developed from distinctly male perspectives such as those dealing with women's sexuality.<sup>29</sup>

Justice Mary Gaudron said on the formation of the Australian Women Lawyers in September 1997:<sup>30</sup>

"I believe that having acknowledged and asserted their difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive to the different experiences and circumstances of others, to articulate those differences when necessary, to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice."

In July 2000, her Honour's sentiments were echoed in England by Cherie Booth QC who said:<sup>31</sup>

"Judges and lawyers should be diverse because the issues they handle [are] diverse. Law and the legal profession must be representative to strengthen public confidence. It must be multi-faceted, then it will be more in touch with society."

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<sup>27</sup> J. Morris, 'Women's Experiences of the Justice System' (1997) 27 VUWLR 649 at 662

<sup>28</sup> Parliament of the Commonwealth of Australia, *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, 1994

<sup>29</sup> B. Naylor, 'Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before Law*' (1997) 23 *Monash University Law Review* 423 at 432 - 433

<sup>30</sup> Hon. Justice M. Gaudron, 'Speech to launch Australian Women Lawyers' (1998) 72 ALJ 119 at 123 - 124

<sup>31</sup> F. Gibb, *The Times*, 20 July 2001

In July 2001, Ms Booth said that the under representation of women as judges threatens to undermine the legitimacy and authority of international courts. “A court without women, or with an insufficient number of them, cannot be representative of the ‘main forms of civilisation.’ ”<sup>32</sup>

However, the appointment of women to the bench is only one of the changes to the legal system which must occur. While the appointment of female judges is necessary, it is hardly sufficient.

Judges are after all obliged to apply the laws passed by parliament and follow binding precedent no matter what their personal views may be. Justice should be dispensed for women, not just by women. The rights of all citizens free of irrelevant bias, such as gender bias, can only be protected if those rights are able to be vindicated by the substantive law. In Canada, for example, in common with most democratic and developed countries, a citizen’s right to be free of sex discrimination is constitutionally protected. The effect of this can be seen in the analysis of the court in the case to which I have referred when Madame Justice L’Heureux-Dubé said:<sup>33</sup>

“Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J wrote in *Osolin*,<sup>34</sup> sexual assault ‘is an assault upon human dignity and constitutes a denial of any concept of equality for women’. These human rights are protected by s 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the [criminal code].”

In Australia, equality rights are protected by the Commonwealth *Sex Discrimination Act* and State *Anti Discrimination Acts*. These Acts are very effective in allowing women and men to take action against discrimination in various important areas of the activity but they do not have the overriding force given to Charters and Bills of Rights and other means of constitutionally protecting rights and freedoms and eliminating unfair discrimination.

The need for an overriding protection of human rights has been recognised in jurisdictions very similar to our own. In July 2001, Lord Woolf, the Lord Chief Justice of England and Wales, delivered a strong speech to a conference of Hong Kong judges and lawyers concerning the need for global human rights enforced by strong independent judiciaries.<sup>35</sup>

The emphasis on the vindication of rights empowers those who have been the object of discrimination. In South Africa, rights to equality are protected by s 9 of the Constitution. The inspirational and aspirational nature of the

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<sup>32</sup> C. Booth and P. Sands, ‘Keep Politics out of the global courts’, *The Guardian*, 13 July 2001

<sup>33</sup> (supra) at [69]

<sup>34</sup> *R v Osolin* [1993] 4 SCR 595 at 669

<sup>35</sup> F. Gibb, ‘Woolf Stresses Human Rights’, *The Times*, 25 July 2001, p. 2

Constitution is then reflected in the preamble of their Equality Act<sup>36</sup>, which provides:

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

Unlike South Africa, our democracy was born out of consensus not struggle. We have perhaps more in common with Canada, the United Kingdom and New Zealand. Yet all of these nations have recognised the importance of human rights. The Canadian Charter of Rights and Freedoms was enacted in 1982; in 1990 New Zealand passed a Bill of Rights Act; and the Human Rights Act became law in the United Kingdom in 1998. The fabric of society in those countries has been strengthened rather than torn by the protection of human rights.

In conclusion, in answer to the question, is there equal justice for women, the answer must unfortunately be that there is not; not entirely; not yet. It is my view that fundamentally women's rights are human rights. By protecting human rights we enhance women's rights by ensuring we strive for a just society free of irrelevant inequality. To ensure equal justice for all of our citizens, there is great value in having a yardstick against which issues of equality can be measured as they are in other common law countries. That is the real advantage of the legislative or constitutional protection of human rights.



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<sup>36</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*

# Bridges and Strategies Spanning the

## 20<sup>th</sup> and 21<sup>st</sup> Centuries – A Personal View

Justice Margaret McMurdo is an honoured alumnus of the University of Queensland law school and has been President of the Queensland Court of Appeal since July 1998. Her Honour gave this speech at a Celebration and Affirmative Action Award Breakfast at the University of Queensland Staff and Graduates Club in March 2000.

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Congratulations to the University's Senate Standing Committee on the Status of Women and its executive body, the Office of Gender Equity, for sponsoring and organising this Breakfast and the Affirmative Action Award to recognise, publicise, promote and celebrate the advancement of women at the University of Queensland.

The culture which now exists for women in the University of Queensland, whilst perhaps still flawed, has vastly improved since the '70s when I was a student. My formative years were passed comfortably with TV institutions like The Wonderful World of Disney every Sunday night at 6.30 pm, each episode set in one of four worlds – Fantasyland, Adventureland, Frontierland or Tomorrowland. Forgive me whilst I reminisce and return to Disney's Frontierland and tell tall tales but true from the legendary past.

When I commenced my law degree at UQ in 1972, lobbying by women law students had just resulted in the provision of the first dedicated women's toilets within the law faculty. As a 17 year old straight from a girls' high school, it took me a while to realise that the contraption on the wall as you entered was a men's urinal. It remained in the women's loo throughout my years at the law school but, contrary to the jibes of some of the male law students, to my knowledge it was never used by the girls! Whilst I'm telling toilet stories, I also recall hearing that the male student toilets prominently featured explicit graffiti about the women law students.

In keeping with this crude theme, I remember once looking up a law report in preparation for a pending tutorial and reading a decision of a judge named Cockburn (which, in the polite English way, was pronounced 'Coburn' but spelt C o c k b u r n). I was not impressed to see that a male student or students had written the names of female students against the name of that judge! After hearing these stories, you won't be surprised to know that in those days there was no women law students' association. That much needed organisation was not established until some years later by Di Fingleton, now Chief Stipendiary Magistrate, and others.

Apart from the annual law ball, a still continuing pleasant enough tradition which bridges both centuries, the only social functions organised by the law students' association were the law smokos, "prawn and porn" Friday evenings, featuring Brisbane stripper, "Lana Banana", whose name left just enough to the imagination for the boys to enter Fantasyland, but not perhaps the Disney variety! I did not find it difficult to resist the temptation to attend.

Although there was a high percentage of women students enrolled in first year law in 1972, I was always puzzled as to why only a handful attended lectures and studied in the law library. In retrospect, I realise it was because of the culture: for a young woman student, simply walking into a law lecture or the law library was an act of courage; the young woman's presence would be met by hushed silence, leers or *sotto voce* sniggers. Perhaps it was the law faculty's equivalent to Walt Disney's Adventureland for women, good training for the trail blazing that lay ahead, but hardly a culture to nurture the talent of bright young women. The term "sexual harassment" was not then known to lawyers; no wonder so many women dropped out or lacked confidence to later enter practice. Who knows how many potentially outstanding women lawyers were discouraged by such an unwelcoming, hostile environment?

On one occasion, another women law student and I upset the applecart by putting our name on the list of students to play the staff in the annual Staff/Student Cricket Match, something which I suspect would not raise an eyebrow these days, but was then considered quite radical. Unfortunately, we were pretty hopeless at cricket and so I do not think we did a lot for the women's movement, but we gave the staff an even chance of beating the students that year!

I remember, a fellow law student, now a prominent stockbroker known as Brisbane's Medici, who told me in the course of a discourse on women's rights: "Margie, you're not a feminist. Feminists are just girls who can't get guys!"

At least I had the benefit of the role models provided by Quentin Bryce, now head of Women's College in Sydney, and Margaret White, now Justice White of the Supreme Court, clever, articulate and what my teenage boys would call "drop dead gorgeous" tutors in law, managing to live the superwoman myth, successfully combining work and family commitments. It is hardly necessary to mention that there were no women law lecturers, let alone professors.

I also have many happy memories of my time at UQ Law School. With my busy life now, it is pleasant to reflect on those luxurious but poverty stricken days when I had an abundance of that rare commodity "time". Long, lazy, sometimes romantic afternoons by the lake in the winter sunshine; intellectual, and sometimes not so intellectual, discussions in the refec. over the world's worst coffee, making difficult decisions like whether or not to attend the next lecture; afternoon movies at the Schonell, especially if it meant avoiding exam swotting; life long friendships formed; red wine and cannelloni at the Giardinetto in the Valley; the development of a commitment to and love of



lifelong learning. It was at UQ that I met my husband, Phil, a fellow law student, and on a personal level, that supporting relationship has been a central, strong bridge between the centuries.

One of the highlights of my university days was hearing Ralph Nader, renowned USA consumer advocate, speak on campus on what could be achieved by lawyers working for the public good. His lecture inspired me to continue with my course at a time when I was feeling jaded and disenchanted with the law.

I share these reminiscences not to be self indulgent, but to demonstrate the positive changes to the university culture over the last 25 years and the worth of affirmative action awards and celebratory breakfasts like this. I hope the less pleasant reminiscences are now completely foreign and that the many positive memories remain apposite, representing elegantly crafted bridges preserving all that is worthwhile from the past. Our challenge is to extend and to build more bridges and strategies for the next century, creating, shaping and embracing positive change.

Let me demonstrate with a potted history of women in the law. Shakespeare was a man of vision when he saw in Portia the woman as lawyer/advocate. But it was another 300 years before that vision would become reality. In 1896, Edith Haynes in Western Australia was refused admission as a solicitor by the court, although she had completed all requirements, simply because of her gender. The statute permitted every "person" who had completed the requirements to be admitted, but the court held that "person" did not include "women". Enabling legislation was required in the early 20<sup>th</sup> century to permit women to be admitted as lawyers. Queensland's first female solicitor, Agnes McWhinney, was admitted in December 1915. She worked as a solicitor in a Townsville firm, significantly whilst many men were absent during World War I. It seems her salary was paid not to her, but to her solicitor brother, who was a soldier posted overseas. Agnes married in 1919, giving up her career, as was the norm in those days. She later became a judge of cookery!!

Very few women exercised their entitlement to enter the legal profession over the next 50 years. In 1976 when I was admitted as a barrister, the Bar Association had 350 members, 4 or 1.1% of whom were women. The Queensland Law Society had 1,250 members, 45 or 3.6% of whom were women. In 1976, the University of Queensland Law School, the only Law School in Queensland, produced 76 graduates, 13 or 17% of whom were women. There were no women judges and no women law lecturers.

In 1978, a group of women lawyers led by Leneen Forde, later Queensland Governor, formed the Women Lawyers' Association of Queensland. We were confident that one day there would be no need for a Women Lawyers' Association because women would have full equality and acceptance.

Twenty years later in 1998, 51.2% of university law graduates in Queensland were women. Despite this, women are still not represented at the higher echelons of the legal profession as judges, silks and high income earning partners in the big solicitors' firms. Of the 541 present members of the Bar Association, only 61 or 11.3% are women. Of these, only 5 of 105, or 4.7% are senior counsel. Of the 4,525 solicitors with practising certificates, 1,224 or 27% are women. The percentage of partners in the large and prosperous firms is much less.

As to judicial appointments, Justice Mary Gaudron (who was appointed in 1987 on the retirement of Sir Harry Gibbs) became the first and remains the sole woman appointee to Australia's High Court of seven judges. In Queensland [as at March 2000], we have one woman Federal Court judge from a bench of 5; 4 women Supreme Court judges, of which I am one, from a bench of 24; one woman Family Court judge from a bench of nine; 4 women District Court judges from a bench of 35 and 10 women magistrates from a bench of 78.

The position in academia also reflects this disparity. The UQ Law Faculty has 51 full time teaching staff, 16 or 31% of whom are women BUT there are no women professors, just 2 readers, 4 senior lecturers, 9 lecturers and 1 associate lecturer. For many years now the various Queensland law schools have produced at least 50% female graduates who consistently equal or beat the males in achieving the glittering prizes. Why then are women so under-represented in positions of power and influence in the legal profession? The answer usually given is that all will change and be put right in time. But many women and right thinking men ask, how much time? The 22 years since the formation of the Women Lawyers' Association of Queensland has not been enough time.

The appointment of more women to positions of power and influence in the community creates positive role models for other women, especially young women, and helps change the male culture of the institutions and organisations which they join. Many far sighted people in the community advocate that in order to accelerate positive, considered change, gender should not be excluded as a consideration when making appointments to influential community positions, whether to the judiciary, boards, or academia; these institutions should more equitably reflect the diversity of those qualified to be appointed to them. That is not to suggest there should be any compromise on the quality of those appointed. Australia's egalitarian background and its future hopes are and must continue to be solidly founded on a meritocracy. For example, judges are appointed until age 70 and they make daily decisions affecting the liberty and fortunes of litigants; to appoint someone who is not up to the very demanding job is to do a disservice to the appointee, the court and the community. Similar considerations apply to other influential appointments in the community and academia. But if a candidate is well qualified for the position, why should gender not be considered in finally determining the best person for a particular body or institution at that point in time?

In 1990 there were no women judges in Queensland. An increasing number of women judges have since been appointed. Women now fill the positions of Chief Stipendiary Magistrate, Deputy President of the Queensland Industrial Relations Commission, Chief Judge of the District Court, and President of the Court of Appeal. Despite the fears of some little red hens, the sky has not fallen in!

Looking into the 21<sup>st</sup> century with my millennium glasses, I see Disney's Tomorrowland, promise of things to come. I envisage a world in which our children will be part of a culture where females and males share a comfortable equality within the family, the classroom, the universities and the professions. Women will be equitably represented, with equal pay a reality, at all levels of the community, to the benefit of women, men and society as a whole. Strategies such as this Breakfast; the Affirmative Action Award; the efforts of individuals like Professor Ted Brown, Dr Janet Irwin, Rachel Hooper (the recipient of this morning's Affirmative Action Award) and you all and, at least in the short term, appropriate, carefully considered affirmative action in respect of community appointments form strategically important bridges which span the 20<sup>th</sup> and 21<sup>st</sup> centuries, to bring positive change.

Who can say how quickly this change can be wrought? But as more and more women complete their tertiary education and enter the professions, accepting challenging roles of power and responsibility (even where it means biting off more than others might think they can chew or they would ordinarily want to chew, requiring them to chew like mad), mentoring and nurturing other younger women along the way, more and more bridges will be built for women to cross until the culture is changed irrevocably, and at a snowballing pace. Do not underestimate the power of voting women, protected by the rule of law, working together effectively in a democracy.

As we approach International Women's Day (prophetically this year [2000] on Ash Wednesday, a day of acknowledgement of past sins), we should remember that the democratic vote was a monumental 20<sup>th</sup> century achievement for many women, yet most women in the world do not yet have a democratic vote; nor do they have the protection of the rule of law which we Australians take for granted, at least those of us who do not live in some notorious Aboriginal communities or in relationships of domestic violence. As Australian women accept positions of power and influence, we must remember the desperate plight of most of the women of the world, including many of our Indigenous Australian sisters, and continue to build bridges for them to safely cross into this 21<sup>st</sup> century vision, bridges between women and women; schools and universities; universities and the professions; nation and nation; women and men.

Congratulations to you all on your strategies so far and happy, busy bridge building!



# Corporate Accountability: Corporate Code of Conduct Bill 2000



Senator Vicki Bourne is a New South Wales Senator and is the Australian Democrats' spokesperson on foreign affairs and human rights. Senator Bourne has been working on a private member's bill to regulate the conduct of Australian multinational corporations. This paper is taken from a speech made in Parliament in September 2000 and it is published here with Senator Bourne's kind permission.

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The Australian Democrats' Corporate Code of Conduct Bill 2000 aims to regulate the activities of Australian companies overseas in the areas of human rights, environment, labour and occupational health and safety.

The necessity of a legislative response to the activities of Australian multinational corporations has been highlighted in recent months. Most people would remember the cyanide spill earlier this year [2000] at the Australian owned Esmeralda mine in Romania. Most people would remember the environmental devastation caused by the Ok Tedi mine, or in Freeport or Kelian. Accusations of environmental destruction, improper security use, dislocation of Indigenous peoples and other human rights abuses throughout the world have plagued mining and exploration companies.

It is not only mining or Australian companies which attract these accusations. We just have to think of Royal Dutch Shell's presence in Ogoni in Nigeria, and the Brent Spa issue. Most of us who care about human rights would not consider buying certain brands of sports shoes, due to the labour conditions in their factories. Many of us are disappointed when our favourite chocolate bar or brand of coffee turns out to be owned by a company which has saturated the third world with infant formula.

Increasingly, contact between the industrialised world and the developing world is through multinational firms. In 1999 global foreign investment grew by 25% to \$US 827 billion. This represents a massive investment, much of it in the developing world. Figures like these lead many to agree with comments such as those made last year by the CEO of Merrill Lynch & Co:

"Global markets do represent a giant leap forward. They allow us to pursue the vision of a truly global economy, one that can create unprecedented wealth for all to share in.... I particularly mean developing nations.... The spread of global capitalism is their best chance to climb the ladder of growth and progress".



To him and others who believe this I would say: take a long hard look around you for the evidence. Talk to the Indigenous community who lives in the shadow of your mine, listen to the family who works in your clothing factory, and play with the children who make your shoes but who remain illiterate and uneducated. Look at their lives and then give us the evidence that shows they are sharing in unprecedented wealth. I think you have to search long and hard to find this evidence.

In fact, globally there are 100–200 million children between 4 and 15 years old, labouring in mines, making matches, cooking, washing, weaving, sewing and working in fields, building sites and rubbish tips. More than 125 million school age children have never seen the inside of a school classroom; two thirds of these are girls. Millions more children drop out of school in the early grades, unable to read or write, and the numbers are growing. There are now an incredible 880 million people around the world who are illiterate. Seven million children die each year as a result of the Third World debt crisis; 4,723,486 children have died since the start of the year 2000.

These are just a sample of statistics; there are countless more that show the divide between rich and poor is increasing, here in Australia and globally. The poorest in the world are not sharing in the global wealth. The 'trickle down' effect, if it ever seeped at all, has dried up.

Of course, not all multinational activities will result in a so-called race to the bottom. This is particularly true of the newer type of multinationals, ie. those who are not mining and exploration companies.

Indeed, the Australian Democrats are not advocating that multinational corporations should not exist, but rather that their mode of operation should be challenged. No longer can multinationals take an arm's length view or limit their responsibility for proper labour rights within their companies.

Corporations have a responsibility to act as good corporate citizens. Halina Ward, at the UK Royal Institute of International Affairs, describes corporate citizenship as an invitation to companies "to make strategic choices based on an understanding of the total impacts of their business in society". This understanding of corporate citizenship calls on the corporation to focus on the impacts that come from voluntary contributions that business makes to communities affected by their operations, the societal impacts that flow from basic business policy and practice, and the impacts up and down the value chain.

It is the last two points that this bill particularly seeks to address.

The St James Ethics Centre recently published results from a global poll co-sponsored by Price Waterhouse Coopers. The results showed that 92% of Australians think that the role of large companies is to go beyond the minimum definition of their role in society, which is to employ people and make profits.



They should also contribute to setting higher ethical standards and help build a better society for all.

The same study showed that one in five respondents globally avoid a company's product if they perceive the company not to be socially responsible and six out of ten consumers form their impression based upon labour practices, business ethics, responsibility to society at large, or environmental impacts.

These results highlight the community demand for corporations to be good corporate citizens. The bill we are tabling today is not just reflective of a small group of people; it is reflective of a desire amongst the great majority of Australians who expect this behaviour of their corporations.

Corporate citizenship and a broadening of responsibilities to include all stakeholders are topics which I hope will be at the forefront of talks in Melbourne at the World Economic Forum next week. Earlier this year, at Davos, the same group of the world's economic and political leaders spoke of putting the "human face on globalisation". I remain unconvinced that the discussion has resulted in anything more than a job for the spin doctors. I would love to hear from business leaders who can show me tangible improvements to the quality of life of the world's poorest people, through the activities of their corporations.

At the World Economic Forum in Davos, Sir Robert Wilson, the Executive Chairman of Rio Tinto UK, spoke about the positive impact corporations can have on certain human rights issues such as employment, fair wages, or access to health and education. Unfortunately, he does not believe that companies have a responsibility for issues unrelated to the business.

Industry leaders cannot talk about spreading the benefits of globalisation whilst at the same time seeking to minimise their responsibilities. The fact that these issues are increasingly framed in terms of "reputational assurance" indicates how distant we are from the real issues of poverty, human rights abuses and environmental devastation. When we can talk about corporations addressing these issues, solely because it is RIGHT, and not because of what the company will get out of it, then I will know we are putting the "human face on globalisation".

Until then we, as a country, need to be more proactive in tackling the impact our corporations are having on people and places around the world. If you want to put it in corporate language, then think of it as reputational assurance for Australia.

This bill does not advocate the view that all multinationals are bad and should be broken up. The issue is far more complex than that. This bill seeks to influence the nature of multinational corporations, rather than disrupt them. Currently the activities of multinational companies are regulated through a

combination of voluntary codes, usually instigated by peak bodies or representative councils, as well as international level efforts such as the OECD guidelines, the recent European Union resolution, and regional initiatives such as the North American Free Trade Agreement's code.

Generally the international regulatory environment has failed to adequately address the issue of the rapid globalisation of business. The nature of today's corporations means that traditional national legal structures do not apply to a company whose head office is in one country but whose operations are in another.

This is not a new issue. Corporations in one form or another have been around for some time. Professor John Braithwaite makes the point that Roman emperors had foreseen the mediaeval rise of corporate power, which was independent of state power. This resulted in the Emperor Trajan forbidding the creation of a society of firemen to deal with a fire in Nicomedia, because "Corporations, whatever they are called, are sure to become political associations". The British, however, were less fearful and in effect used corporations to further the empire. The British East India Company, for instance, was able to govern colonies, make laws and wage war.

The point of this brief diversion into history is to illustrate that the tension between states and corporations and the public has always been there. It is not true that corporations have never been involved in "state" issues. The nature of corporations has not always been set in stone. It has evolved. There is therefore room for continued evolution.

Multilateral institutions have also grappled with the issue but the mechanics of the international bureaucracies have been slow to adapt to the fast changes of the last few decades. They are also subject to intense lobbying from powerful industry groups eager to maintain a self regulatory environment.

International regulation of corporations is severely hampered by the lack of an international legal system and court where cases could be taken. Even where international conventions and resolutions are incorporated into domestic law there is no assurance of compliance. Another issue for legislators is ensuring that national law complies with World Trade Organisation regulations. This has yet to be fully tested.

Issues of jurisdiction and extra territoriality have often been cited as an obstacle to achieving international regulation. This is increasingly being tested. Recently, for instance, in the UK, the House of Lords allowed a group of plaintiffs claiming damages for personal injuries against Cape PLC to bring action in the UK. Cape PLC operated asbestos mines in South Africa, but the appellants made their claim against the parent company, located in the UK, claiming that they should have ensured that proper working practices were employed throughout their group.

Of course, the reasons for allowing the case to go ahead in the UK are not solely about the location of the parent company. There are also issues such as access to legal aid, the nature of the South African system and so on. But the notion of foreign nationals not being able to take action is slowly being challenged.

In Australia we already have two precedents which deal with this complex issue of extra territoriality. These are the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999* and the *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999*. The end result for the 8,000 appellants taking their case to the House of Lords has yet to be established. But already the cost, time and stress have been significant. This issue of extra territoriality should be clarified to prevent this situation.

The law as it stands currently represents a David and Goliath situation and inhibits action simply because of the extent of resources required to bring such a case. The people who have suffered most at the hands of a multinational enterprise have generally done so because they are poor, often Indigenous, and have comparatively little power. Additionally, representative bodies such as Non Governmental Organisations do not have any standing before the courts and so are limited in their effectiveness.

In formulating this bill we have looked to models already in existence, in particular the 1999 European Union Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, as well as a bill recently introduced by Congresswoman McKinney in the USA.

The EU resolution encompasses key issues such as:

- maintaining the competitiveness of companies;
- identifying the need for an effective monitoring system;
- suggesting that European courts be given legal jurisdiction to deal with cases, rather than setting up an entirely new system; and
- suggesting that it is possible to promote European Standards internationally through domestic law.

This resolution is not yet law, but it does require the European Commission to act, and causes the Commission to respond to every single point raised in the resolution within six months. There is also a requirement to hold an annual hearing to highlight good and bad corporate practice. In November 2000 Rio Tinto will be the focus of this year's hearing.

I commend the European Member of Parliament, Mr Richard Howitt, and his colleagues for instigating this resolution, because despite it not yet being legally binding, it is nevertheless an important step forward in introducing an international regulatory regime.

Richard Howitt's report on the resolution challenged several arguments against regulation. Not least of these is that a regulatory regime will diminish a

corporation's competitive advantage where they are competing against companies that are not subjected to mandatory codes of conduct. However, 42 of the top one hundred companies are based in Europe, compared to 35 in the USA. 85% of large companies in the USA do have codes of conduct. In addition, the North America Free Trade Agreement already has a mechanism where trade unions and civil society can bring complaints against companies. It is important to note this point because nobody wants to decrease the competitive edge of particular companies. If we co ordinate an international response to the activities of multinational companies, the playing field will be level.

As mentioned previously, we also looked to another model in drafting our bill. In June this year, US Congresswoman Cynthia McKinney introduced a corporate code of conduct bill. Like the Australian Democrats' bill, Congresswoman McKinney has sought to regulate the operations of corporations overseas. McKinney said in a recent speech:

"The race to the bottom is the quest to find the lowest wages, the lowest environmental, labour and human rights standards. That's why American corporations are now by passing emerging democracies and finding the most repressive governments for their investments well, I think it is time to change those rules."

I have to agree with Congresswoman McKinney.

We also studied existing avenues of regulation. For instance, the OECD Guidelines are recommendations by governments to help ensure that multinational corporations act in harmony with the policies of countries in which they operate and with societal expectations. These guidelines originated in the 1976 OECD Declaration on International Investment and Multinational Enterprises. They are not legally binding but are theoretically promoted by signatory governments to multinationals.

The guidelines have undergone several reviews. Most recently, in November 1998, a major review was launched which culminated in the adoption of a new set of guidelines in Paris in June 2000. Australia was a signatory to the new guidelines. The latest review was notable not only because of its depth and breadth, but also because for the first time the consultation process included civil society.

Despite the positive aspects of the new guidelines and the emphasis on transparency and accountability there is still dissension about their effectiveness. The main criticisms are that they are too weak, they are still voluntary, and too much discretionary interpretation is left to the National Contact Point.

As a general principle there is not much evidence that self regulation or voluntary codes have worked. I am often told that the benefits are hard to categorise and quantify, but when people say this, they usually mean benefits to



the company. It is usually fairly easy to see when people are displaced, or can't fish in their polluted rivers any more, or when child labour is being used.

Voluntary regimes do have the effect of raising general awareness so that at least social sustainability issues are on managers' radar screens. Certainly various industry groups such as the Mineral Council of Australia do provide an effective forum for discussing the issues and I have read some heartening speeches from industry leaders. There are also quality assurance standards, such as ISO14001, which have grown out of voluntary regulation. There is no doubt that a voluntary agreement carries a great degree of weight amongst signatories.

Having said that, it is also true that self regulation has not delivered enough tangible outcomes to the people who need them. Countless NGOs and consumer organisations would agree. They say that self regulation leads to standards that reflect the lowest common denominator, and that enforcement and penalties are unclear and arbitrary. Most groups working in this area would also complain that industry 'co opts' the debate by creating self regulatory regimes, in the hope that this will stave off regulation.

There is also the problem of companies not signing on to their industry's voluntary code. The owners of the Esmeralda mine, for instance, were not a signatory of the Australian Mining Industry's Code of Environmental Management, thus undermining the credibility of the whole process.

There are also issues about who sets the targets, whether the targets could have been achieved through normal business improvements, and whether the outcomes have been identified in consultation with all stakeholders or solely by the industry. Voluntary codes are also often based on reporting after the fact, with a vague understanding that in order to get to the process of reporting, the necessary operational standards must be put in place. This is too haphazard. Disasters must be stopped, not described in an annual report.

The Corporate Code of Conduct Bill 2000 seeks to address some of the issues mentioned above. The bill has been based on international standards such as the minimum standards contained in the International Labour Organisation Conventions and as agreed under Australian law. These principles include the freedom of association, the right to organise and the right to collective bargaining. They also mean that companies cannot use forced labour or child labour. The Bill also requires that an employer must provide a safe and healthy workplace for its employees, it must provide sanitary working conditions and it must adhere to proper standards of working hours.

We have drawn on the Universal Declaration of Human Rights to ensure that corporations do not discriminate against an individual based on race, colour, sex, gender, religion, political opinion, national extraction or social origin. We have also required companies to assess, monitor and report on their environmental impact.



We have been careful not to demand that companies be subject to more stringent rules than are in law in this country. These are all conditions that we would expect our companies to adhere to in this country it is reasonable to expect them to do the same overseas.

I would like to end by commenting on the broad range of support we have had in drafting this Bill. The Bill is the result of months of consultations with NGOs, academics, unionists, lawyers, environmentalists, human rights advocates and other interested parties, both here and overseas. This resulting Bill represents the expectations of a wide section of the community those stakeholders who wish to engage with corporations to ensure that returns to shareholders are not at the expense of human rights, labour conditions, or the environment.



# Does Australia Protect Human Rights?



Professor Margaret Reynolds is a former Queensland Senator and has been a determined advocate of human rights and social justice concerns for many years. Professor Reynolds is currently Adjunct Professor with the Department of Political Science and International Relations at the University of Queensland, National President of the United Nations Association of Australia and Chair of the Commonwealth Human Rights Advisory Commission. This paper was presented at a conference in November 2000.

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There is a popular misconception in the community that human rights breaches occur only in distant foreign countries where the ravages of war and certain 'cultural' practices result in torture and brutality unknown in Australia. We may not cut off hands for theft but we routinely cut off access to protection for some of our most vulnerable citizens. It is true that most of us enjoy a high standard of personal freedom and in comparative terms, Australians are not subject to the gross violations of human rights abuse reported so starkly on our television screens. Yet it is irresponsible and inaccurate for community leaders and some media commentators to dismiss the very real human rights abuses experienced by some Australians. These Australians can justifiably ask "Does Australia Protect Human Rights?"

The young Aboriginal woman taken just last month [2000] from a North Queensland prison in leg chains to attend a family funeral may not be convinced by such bland assurances that Australia does protect human rights. For many years now I have become all too familiar with the persistent infringement of human rights within the Australian community. Many of these abuses are hidden from the general public because they occur within our institutions primarily in police watch houses, prisons and detention centres but also in children's and nursing homes, schools and hospitals. It is all too often a public official acting with a 'duty of care' responsibility who undermines expected professionalism by imposing a form of rough justice, which bypasses normal procedure and respect for the individual.

My first awareness of human rights abuse dates back to the early 1960s when I taught intellectually disabled children institutionalised in Tasmania's 19<sup>th</sup> century style mental hospital, where daily beating was an accepted practice and children were routinely tied down in their beds. As an idealistic youngster, I challenged this culture of brutality and intimidation by insisting that all children had potential and the right to an education. The number 'eligible' to attend school grew from 16 to over 100 as I ran sessional classes to accommodate the very young and disabled together with older offenders whose low IQ and general behaviour had resulted in their inappropriate incarceration in a mental institution. At the time, I naively believed that only the

misunderstood intellectually disabled and mentally ill faced such gross discrimination but then I moved to North Queensland! Here I came face to face with a kind of apartheid I thought only existed in South Africa. The level of racist and sexist violence on this Australian frontier could not be ignored. Living in this environment politicised me in a way which was unexpected for a young woman conditioned to believe that all Australians lived in the 'lucky country'. I could scarcely comprehend that the blatant discrimination and persecution of some 10% of the Townsville population was occurring in 1965 in my own country.

Starting in community organisations, I went on to learn about the ways in which local, state and federal government institutions can operate to limit the rights of citizens. Over thirty years of working within Australian public policy administration has taught me that the very mechanisms created to protect our citizens can be used to undermine their rights. This may seem a particularly harsh judgement and naturally I acknowledge that my particular experience of social justice advocacy has affected my perspective. Most Australians can assume that their human rights are protected by democratic government and the rule of law. But if you are poor, disabled, homeless and without support, you can experience a form of institutional discrimination few of us can imagine. If you belong to a minority group or if you choose a different lifestyle your rights are very insecure.

So many indigenous Australians live within a climate of constant harassment, justifiably suspicious that the law does not automatically protect their rights. We love to boast about our 'successful' multicultural society but who talks to those people from various ethnic groups, many of whom feel isolated and excluded from the general community? Are asylum seekers mandatorily detained and those with Australian born children growing up behind razor wire enjoying the standard of human rights protection we would expect if we were fleeing an oppressive regime?

Recently the human rights standards of Australia have been under scrutiny within the United Nations and have been the subject of critical reports expressing concern about government commitment to our international obligations under voluntarily agreed standards set down in various human rights conventions. What do we mean when we talk about 'human rights'? Are we referring to the original Universal Declaration of Human Rights? Successive Australian governments since 1945 have pledged commitment to this fundamental definition of the inalienability of these basic standards all humankind should have guaranteed as citizens.

Since 1975 Australia has ratified eight specific human rights treaties:

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	30 September 1975
International Covenant on Economic, Social and Cultural Rights (ICESCR)	10 December 1975

International Covenant on Civil and Political Rights (ICCPR)	13 August 1980
Convention on Elimination of All Forms of Discrimination against Women (CEDAW)	28 July 1983
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT)	8 August 1989
Convention on the Rights of the Child (CROC)	17 December 1990
Optional Protocol to ICCPR: individual complaints procedure (OPT)	25 September 1991
Second Optional Protocol to ICCPR: abolition of death penalty (OPT2)	2 October 1990

Most citizens are unaware that Australian governments have given these specific commitments to protect their civil, political, economic, social and cultural rights. There is some understanding of the sex, disability and race discrimination mechanisms but few people have knowledge of accessing justice by referring to children's rights or torture conventions. A majority of Australians assume their rights are protected within a functional democracy and according to the rule of law. But there is no Bill of Rights, as in many comparable countries, and so vulnerable Australian citizens or those facing unexpected persecution can find their fundamental human rights undermined by over zealous or ignorant public officials and others.

In such a climate of uncertainty it is important that governments make an effort to inform all their citizens about their rights. How do Australians develop a consciousness of their basic entitlements as citizens? What emphasis is being placed on human rights education in Australia? Despite the fact that we are now halfway through the United Nations Decade of Human Rights Education [1995 2005] there is only a limited national approach to informing Australians about human rights. There is no government national information campaign to advise Australians about the United Nations Human Rights Treaty process and how nation states implement their voluntary ratification of specific conventions.

Indeed, recent statements by a number of Federal, State and Territory ministers have deliberately obscured the factual basis of this process. Alarmist and populist criticism of the very genuine efforts of the United Nations to encourage nations to be accountable for human rights protection has resulted in an undermining of the process and many Australians are openly hostile to these procedures. Nevertheless the campaign of disinformation has successfully heightened interest in human rights, as educators, media and especially young people seek out the facts.

In Australia the Human Rights and Equal Opportunity Commission has developed over many years excellent resources which can be used by educators and students. As an independent organisation it has been very proactive in initiating creative projects, seminars, schools visits, conferences and multi media resource materials to inform the Australian community. However, there

is no fully co ordinated and national strategy at government level to ensure that we are fully informed about human rights and what avenues we can pursue if we experience infringement of them. Similarly, if there is no comprehensive strategy aimed at students or the community, there is equally a lack of focus in educating public servants, who are often the very people imposing their inadequate judgements on citizens.

Ironically, it would seem that the Defence Department is more committed to instilling in its service personnel respect for human rights and cultural diversity overseas than other departments responsible for administering public policy within Australia. Australian peacekeepers deservedly enjoy an excellent reputation for their ability to respond impartially to volatile situations while respecting the rights of the local community. Yet any serious assessment of some Australians' experience of police, prisons and other institutions would reveal that human rights violations occur with disturbing regularity.

In just one Sunday newspaper recently [2000], two cases highlight the arbitrary way in which some bureaucratic procedures are denying individuals their basic rights:

In NSW a crippled migrant, gaoled for seven months for shoplifting \$30 worth of goods, faces deportation even though he has lived in Australia for 30 years since he migrated with his family as a child. The Immigration Department said his crime – a bungled robbery while armed with a toy gun – showed that:

“the lack of respect for the law, the serious consequences of further offences and the lack of significant contribution to the Australian community, all support deportation.”

Yet his lawyer described the continued incarceration as a humanitarian scandal and said the government's decision to deport was unreasonable.

In the same newspaper, a second example of bureaucratic bias revealed that the Australian Security Intelligence Organisation (ASIO) had bungled a security assessment which held a person in jail for 18 months. While compensation will be paid, one wonders how monetary benefit can overcome totally unjust detention. Clearly, in this case of a refugee seeking Australia's protection, ASIO officers responsible should have known that:

“the country concerned had been assessed as having a poor human rights record particularly in relation to the ethnic group to which the applicant belonged.”

How many such human rights breaches occur within Federal Government jurisdiction? Who is responsible for monitoring administrative appeals and complaints to the Ombudsman and how many people remain silent in fear of further persecution?



Of course, throughout Australia, many people are involved in both formal and informal human rights education – universities and schools, media outlets and community based organisations are providing a diverse range of opportunities focusing on human rights. Lawyers, journalists, teachers, academics, NGO advocates, politicians, students and activists are involved in a broad ranging discourse which is informing community understanding. A more proactive approach within government would enhance this process. Furthermore, there is a need for a national publication which specifically details all human rights conventions ratified, with an updated outline of government commitment to these. Australians deserve an accessible and concise publication which lists the way in which government advances human rights protections and the mechanisms through which appeals may be heard or remedies considered.

Next October [2001], Australia hosts the Commonwealth Heads of Government Meeting in Brisbane, when leaders will assess 10 years' progress in the implementation of the Harare Declaration, their commitment to democracy, the rule of law and human rights. Australia has the opportunity to upgrade its own commitment to domestic human rights implementation by initiating a national human rights education programme aimed at students, public servants and the community. Such a wide ranging policy would not only contribute to better securing domestic human rights standards, but would offer an important message to our Commonwealth guests.

Australia can no longer rely on self satisfied rhetoric that we all enjoy high standards of human rights. We must examine which Australians are being excluded from fundamental protection and we must better inform all citizens to guarantee their rights in the future.



# Australia and the International Human Rights System



Professor Hilary Charlesworth is Director of Research at the Centre for International and Public Law at the Australian National University in Canberra, with particular research interests in international law, human rights law and feminist legal theory. Professor Charlesworth presented this paper at the 'Human Rights: A Fair Go for All' Conference held at Curtin University, Perth, in December 2000.

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At the Millennium General Assembly in September 2000, the United Nations adopted a special declaration setting out fundamental values for the 21<sup>st</sup> century: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. The declaration also committed all states to spare no effort in promoting human rights. How should we here in Australia participate in this global effort?

Thus far we have heard a great deal about human rights issues here in Australia and in our region: many problems have been identified. But it is important not to be too cast down by the problems and to plan productive moves ahead. We must think about how we can best bring the international standards home.

I think that it is fair to say that this is both the best of times and the worst of times for human rights in Australia.

On the one hand, Australia has spoken out strongly on human rights issues recently in a range of contexts, for example: East Timor, Fiji, and our support for the Statute of the new permanent International Criminal Court (ICC). I think that there is a great deal of international respect for Australia's stand on these issues. In the case of the ICC, for example, our position is in strong contrast to that of the United States, which has sought to undermine the idea of a world criminal court on the basis that it might put US servicemen on trial.

But on the other hand, Australia seems to be acting as if the UN human rights guarantees apply everywhere else but here in Australia. We seem to be becoming increasingly myopic and insular and suspicious of our scrutiny of our human rights record.

The popular wisdom is that, give or take the odd issue here or there, Australia is a splendid protector of human rights and that it is only the carping chattering classes that would challenge this, out of a meanness of spirit or lack of patriotism. This view was put strongly by the Prime Minister in February when, in response to the controversy over mandatory sentencing and possible UN criticism, he declared that Australia had a 'magnificent' human rights record.

How can we assess this assertion? I don't think it's useful to do it by comparison to other countries; if we were the best among human rights abusing governments, of what value would this be? The international human rights system offers a set of benchmarks to measure Australia's human rights performance. It allows a conversation about basic values in our society.

Australia is a party to all the major United Nations human rights treaties: the two general treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the treaties dealing with either particular human rights abuses (the Genocide Convention, the Convention on the Elimination of Racial Discrimination (CERD), the Convention Against Torture (CAT)) or protecting particular groups (the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CROC)).

It is worth noting that both sides of politics have been prepared to accept these human rights obligations at the international level.

What is striking is that a wealthy country like Australia, with a long democratic tradition, has not managed to implement fully any of our human rights treaty commitments. Take one of the central Covenants: the ICCPR sets out a range of rights, from the right to self determination, the right to be free from torture, to the right to freedom of speech, to the right of minorities to the preservation of their culture, to the right of privacy and non-discrimination.

Under article 2 of the Covenant, Australia has agreed to take the necessary measures to give effect to the rights recognised in the treaty. No Australian government has yet taken this obligation of implementation seriously. The best that we have come up with is the creation of the Human Rights Commission and its successor, the Human Rights and Equal Opportunity Commission (HREOC).

Although the ICCPR is appended to the HREOC legislation, its rights cannot be directly enforced. HREOC only has the power to advise the government on any violations of the rights, advice which governments have ignored far more often than not. I should also acknowledge that Professor Tay, the current President of HREOC, has been a very strong and effective advocate of human rights.

We have done better with respect to our international treaty commitments specifically on race and sex discrimination, with the enactment of the *Racial Discrimination Act* and the *Sex Discrimination Act* (SDA).

However, significant gaps in implementation remain. For example, the SDA has built into it many exemptions that compromise our commitment to non discrimination on the basis of sex (for example with respect to equal pay, maternity leave, private clubs, religions and the armed forces).

At the other end of the spectrum, in the case of the CROC, Australia has taken no steps at all to implement its treaty obligations. We have left implementation entirely up to the discretion of the states, and allowed clear violations of the treaty, such as the state mandatory sentencing laws, to go uncurbed.

The reasons for Australia's reluctance to take our international obligations seriously are complex, but one major issue is the sense that we can rely on a democratically elected legislature to 'do the right thing' and adequately protect our human rights. The idea is that we should trust our politicians to be on the alert for human rights abuses and to remedy them.

But this trust does not have a firm empirical basis. No democracy, not even gold plated democracies, perfectly protects human rights. For example, in Australia many politicians refused to criticise mandatory sentencing laws on the basis that they were supported by a majority of the electors.

The very essence of the protection of human rights is to protect vulnerable minority groups from always being subject to the will of majorities: the idea is that there are some rights that are so basic to human dignity that they should be taken out of the political arena and given special protection. So, a true democracy does not rest entirely on majority rule and it should also allow minority groups to freely exercise certain rights.

If the major problem facing Australia in the area of human rights is our failure to adequately implement the international human rights treaties we are a party to, what are the ways ahead?

The first step we should take is to treat seriously our international commitment to translate the human rights treaties into domestic law: after all, international standards have little value if they are not given expression in national legal systems. The Commonwealth government should enact legislation that gives all the human rights treaties effect in Australian law: this would mean translating very general standards into more precise terms and would be a major enterprise. But this is one concrete and achievable step Australia could take to promote human rights and to make real their promise of a fair go for all. It would also rehabilitate Australia's human rights reputation at the international level, where we are being increasingly viewed as wary of, or indeed hostile to, the international human rights system.

A second longer term step Australia should take is to introduce human rights protections into the Constitution so that they are not subject to repeal or amendment. With the coming into force of the United Kingdom's *Human Rights Act* in October 2000, Australia remains the only common law country not to have a system of human rights protection in its domestic legal system. The development of an Australian Charter of Rights would also defuse the suspicion that human rights are somehow a foreign import and undermine Australian sovereignty. It would allow human rights issues to be debated and decided here at home with a full appreciation of the historical and cultural

context. Ironically, however, it seems that the greatest critics of the international human rights system also provide the greatest resistance to the development of a proper Australian human rights system.

What models are there for Australia to consider in developing an Australian Charter of Rights? I want to look briefly at three: the Canadian, the South African and the British.

In 1982, the Canadian Constitution was finally patriated through the United Kingdom Parliament's adoption of the Canada Act. At the same time, due to the great commitment and energy of the Prime Minister, Pierre Trudeau, a Charter of Rights and Freedoms was inserted into the Constitution. The Charter set out various categories of rights drawn from national and international sources: fundamental freedoms (including conscience and religion, thought, expression and association; democratic rights (the right to vote, the maximum duration of legislatures and their minimum annual meeting times); mobility rights; legal rights (procedural rights in criminal matters and the right to an interpreter in all proceedings); official language rights and the educational rights of minority language groups. The Charter also affirmed existing aboriginal and treaty rights of the Indian, Inuit and Metis population.

The Charter rights were made enforceable by the courts, which can grant remedies for infringement of rights as they consider appropriate and just. Because of the Charter's constitutional status, any law inconsistent with the Charter has no force or effect.

The Canadian Charter has two particular provisions which limit its scope. Section 1 qualifies the rights and freedoms by making them subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The second, section 33, which was inserted at the last minute as the price of the provinces' agreement for the Charter, allows any Canadian legislature to exclude legislation from most of the Charter's operation by express declaration for (renewable) five year periods.

It is fair to say that there are mixed views on the Charter. It has brought a raft of major social and political issues before the Canadian Supreme Court. For example, the right to equality in section 15 of the Charter has been broadly interpreted as a substantive right and not just a right to equal treatment: it prevents discrimination against groups subject to stereotyping, historical disadvantage and social prejudice. Not surprisingly, the Court's decisions have regularly provoked great controversy. The criticism has come from all sides: some argue that the Court is now overtly political; others criticise the Court for its failure to advance real social justice in Canada or indeed the very design of the Charter, which they assert does not touch the real causes of social injustice.

The Canadian example reminds us that it would be foolish and utopian to imagine that a set of constitutionally entrenched rights alone can deliver social



justice. At best it can be one tool among many social, economic and political influences contributing to social justice.

A second recent model for a national system of rights protection is offered by the South African Constitution adopted in 1996. The Constitution was drafted over two years by the newly elected multi racial parliament and it involved extensive public consultation. It included a Bill of Rights, whose provisions may be restricted (as in the Canadian Charter) only by limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The South African Bill of Rights applies to all law and to all the organs of state.

The South African Bill of Rights is striking among the three models for its broad coverage of rights: it includes the standard civil and political rights, as well as economic and social rights such as access to housing, health care, food, water and security. It also includes rights such as that to a healthy environment and property rights.

It is too early to assess the impact of the Bill of Rights on South Africa, but there have been some important decisions, such as the invalidation of laws criminalising male homosexuality on the grounds that they violated the equality rights of gay men. Another case, *Makwanyane*, declared the death penalty unconstitutional because it violated human dignity, the right to life, the right not to be punished cruelly and inhumanely and the right to equal protection of the law.

Of particular interest have been decisions of the South African Constitutional Court interpreting the economic and social rights. The first, *Soobramoney*, involved the denial of ongoing dialysis treatment to a man suffering renal failure, on the basis that there were not enough resources to give such treatment to all patients and that it should be reserved for patients who were able to have a kidney transplant. The Court held that the right of access to health care was subject to the availability of resources. It did not see itself as appropriately second guessing decisions made about the availability of dialysis by the hospital based on its allocated budget.

A very recent South African case, *Grootboom*, decided in September 2000 suggests a different approach. A group of squatters (500 children and 400 adults) on land in the Western Cape brought a case under the Constitution challenging their eviction. They argued that the South African government was required to provide them with adequate basic shelter or housing under the Bill of Rights. The Constitutional Court unanimously decided that the Bill of Rights required the state to devise and implement a programme to realise progressively the right of access to reasonable housing. Given the crisis situation with so many people living in intolerable conditions, the Court held that the programmes in place were clearly inadequate.

The third model for rights protection I would like to consider is that of our constitutional parent, the United Kingdom. It is also the most recent, having come into operation only on 3 October this year. The *Human Rights Act* has been termed 'the most significant formal redistribution of political power in the United Kingdom since 1688.' It requires that all legislation is to be read and given effect to in a way which is compatible with the European Convention on Human Rights, and it imposes an obligation on public authorities to comply with Convention rights. No cases have yet been decided under the Act but the potential of the legislation is clearly very significant.

What lessons for Australia can we draw from the three models I have just described?

The three models I have just set out suggest a variety of procedures to introduce rights into the Constitution: at one end of the spectrum is the South African model of the adoption of a totally new constitution after massive political upheaval and extensive community consultation. Canada is an example of the two stage procedure: first, a statutory bill of rights and then, after a decent interval to let everyone get used to it, the introduction of constitutional guarantees. The United Kingdom *Human Rights Act* is a relatively cautious move, piggybacking on an existing sophisticated and effective international human rights treaty system.

The dramatic South African constitutional changes were of course prompted by massive political changes, the move from the era of apartheid and minority white government to majority black rule. It is difficult to imagine a parallel set of circumstances in Australia and I think we are unlikely to have the chance to begin all over again. We have to work with what we have.

The United Kingdom suggests another type of approach: tying domestic rights protection to an existing international one. Australia is not of course a party to the European Convention on Human Rights, so the appropriate parallel procedure may be to legislate to require Australian courts to take into account the jurisprudence of the United Nations human rights system. This may not be as useful as it has been in the United Kingdom. For a start, the UN system does not operate as a judicial system: UN human rights committees are part time institutions, without the resources or mandate to produce considered legal opinions on the basis of full argument about all the issues by the parties to a dispute.

The most appropriate model for Australia may well be some version of the Canadian two stage procedure: this 'softly softly' approach was for example recommended by the ALRC in its report on Equality before the Law in 1994.

I agree with the Conference organisers that education is the key to promoting human rights. But it is not just the education of our young people that is important. Indeed, I have found in talking to school groups that they have an intuitive sense of what human rights are all about and have very strongly

developed senses of fairness and justice. Somehow, but not always, this intuition seems to evaporate with age and I think it is my generation and above who need to better understand the idea that human rights means much more than going along with the majority's views on what is right. The group in our society probably most in need of education are politicians. Understandably, they hold tight to the belief that the party with the numbers in the legislature has a right to pursue its agenda unfettered by niggling questions of individual and group rights. They are vexed and annoyed when human rights standards are used to criticise their policies and laws.

We all need to be educated to see the larger picture: that a living and vibrant democracy means showing respect and concern for the rights of all people, whether or not they hold our political views. So it is up to each of us to become educated and to educate others about human rights; enough individuals acting can have a major effect. It has been said that anyone who thinks they can't have an impact has never been to bed with a mosquito!



# The Teoh Bill and International Human Rights



Senator Vicki Bourne is a New South Wales Senator and is the Australian Democrats' spokesperson on foreign affairs and human rights. This paper is taken from a speech made in Parliament in April 2001 and it is published here with Senator Bourne's kind permission.

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I rise to speak on the Administrative Decisions (Effect of International Instruments) Bill 1999, also known as the *Teoh* bill. When thinking about what to say on this bill the word 'iniquitous' came to mind. It seemed to me to be the best word to describe this bill, so I looked it up in the dictionary. 'Iniquitous' means great injustice and wickedness. From there, I looked up 'wickedness', which means morally bad, offending against what is right, formidable, severe and mischievous. I think 'mischievous' is the least of those. Those words are perfectly reasonable descriptions of this bill.

This bill had its beginnings when the *Teoh* decision was handed down in April 1995. Very soon after that the then Government responded with a very interesting statement to the effect that they did not believe that there should be an expectation within the Australian community that, if an Australian government ratified a treaty or convention, that treaty or convention ought to be considered in any administrative decisions. The then Minister for Foreign Affairs and the then Attorney General said:

"...entering into an international treaty is not reason for raising any expectation that Government decision makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law."

In that same year, the first *Teoh* bill arrived with great iniquity. I will use that word again; it is a rather good word. There was an outcry amongst human rights groups in Australia and around the world. There was general thought that it was an absolute disaster of a bill for anybody to even contemplate putting up. People wondered what on earth the government was thinking of, because that government had a good reputation on human rights around the world except for East Timor, which we will not go into. Unfortunately the *Teoh* bill blurred that reputation quite considerably.

The bill lapsed in 1996 because of the federal election. We then had a new government. Lo and behold, the new government brought up almost the same bill in almost the same terms. That bill lapsed again in 1998 when we had another election. Lo and behold, when we looked at the list of bills that the current government wanted, there it was: still on the list. The human rights

groups and most of the groups around the world who had an interest in this could not believe that this government would bring it up again. I still cannot believe that this government has brought it up again, and I am not alone in that. I am sure that, like me, everybody in this chamber has had many letters, emails and phone calls about the bill since it appeared again on the Senate Notice Paper at the beginning of last week [March 2001].

The Australian desk person from Amnesty International in London was on AM speaking about it. He was as outraged as I am. I have a copy of a press release from Human Rights Watch in New York, and they are also outraged. So Amnesty International's headquarters in London and Human Rights Watch in New York are outraged that this bill is being debated again that anyone could even think of passing this bill. They have to be two of the most pre eminent human rights groups in the world and they are both outraged that this bill is even being considered. The 28 March 2001 press release from Human Rights Watch, entitled 'Australia on the verge of weakening human rights protection', said:

Human Rights Watch warned that a bill before the Australian parliament today, if passed, would undermine Australia's commitment to the human rights treaties it has ratified.

The Administrative Decisions (Effect of International Instruments) Bill 1999 would prevent a person from challenging an administrative decision on the basis that the decision-maker failed to take into account rights granted by international treaties to which Australia is a party.

"This bill is an over reaction by the government and, of course, the last government to the decision in the *Teoh* case and is a step backwards not just for Australia but for human rights protection more generally," said Sidney Jones, director of Human Rights Watch's Asia division.

The High Court said in the *Teoh* case that ratification of an international convention should not be dismissed as a "merely platitudinous" act but as a "positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention."

Other courts, including in the UK and New Zealand this is particularly interesting have followed the *Teoh* decision. The superior courts of these countries the UK and New Zealand - which share the same legal system as Australia, clearly believe that this procedural right is consistent with the recognised roles of the courts, the Parliament and the executive in implementing international law in domestic law.

The right to challenge a decision on the basis that it was made without reference to the many human rights treaties Australia has ratified is important for at least two reasons. The first is that Australia has failed to



fully incorporate its treaty obligations into Australian law, and the second is that Australia has no bill of rights.

That is something that my Party is particularly fond of. The press release continues:

The *Teoh* decision thus gave important additional protection to those living under Australian jurisdiction.

The point about the bill of rights is a very moot one. If we had a bill of rights in this country it would probably cover at least the basic human rights instruments. It would probably cover the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. So, if nothing else, it would at least cover those. If it were better than that, it would cover the basic human rights legislation which is enacted in the *Human Rights and Equal Opportunity Commission Act*.

But I have received other comments. One comment that I think we should particularly have a look at is the comment of the Human Rights Committee of the United Nations. On 28 July 2000 in Geneva, the Human Rights Committee in its sixty ninth session considered reports submitted under article 40 of the ICCPR, including observations of the Human Rights Committee on Australia. In general, they found that things were not too bad, but in paragraph 15 of their report they say:

The Committee is concerned by the government bill in which it would be stated, contrary to a judicial decision, that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.

The Committee considers that enactment of such a bill would be incompatible with the State party's obligations that is, Australia's obligations under article 2 of the Covenant the ICCPR and urges the government to withdraw the bill.

That is as strong as that committee gets in its language. So the Human Rights Committee of the United Nations sitting in Geneva considering Australia's obligations under the International Covenant on Civil and Political Rights which the entire world considers to be one of the three absolutely major human rights covenants and treaties considered that this bill was contrary to article 2, which is one of the most fundamental articles of the ICCPR. I will read paragraph 3:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

- (b) To ensure that any person claiming such a remedy shall have his [or her] right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 2 also says that everything has to be absolutely basic – you cannot discriminate against people because of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This is the article which gives the absolute basic civil and political rights.

We have been urging China to ratify the ICCPR, but they have not done that yet. I assume Australia has been urging them to do it because we want to see them carry out the provisions of the ICCPR, because they are so basic. They are the absolute basic civil and political rights that everyone in the world should have. If it is the case that Australia has been urging China to ratify the ICCPR, why are we even considering a bill that would say, “But, by the way, any administrative decision taken by anybody in Australia does not have to consider the ICCPR”? Why on earth do we want China to ratify when, even though we have ratified, we do not want to take the ICCPR into consideration? It is just extraordinary. How can we even consider doing this? Dr Evatt would be turning in his grave. Dr Evatt was intimately involved in setting up not only the United Nations but also the ICCPR – in particular, those terribly important rights that we want the whole world to have. That anybody in this parliament could consider that we should order administrative bodies in this country not to take into account the international treaties that we have ratified is just extraordinary.

I will go to a couple of the other points I want to make. One eminent professor of law in Australia has emailed me about this. I am sure he has emailed everybody; I am sure I am not the only one he has emailed. I would like to read some of what he said. In saying that he adds his voice to those urging the defeat of this bill currently being debated, he says:

The effect of the High Court decision has been seriously overstated particularly by those who represent it as a threat to Australian sovereignty, in the sense that it might enable the international community to make laws for Australia independently of Australia's legal and constitutional processes. As to that, the leading judgment of Sir Anthony Mason and Sir William Deane in the *Teoh* case emphatically reaffirmed the true position.

The professor quotes that judgement. It reads:

“It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless

those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.”

That is the end of the quote from the High Court judges. The professor continues:

That principle has never been in doubt. But it is, of course, consistent with that principle that, in an appropriate case, the Parliament should decide that the requirements or effects of a treaty should be implemented in Australian law by the enactment of legislation. Such legislation is an exercise of Australian sovereignty, not an abdication of it.

It is also consistent with the above principles that the courts, within the areas permitted to them for shaping of the law (for instance, in the development of the common law, or in the interpretation of ambiguous statutory provisions), should be guided by the principles and expectations of international law, to the extent (as Justice Gaudron emphasised in the *Teoh* case) that the relevant international principles correspond with the fundamental values of the Australian community. For Justice Gaudron, in the *Teoh* case, the significance of the relevant international Convention was “that it gives expression to a fundamental human rights which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries” ... “that the Convention gives expression to an important right valued by the Australian community”.

And it does.

The professor goes on to say:

The actual decision in *Teoh* case fell well within the legitimate area of judicial development of the common law. It was that there is a “legitimate expectation” that the Australian government will abide by its treaty obligations. This did NOT have the effect of imposing on the government any legally enforceable duty to do so; the effect of the “legitimate expectation” was only that, if a government decision maker intends to proceed in a way which does NOT comply with Australia's international obligations, the persons affected should be notified of that intention so that they have an opportunity to argue against it.

The anti *Teoh* reaction, including the proposed legislation now before the Senate, necessarily entails a proclamation to the world that Australia has no intention of taking its international obligation seriously.

To those of us who do not wish to see Australia become an international pariah, any intimation of that kind is a source of deep embarrassment. The fact that there have been other such intimations of late serves only to make the issue more sensitive.

I earnestly hope that the Bill will be defeated, and that you will help to ensure its defeat.

Yours sincerely.

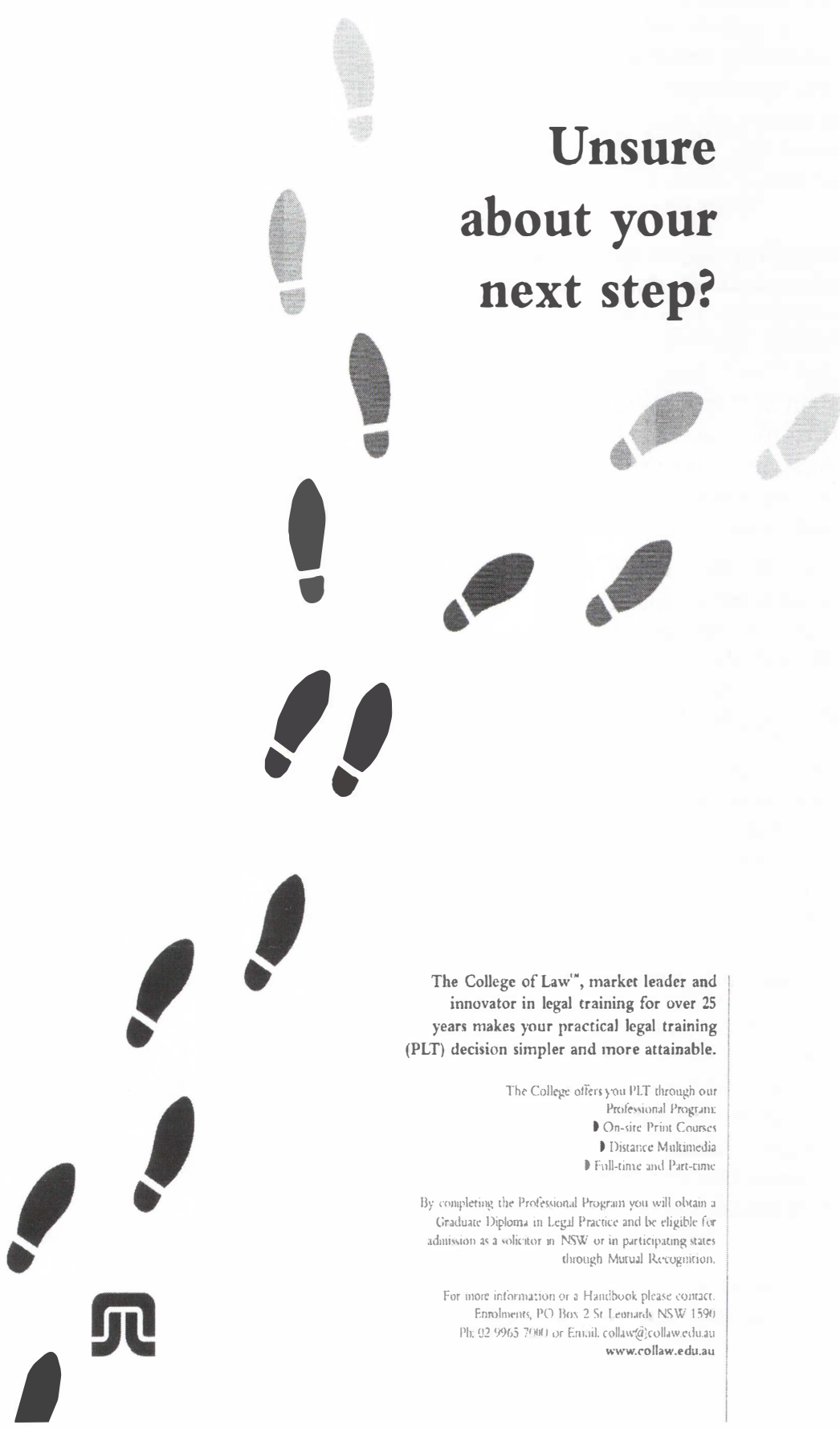
I could not agree more; I particularly could not agree more with the second last paragraph. It does make us internationally very noticeable very sadly noticeable. That this is even on the Notice Paper! International human rights bodies, the most significant ones I can think of, cannot believe we are doing this. They cannot believe we are debating, let alone considering passing, a bill such as this. This is, as I said, an iniquitous bill. This is a wicked bill. This is a dreadful bill. This is something which says, "You cannot take the word of the Australian government. The Australian government, even though it signs treaties, does not intend to abide by them and in fact wants everybody else not to as well."

I know that before we sign treaties we do several things: the treaties are considered by the Joint Standing Committee on Treaties, and that is very good; they are checked and agreed to by all the states, and that is very good; and, in general, the law is changed in order that we abide by that treaty, if such a law does not already exist. But that does not cover everything. The point is that if we agree with a treaty then we should tell the entire world.

I thought we were doing that before this happened. I was quite proud of it. I used to boast of it when I went overseas: when I went to China on human rights delegations and when I went to Vietnam on a human rights delegation. I cannot anymore. I may be able to again I certainly hope so when this bill goes down. I used to boast that Australia had such a good international reputation. I also used to boast, "If you want to come to Australia and see exactly how we treat everybody, then feel free to do so." Of course, that has been taken away by the Minister for Immigration and Multicultural Affairs, but that is another story.

The point about this bill is that it is a bad bill. It is bad legislation. It is something that none of us should even be considering or thinking about. We should take the advice of Amnesty International in London, we should take the advice of Human Rights Watch, we should take the advice of those hundreds of people who have emailed and phoned us and we should take the advice of the Human Rights Committee of the United Nations, sitting in Geneva, saying, "Get rid of this bill."





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# The Silences of Human Rights



Professor Hilary Charlesworth is Director of Research at the Centre for International and Public Law at the Australian National University in Canberra, with particular research interests in international law, human rights law and feminist legal theory. Professor Charlesworth presented this paper at the Humanities Research Centre Conference held at the ANU in June 2001.

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At the beginning of this new millennium, the language of human rights has become part of our everyday discourse. Even though Australia offers little constitutional protection for individual rights, people use the term 'human rights' here as though we share a common understanding of its meaning and know what it's all about.

Let me give two recent examples: Amnesty International this week issued a report condemning the Australian government's record on human rights, citing the treatment of applicants for refugee status, mandatory sentencing and indigenous land rights as evidence of violations of human rights standards. And Pauline Hanson invoked the human right to freedom of speech, which she said had been trampled on by noisy protestors in the Western Australian parliament who drowned out a maiden speech by a One Nation MP.

'Human rights' is a malleable and layered concept. It runs the risk, I think, of becoming a bland catch all container for a sense of personal entitlement to something. One claim to human rights can be met with another claim without deepening or advancing the substantive debate at all.

I want to try to explore one set of possible meanings of the notion of 'human rights' from the perspective of an international lawyer. What I plan to do is to first sketch the outlines of one set of human rights principles, those contained in various international treaties and instruments. I want then to consider the gaps and silences of this account of human rights and to argue that the silences are as significant as the commitments. At the same time, I want to conclude by arguing that the international account of human rights offers the possibility of transformation of the position of marginalised groups.

## **1. The international human rights system**

Modern human rights law derives primarily from Western philosophical thought dealing with the relationship between those who govern and those who are governed, although it also has some resonance in other cultural traditions. Of particular significance in its development have been the values of Judaeo-Christian morality, natural law principles and political theories associated with the rationalism of the French and American revolutions. These theories include Locke's social contract and natural rights theories, Montesquieu's theory of the

separation of powers between the legislature, executive and judiciary, and Rousseau's theory of the sovereignty of the people.

What do we mean by 'the international human rights system'? This system is a series of declarations and treaties adopted by the international community through the United Nations and various regional organisations.

Traditionally, the province of international law was considered to be the relationships *between* countries and not the relationship between a country and its population. The atrocities of the Holocaust before and during the Second World War finally prompted the international community to formally acknowledge its concern with nation states' treatment of all individuals within their jurisdiction.

The Charter of the United Nations contains the first explicit recognition in international law that an individual is entitled to the observance of fundamental rights and freedoms. Among the purposes of the United Nations set out in Article 1 of the Charter is that of co operation 'in promoting respect for human rights and fundamental freedoms for all'.

The Universal Declaration of Human Rights, adopted unanimously by the General Assembly of the United Nations in 1948, gave content to the undefined notion of fundamental human rights in the Charter. Together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both adopted in 1966, the Universal Declaration forms the so called 'International Bill of Rights'.

While the Universal Declaration and the Covenants deal with human rights generally, a variety of other instruments dealing with specific areas of human rights have been adopted internationally. Some deal with particular rights: for example, the Genocide Convention (1948), the Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

Some deal with particular categories of rights holders: for example, the Standard Minimum Rules for the Treatment of Prisoners (1957), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

The International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and other specialised agencies of the UN have drafted and now administer a wide range of human rights instruments. There are also a number of significant regional human rights treaties, such as the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), the African Charter of Human and Peoples' Rights (1982) and the Arab Charter on Human Rights (1994).

International human rights law is one of the most developed branches of international law. It has not only generated a considerable number of treaties and 'soft' law instruments, but it has also developed relatively sophisticated monitoring regimes and institutions. The regional treaties can be invoked under specified circumstances by individuals claiming violations in special courts and commissions, and most of the UN treaties establish expert monitoring committees that oversee compliance in a number of ways

The development of human rights law through the UN is often, if controversially, described in terms of 'generations'.

The first generation of rights consists of civil and political rights. First generation rights are typically characterised as rights that can be claimed by individuals against governments. Such rights protect against arbitrary interference by the state. Civil and political rights may be described as 'negative' in that they require abstention by the state from particular acts, such as torture, arbitrary deprivation of life, liberty and security. They focus on "domesticating, restraining the state, making the state obey due process of law in principle created and upheld by the state." The core of first generation rights is the preservation of the autonomy of the individual. The major general document of the first generation of rights is the ICCPR.

The second generation of rights comprises economic, social and cultural rights. These are rights, such as those to health, housing and education, that require positive activity by the state to ensure their protection. They assume an active, interventionist role for governments and can be claimed by individuals and groups to secure their subsistence, with dignity, as human beings. The most detailed definition of second generation rights is in the ICESCR.

The comparative justiciability of the first and second generation rights is often raised in debates about the implementation of human rights. Can governments be held accountable for violations of economic, social and cultural rights in the same way as they can for violations of civil and political rights? How can causal links be established between alleged violations of economic and social rights and state actions, or inaction? What standard of compliance is required – is it a general standard, or does it depend on the level of economic development of the state concerned?

The third generation of rights encompasses peoples', or collective, rights, such as the rights to self determination, development and peace, that can only be claimed by groups, rather than by individuals. Claims of peoples' rights can be made against the international community, as well as particular nation states. The guarantee of collective rights assumes both that the benefits will flow to individuals within the group and that the interests of all members of the group will coincide. Many of the third generation rights are contained in 'soft' law instruments, such as UN General Assembly declarations and resolutions.

When we look at the acceptance of the human rights treaties, the picture is a relatively positive one. One treaty, the Convention on the Rights of the Child,

has 192 treaty parties (more than the UN membership); the International Covenant on Civil and Political Rights had 140 parties; the International Covenant on Economic, Social and Cultural Rights 138; the International Convention on the Elimination of All Forms of Racial Discrimination, 151; the Convention on the Elimination of All Forms of Discrimination Against Women, 162; and the Convention against Torture, 110.

Human rights law is under constant challenge. Most states formally accept the international regime, but undermine their legal commitment by use of extensive reservations, claw back and derogation provisions that allow states to assert imperatives of national law, public safety and security or inadequate national implementation. Many states are responsible for widespread human rights violations.

Another form of challenge focuses on the Western origins of human rights law allowing claims of cultural relativity. For example, at the Vienna Conference on Human Rights in 1993, a number of Asian states claimed that human rights as interpreted in the West were based on a commitment to individualism and were at odds with the Asian tradition of concern with the community.

The international system of human rights protection may have a long history and broad participation, but, as we see all the time, concern with human rights remains very controversial internationally because it conflicts with traditional notions of state sovereignty that accord states great freedom in their domestic, or national, activities. Economic and political considerations often take precedence over human rights on the international agenda.

## **2. The silences of human rights law**

Discussion about human rights usually focuses on the difficulties of implementation and the problems in getting governments of all types to take their treaty obligations seriously. These are weighty issues, but I would like to focus on another set of questions relating to the type of rights that are enshrined in the treaties. I want to suggest that the framing of the international standards is built around a particular model of a human life that effectively excludes a number of marginalised groups.

Some gaps in the international human rights canon are clear on its face. For example, physical and mental disabilities do not figure at all in the grounds of prohibited discrimination.

The rights of indigenous peoples also do not rate specific mention in the international human rights treaties. It is true that the right to self determination figures prominently as the first article of both the major Covenants, but this was intended to refer only to the situation of former colonial possessions. Attempts by minority indigenous peoples to invoke the right to self determination have been met with great resistance and have not been supported by the independent expert human rights treaty monitoring bodies. Attempts to conclude a Declaration on the Rights of Indigenous Peoples have dragged on in the UN for almost 20 years.



The silence I want to focus on is a different one: the limited nature of the bearer of human rights contemplated in the international treaties from the perspective of women. At first sight, the international law of human rights offers considerable protection to women. The major focus of the protection of women's rights has been the right to equal treatment and non discrimination on the basis of sex.<sup>1</sup> It has been pointed out that the value of much of women focused international human rights law is undermined by the procedural understanding of equality in international law, ie. are women treated in the same way as men when they are in the same position?

Understanding the global situation of women as simply a product of unequal treatment compared to men is inadequate. The fundamental problem for women is not simply discriminatory treatment compared with men, although this is a manifestation of the larger problem. Women are in an inferior position because they lack real economic, social or political power in both the public and private worlds.

In 1995, the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women elaborated in detail the international understanding of women's equality. Equality is generally presented as women being treated in the same way as men, or at least having the same opportunity to be so treated, with little consideration of whether the existing male standards are appropriate. The Platform calls for women's equal participation in a wide range of areas from the economy and politics to environmental management. The assumption appears to be that women's inequality is removed once women participate equally in decision making fora.

This account of equality ignores the underlying structures and power relations that contribute to the oppression of women. While increasing the presence of women is certainly important, it does not of itself transform these structures. We also need to understand and address the gendered aspects of fundamental concepts such as 'the economy', 'work', 'democracy', 'politics' and 'sustainable development'.

Other problems of the international human rights order with respect to women include the weak institutional enforcement measures, and the practice of countries making extensive reservations to the terms of the treaties. But I want to look particularly at the substance of the human rights canon to argue that the international law of human rights is inadequate as a response to the global position of women because it has been developed in a gendered way. I want to try to justify this claim, using examples from each 'generation' of rights. Despite their apparently different philosophical bases, the three generations are remarkably similar in their exclusion of women's perspectives.

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<sup>1</sup> For a fuller discussion of these issues see H Charlesworth & C Chinkin, *The Boundaries of International Law* (Manchester, 2000) chapter 7. What follows draws on chapter 7.



With the exception of the Children's Convention and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, all the 'general' human rights instruments use only the masculine pronoun. The importance of language in constructing and reinforcing the subordination of women has been much analysed by feminist scholars, and the consistently masculine vocabulary of human rights law operates both directly and more subtly to exclude women. Such word use is significant in reinforcing hierarchies based on sex and gender, even if it is intended to be generic.

Another feature of the human rights treaties is the attention they pay to the idea of the family. The family is presented as "the natural and fundamental group unit of society" and is thus "entitled to protection by society and the State".<sup>2</sup> Human rights instruments assume a certain model of the family, that is, a heterosexual married couple and their offspring. Spike Peterson and Laura Parisi have argued that this identification of the family as a heterosexual union serves to further the gendered division of identity, authority and power within society. Indeed, it is assumed that the purpose of marriage is to have children. Within the marriage the woman will be economically dependent on her husband, so that if she is widowed, she will have a special claim on social security.<sup>3</sup> Emphasis on the family as the natural foundation of society assumes its permanence and suggests that human rights are not applicable within the family circle. The sacrosanct image of the family in human rights law discourages intervention and proper scrutiny of whether the rights to life, liberty, freedom from slavery and security of the person are realised in particular family contexts.

International human rights law rests on and reinforces a distinction between public and private worlds, and this distinction operates to muffle, and often completely silence, the voices of women. In the sphere of human rights, a number of actors have an interest in preserving the dichotomy between public (regulated) action and private (unregulated) action. Powerful entities in the private arena, such as religious and commercial institutions, benefit from lack of international human rights scrutiny.

### **First generation rights**

The epithet 'civil and political' to describe those rights that make up the traditional first generation of international human rights law suggests the defining nature of a public/private dichotomy in their content. These are rights that the individual can assert against the state: the public world of the state must allow the private individual protection and freedom from intervention in particular areas.

The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men

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<sup>2</sup> Eg. Universal Declaration of Human Rights, article 16 (3).

<sup>3</sup> Eg. UDHR, article 23.

within public life and their relationship with government. Although the civil and political rights (in the traditional sense) of women should be fully protected, violations of these rights are not the harms from which women most need protection.

The operation of a public/private distinction at a gendered level is most clear in the definition of civil and political rights, particularly those concerned with protection of the individual from violence. The construction of these norms obscures the most pervasive harms done to women.

One example of this is often considered the most important of all human rights the right to life contained in article 6 of the ICCPR and in regional human rights treaties. The right is primarily concerned with the arbitrary deprivation of life through public action. Protection from arbitrary deprivation of life or liberty through public actions, important as it is, does not however address the ways in which being a woman is in itself life threatening and the special ways in which women need legal protection to be able to enjoy their right to life. We know that from conception to old age, womanhood is full of risks: of abortion and infanticide because of the social and economic pressure to have sons in some cultures; of malnutrition because of social practices of giving men and boys priority with respect to food; of less access to health care than men; of endemic violence against women in all states.

Although the empirical evidence of violence against women is globally at epidemic levels, it has not been adequately reflected in the development of human rights law. The significant documented violence against women around the world is unaddressed by the international legal notion of the right to life because that legal system is focused on 'public' actions by the state.

The international prohibition on torture is similarly limited. A central feature of the international legal definition of torture is that it takes place in the public realm: it must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.<sup>4</sup> Although many women are victims of torture in this 'public' sense, by far the greatest violence against women occurs in the "private" non governmental sphere.

Thus in 1996 in her second report, the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, made the case for defining severe forms of domestic violence as torture.<sup>5</sup> She showed the similarities between torture and domestic violence: both the torture victim and the abused women are isolated and live in a state of terror; they suffer physically and psychologically; they develop coping mechanisms that come to dominate their existence; both forms of violence are committed intentionally in order to terrorise, intimidate, punish or to extort confessions of often non existent deviant behaviour.

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<sup>4</sup> UN Convention Against Torture, article 1 (1)

<sup>5</sup> See Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 5 February 1996, UN Doc. E/CN.4/1996/53.

She concluded that:

Battered women, like official torture victims may be explicitly punished for infraction of constantly changing and impossible to meet rules. Both may be intimidated and broken by the continual threat of physical violence and verbal abuse; and both may be most effectively manipulated by intermittent kindness.<sup>6</sup>

In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women which supports this approach. The Declaration is a valuable development in women's international human rights law because it affirms that violence against women is an international issue and because it defines gender based violence in a broad manner. Violence against women is analysed as "a manifestation of historically unequal power relationships between men and women".

The Declaration, however, also illustrates the problem of accommodating harms against women within a human rights framework. Apart from a reference to human rights in the preamble, the Declaration does not clearly present violence against women as a general human rights concern. It appears as a discrete and special issue rather than an abuse of, for example, the right to life or equality.

The failure to explicitly link violence against women with abuse of human rights was due to some states' opposition to the nexus on the basis that this would devalue the traditional notion of human rights.

Apart from the rights to life and freedom from torture, other rights in the traditional civil and political catalogue also have been interpreted in ways that offer very little freedom or protection to women. The right to liberty and security of the person set out in article 9 of the ICCPR, for example, operates only in the context of direct action by the state. It does not address the fear of sexual violence, which is a significant fear in many women's lives.

### **Second generation rights**

Second generation rights – economic, social and cultural rights – might be thought to apply in both public and private spheres and thus offer more to women's lives. The definition of these rights as set out in the ICESCR, however, indicates the tenacity of a gendered public/private distinction in human rights law. The Covenant creates a public sphere by assuming that all effective power rests with the state. But, as Shelley Wright has pointed out, "[f]or most women, most of the time, indirect subjection to the State will always be mediated through direct subjection to individual men or groups of men." The Covenant, then, does not touch on the economic, social and cultural context in which most women live.

For example, the definition of the right to just and favourable conditions of work in article 7 is confined to work in the public sphere. Marilyn Waring has documented the tremendous amount of economic activity by women all over the

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<sup>6</sup> *Ibid.* at para. 47.

world that is rendered invisible precisely because it is performed by women without pay and considered within the private, domestic sphere.<sup>7</sup> Article 7's guarantee to women of "conditions of work not inferior to those enjoyed by men, with equal pay for equal work" is thus rather hollow in light of the low valuation of the extent and economic value of women's domestic work.

Further, even within the paid, public sector, the sexual division of labour that clusters women in typically low paying jobs that are deemed 'suitable' for women, means that there is often no male comparator, again exposing the deficiencies of the equality paradigm. It is striking that the ILO did not conclude a Convention on homeworkers, the majority of whom are women, until 1996.<sup>8</sup> Mohanty has shown how homeworking is perceived as a leisure activity pursued by housewives, while the marketing and distribution of the finished products, which is mainly performed by men, is categorised as economically productive.<sup>9</sup>

The definition of cultural and religious rights can often reinforce a distinction between public and private worlds that operates to the disadvantage of women. In secular states, culture and religion are typically seen as 'private' spheres protected from legal regulation, particularly with respect to discrimination against women. By contrast, in religious states, religion is an aspect of the public domain and its tenets are enforced through state support. While the right to gender equality on the one hand, and religious and cultural rights on the other, can be reconciled by limiting the latter, in political practice cultural and religious freedom are accorded much higher priority nationally and internationally.

One of the most consistent themes at the 1995 Beijing Conference was the impact on women's economic, social and cultural rights of the structural adjustment programmes imposed by the international monetary institutions. Indeed, it has been argued that the severity of the socio economic conditions caused by structural adjustment programmes in Africa undermines the relevance and utility of rights discourse for African women.<sup>10</sup>

For example, such programmes in Ghana were designed to stimulate economic growth, enhance production, strengthen the balance of payments and increase domestic saving and investment. Currency devaluation increased the cost of imported goods and higher taxes meant increased petroleum and utility tariffs.

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<sup>7</sup> M. Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Wellington, Allen & Unwin, 1988); M. Waring, *Three Masquerades: Essays on Equality, Work and Human Rights* (Auckland, Auckland University Press, 1996) chapter 2.

<sup>8</sup> Convention No. 177 Concerning Home Work, 1996, reprinted in *International Journal of Comparative Labour Law and Industrial Relations* (1996) 252.

<sup>9</sup> C. Mohanty, 'Women workers and capitalist scripts: ideologies of domination, common interests, and the politics of solidarity', in M. Alexander & C. Mohanty, eds, *Feminist Genealogies, Colonial Legacies, Democratic Futures* (New York/London, Routledge, 1997) 3 at 12.

<sup>10</sup> A. Kuenyehia, 'The impact of structural adjustment programs on women's international human rights: the example of Ghana', in R. Cook, at 422.



Basic food prices increased, employment levels were reduced and government spending was cut back. Emphasis on export of agricultural commodities reduced the land available to women for subsistence farming while increasing the total burden of their work.

Akua Kuenyehia has written:

For women in Ghana and other African countries facing structural adjustment, the problems seem endless. They continue to have the responsibility for child care, producing food, gathering fuelwood and water, and taking care of sick members of the family. These functions are economically invisible and yield little or no cash. Additionally, they have to engage in economic ventures to earn income in a climate that has been rendered increasingly hostile by a process of adjustment that has completely marginalised their productive activities.

This situation works against all aspects of women's rights: reduction in access to health, sanitation and education has first impact on women. Compliance with structural adjustment programmes gives governments an excuse not to implement obligations under the Women's Convention.

### **Third generation rights**

Third generation rights that have been championed within the UN by developing nations in particular have been only cautiously accepted by the 'mainstream' international human rights community because of their challenge to the Western, liberal model of individual rights invocable against the sovereign. The philosophical basis of group rights rests on a primary commitment to the welfare of the community over and above the interests of particular individuals.

Theories of collective rights assume that the interests of all members of a particular group will coincide. The articulation of collective rights generates a number of questions: how is the group to be defined and by whom? How is membership retained? What is the relationship between rights of the group and the rights of individuals within the group? How is conflict between them to be resolved?" On one analysis, it might seem that such rights would be of particular promise to women, whose lives typically have the quality of connectedness with others, centring more around the family, the group, and the community than the individual. The theoretical and practical development of third generation rights has, however, delivered very little to women. For example, the right to self determination, allowing "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development" has been invoked, and supported, recently in a number of contexts that allow the oppression of women. We see now in East Timor a claim to self determination being recognised by the international community, but the 'self' is identified with an elite cadre of men.

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<sup>11</sup> See W. Kymlicka, *Multicultural Citizenship* (Oxford, Clarendon Press, 1995) chapter 3.



### 3. Conclusion

I have tried to argue that a widely accepted term, 'human rights', can be built on the exclusion of the interests of marginalised groups (even if they form more than half the world's population). So too we can see that the traditional human rights canon has little to say about indigenous peoples, who regard their relationship with the land as central to their existence. The way ahead is to work out how to interpret the generally worded human rights guarantees so that they do not exacerbate the silences of the system.

For all these problems, I think that while the acquisition and assertion of rights is by no means the only solution for the domination of women by men, it is an important tactic in the international arena. Human rights offer a framework for debate over basic values and conceptions of a good society. Because women in most societies operate from such a disadvantaged position, rights discourse offers a recognised vocabulary to frame political and social wrongs.

Martha Minow has described the problems in denying rights discourse to marginalised groups: "I worry about criticising rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, 'you do not need it, you should not want it.'"<sup>12</sup>

The empowering function of rights discourse for women, particularly in the international sphere where women are still almost completely invisible, is a crucial aspect of its value. As has been observed in the context of South Africa, rights talk can often seem naive and unpragmatic, but its power relies on a deep faith in justice and rightness.<sup>13</sup> In discussing the experience of African Americans with the United States constitutional guarantees of rights, Patricia Williams has noted that "the problem with rights discourse is not that the discourse is itself constricting but that it exists in a constricted referential universe."<sup>14</sup> This observation is particularly apt with respect to the silences of international human rights law for women: the system operates within the narrow referential universe of the international legal order.

The need to develop a rights discourse so that it acknowledges gendered disparities of power, rather than assuming all people are equal in relation to all rights, is crucial. The challenge is then to invest a rights vocabulary with meanings that undermine the current skewed distribution of economic, social and political power.

In societies of the South, this task may be particularly complex. In South Asia, for example, Radhika Coomaraswamy has pointed out that "rights discourse is a

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<sup>12</sup> M. Minow, 'Interpreting rights: an essay for Robert Cover', 96 *Yale Law Journal* (1987) 1860 at 1910.

<sup>13</sup> Albie Sachs, quoted in *Economic and Social Rights and the Right to Health* (Cambridge, Harvard Law School Human Rights Programme, 1995) at 42.

<sup>14</sup> P. Williams, *The Alchemy of Race and Rights* (Cambridge, Harvard University Press, 1991) at 159.

weak discourse”, especially in the context of women and family relations.<sup>15</sup> She has argued that the very notion of rights has little resonance in many cultures, for example the countries of South Asia, and that the discourse of women’s rights assumes a free, independent, individual woman, an image that may be less powerful in protecting women’s rights than other ideologies, such as ‘women as mothers’.

But I think that overall the significance of rights discourse outweighs its disadvantages. Human rights provides an alternative and additional language and framework to the welfare and protection approach to the global situation of women, which presents women as victims or dependents. And it allows women to claim specific entitlements from a specified obligation holder.

The very basis of human rights law is contentious politically because it imposes restraints on governmental action in the name of individual or minority autonomy. Both authoritarian *and* democratically elected governments are subject to the constraints of human rights law. In this sense, human rights law is in essence non utilitarian or counter majoritarian because it provides protection for individuals, groups and minorities so that, in certain defined contexts, their interests are not always sacrificed to those of the government or political majority of the day.

On this analysis, human rights are, in essence, what we want to take out of the agenda of short term politics. They create in Roberto Unger’s words “a protective sphere for vital interests, which people need to persuade them that they may accept vulnerability, run risks, undertake adventures in the world, and operate as citizens and as people.”



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<sup>15</sup> R. Coomaraswamy, in Cook, ed. at 55.

# Terrorism in New York



Ms Katarina Månsson is a graduate of the European Master's programme in human rights and democratisation. She has been working at the Office of the High Commissioner for Human Rights in Geneva and is currently in New York as part of an advanced internship programme for the promotion of human rights. She has written several articles about peacekeeping and peace building.

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A normal Friday evening in New York would have been bustling with intense light and roaming noise. This Friday, New York saw a different light and heard a different sound inhabit its streets and avenues, parks and squares.

It was the flickering light of candles cast on the faces of mourning Americans. It was the sound of profound and loud silence, broken only by soft singing or low voices. It was as if the heavy silence that has prevailed here since the so tragic event of Tuesday 11 September had reached its absolute magnitude – not even the surreal sound of the fighter jets that have circled regularly over the city the last few days could for a fragment of a second be recalled. Like the rest of the world, New York was mute, and so it gathered to honour the thousands of its fellow citizens who perished so tragically when the twin towers of the World Trade Centre unimaginably crumbled apart. “We Shall Overcome” was heard and felt and “United We Stand” was read and felt.

The description above of places such as Washington Square Park and Union Square seeks to reflect the atmosphere of collective solidarity, and a strong quest for peace that has dominated in New York in the days following the most devastating terrorist deed ever. Restaurants are offering free meals for firefighters, rescue workers and other people who have gained heroic status, manifested by the cheering crowds saluting them as they drive through the avenues to or back from “Ground Zero”.

The terrorist attack on the most powerful nation in the world, targeting its financial and military think tanks, has spurred an unprecedented wave of patriotism, even in multicultural New York that normally is slow to express feelings of national pride. Some journalists even expressed surprise over the fact that the terrorists were targeting New York, perceived by many as the least “American” city of the United States. New York is, supposedly, the city of the world. However, the Stars and Stripes has now become a compulsory companion whether you’re a taxi driver, shopkeeper, student or visitor. Your sight is coloured blue, white and red wherever you turn. Commercial interests are sadly but inevitably exploiting the situation with T shirt sellers making

profit on New Yorkers wishing to wear “New York Under Attack”, “New York After the Attack” or “I am proud to be an American” on their chest.

Within the turn of a day, America is at war, some people supporting the idea, most people fearing it. Is this ruthless, incomprehensible act, where innocent civilians are the target *per se*, calling on all Western states to engage in a war against terrorism and States perceived as supporting such acts? For the first time in its history, NATO has endorsed Article 5, stipulating that an armed attack against one or several members shall be considered as an attack against all. United States President George W. Bush, together with some leaders of the European Union, has declared the acts against New York, Washington and Pennsylvania an assault against the civilised world.

Is Samuel Huntington’s much debated hypothesis of a “clash of civilisations” in the process of becoming a true feature of world politics of the new millennium? Five years ago this American scholar wrote: “A central focus of conflict for the immediate future will be between the West and several Islamic Confucian States”, believing that religion is the differing element *su excellencis* between cultures and as such the root cause of hostility between them. In the same article Huntington reiterates that “in order to preserve Western civilisation in the face of declining Western power, it is in the interest of the United States and European countries: [...] to maintain Western technological and military superiority over other civilisations”.<sup>1</sup>

I presume that the people fearing the idea of war are fearing precisely this: a polarisation of different cultures, a consolidation of the dividing concepts of ‘us’ and ‘them’, a strengthening of military power, muscle and arsenal for example, justifying proceeding with the planned Missile Defence System as designed by the present US administration. A fear that values such as international justice, widespread respect for universal, indivisible and inter dependent human rights and the fact that we are all part of one civilisation humanity will be overlooked in the search for revenge.

The organisation defending and promoting these values, the United Nations, has its home in New York. Ironically, on the same day as the attacks on the World Trade Centre, the Secretary General was supposed to have rung the peace bell, as the tradition of the opening of the General Assembly sets out. Abruptly, there was no peace to be belled, no convening of almost all states of the world to be seen. However, the following day the Security Council convened and adopted a resolution that condemns the horrifying terrorist attacks defined as a threat to international peace and security.<sup>2</sup> Whilst calling upon all States to work together to bring to justice the perpetrators, organisers

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<sup>1</sup> Huntington, S., 1996, *The Clash of Civilizations*, New York: Simon and Schuster. ‘The West, Civilizations, and Civilization’, chapter 12.

<sup>2</sup> S/RES/1368 (2001).

and sponsors of the attacks, the resolution simultaneously recognises the inherent right of individual or collective self defence. The sacred principle of sovereignty of states, enshrined in the founding and legal source of the United Nations, the Charter, is thus restricting the Security Council and other organs of the UN to wholeheartedly encourage and support the promotion of individual criminal responsibility with regard to human rights abuses.<sup>3</sup> Will the world community, once again powerless, stand by to watch as a war unfolds, this time against terrorism and likely to be fought in a similar non discriminatory fashion as the terrorist attack itself? The world is sadly witnessing the development of a new warfare where the innocent civilian, so eloquently entitled the right to life, liberty and security of person,<sup>4</sup> has become *la raison d'être* of the armed attack. Just as, presumably, a highly fuel loaded aeroplane will from now on fit the description of what is an 'armed attack'. That international humanitarian law is increasingly becoming a non respected set of rules has been proved by the complex internal conflicts that are unfolding in almost every continent of the world. But if terrorism and its response escalate unabated, the four Geneva Conventions of 1949<sup>5</sup> run the risk of becoming nothing but anachronistic relics of the 20<sup>th</sup> century.

While the terrorist attack on New York has resulted in the postponement of such an important event as the United Nations General Assembly's Special Session on Children, it has not succeeded in halting the eighth session of the Preparatory Committee for the International Criminal Court (ICC) in [late September]. The terrorist attacks will without doubt give the negotiations a different course to that previously foreseen. Two issues that are foreshadowed to be discussed are (1) the Relationship Agreement between the United Nations and the ICC, and (2) the crime of aggression. Would it be possible for the UN to hand over to the International Criminal Court terrorists suspected of war crimes, as intentional attacks against the civilian population or against individual civilians not taking direct part in hostilities are defined in the Rome Statute?<sup>6</sup> Or of crimes against humanity, as the attacks on New York and Washington have been called by human rights organisations such as the CICC?<sup>7</sup>

<sup>3</sup> This is implicitly stated in article 2, para 7, of the Charter of the United Nations, which reads as follows: Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; [...]."

<sup>4</sup> The first right to be listed in the Universal Declaration of Human Rights (art. 3), adopted by the General Assembly on 10 December 1948.

<sup>5</sup> The four Geneva Conventions of 12 August 1949 are: relative to the Treatment of Prisoners of War; relative to the Protection of Civilian Persons in Time of War; for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

<sup>6</sup> The Rome Statute of the International Criminal Court, art. 8, para. 2, b (i).

<sup>7</sup> The International Coalition for an International Criminal Court says in its European newsletter #8 of September 2001: "Though the international community has not been able to agree on the definition of the crime of international terrorism, it is our unanimous opinion that yesterday's acts of terrorism were crimes against humanity – the murder of hundreds if not thousands of innocent civilians." p. 3.



Human rights and international justice would then have won against sovereignty. Humanity would then have won over any presumption that a “clash of civilisations” would ever be set in motion and the belief that any civilisation stands above the others.

Terrorism is a scourge, just like war, and as such it can never be defended nor justified. It must be combated. The United Nations agree upon this in their resolutions and conventions.<sup>8</sup> New Yorkers agree upon this in their sorrow, anger and grief over the tragedy of 11 September 2001. But sentiments seem to differ regarding how to respond to it. The Security Council makes way for both options – justice or armed retaliation. Amongst New Yorkers the huge banners that adorn the walls of the Arch in Washington Square Park, like a bandage on a bleeding wound, reflect a similar divide. Pacifist, Gandhian slogans such as “an eye for an eye makes no peace” go alongside more violent seeking wordings like “retaliation x 10”.

Like the candlelight vigil on Friday night throughout New York, let the response be a profound and silent one. But first and foremost, let it be just.



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<sup>8</sup> Over the years the United Nations has adopted nine conventions and two protocols on the issue of terrorism.

# HIV/AIDS and International Law: the United Nations Special Session on HIV/AIDS



Former Ambassador Penny Wensley is a senior career diplomat in Australia's Department of Foreign Affairs and Trade and has recently completed her posting as Ambassador and Permanent Representative to the United Nations in New York. Former Ambassador Wensley was appointed Co-Facilitator of the Preparatory Process for the UN General Assembly Special Session on HIV/AIDS earlier this year, which involved co ordinating the drafting of the UN Declaration of Commitment on HIV/AIDS released in June 2001, and will shortly be taking up her new posting as High Commissioner-designate to New Delhi, India. This speech was presented as a dinner address to the Association of the Bar of the City of New York Council on International Affairs in May 2001.

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I am pleased to have the opportunity to speak about the forthcoming UN General Assembly Special Session on HIV/AIDS, which will take place in New York at the end of June 2001. The Special Session is a landmark event. I thought I would begin by telling you something of the background to the decision to hold it; then talk a little about some of the key issues, which I thought might be of particular interest to lawyers.

Firstly, why are we holding a Special Session on HIV/AIDS? And why now? HIV/AIDS is certainly not a new problem – the international community has been dealing with it for at least 15 years. The difference is that the epidemic has reached crisis proportions, has moved from being a health issue to one of security and development, threatening the lives not just of individuals, but of societies, of entire countries. As the Secretary General said recently:

*“We must make people everywhere understand that the AIDS crisis....is not about a few foreign countries far away. This is a threat to an entire generation; this is a threat to an entire civilisation.”*

And my own Foreign Minister, Alexander Downer:

*“This is an epidemic that will not only strike at individuals but at whole societies...a development crisis with devastating consequences for human, social and economic progress....in silence and in stealth, AIDS is slowly but surely picking at the thread holding the fabric of (already vulnerable) societies together;*

*and once AIDS unravels lives and economies at the community level, its effects begin to be seen at the regional, national and international levels."*

The scale of the epidemic and of its impact – more devastating than the black death that swept through Europe in the Middle Ages; a plague of truly biblical proportions – means that HIV/AIDS is now everyone's problem and must be a high international priority. Dramatic words? Overstatement, you wonder privately? Consider for a moment some of the statistics:

- more than 21 million people worldwide dead of AIDS;
- some 36 million people currently affected by the virus;
- more than 13 million children orphaned by AIDS, with the figure possibly reaching 30 million before the end of this decade;
- in 16 countries, more than 10% of the adults are infected; in seven countries, all of them in Southern Africa, at least one adult in five is living with HIV;
- in the most affected countries, half of ALL the 15 year olds alive today will die of the disease, even if infection rates drop in the next few years; and
- if infection rates remain high, then more than two thirds of them will die of AIDS.

Africa is especially affected, particularly Southern Africa (75% of the people who have died were from sub Saharan Africa; of the 36 million people we know to be infected (with the emphasis on 'know', as much incidence is unreported and unknown), 25 million of these are in Africa; of the 13 million orphans, 12 million are in Africa), **but** make no mistake, other parts of the world are affected; some, like the Caribbean, closer to home and holidays for Americans, also very heavily, and all regions are at risk.

In the Asia Pacific region, where Australia is located (and is leading efforts to combat the epidemic, including through the launch last year of a \$200 million global HIV/AIDS initiative), the epidemic is highly diverse, with different prevalence rates and trends. It has taken strong hold in some countries and is spreading rapidly in others. Currently it is estimated that seven million people overall in Asia are infected with HIV. The figure for affected people is, of course, much higher. The scale in large countries with vast populations, like China and India, is hard to imagine. India, with the second highest number of people infected in the world, has an estimated 3.7 million, and here the increase in the estimated number of HIV infections, from a few thousand in the early 1990s to the current figures, is obviously cause for great concern about the future course and impact of the epidemic in the sub continent. In China, 10 million cases are forecast in the coming decade.

In Papua New Guinea, just north of Australia, in the past two years there has been a 25% increase in the number of reported cases and the figure is jumping from fewer than 1,000 infected just four years ago to now nearly 6,000, in a

population of four million but we think 80% of cases are NOT reported, putting the total figure infected at more likely around 25,000. In the rest of the Pacific, recorded cases are relatively small but as in many other parts of the world, for a combination of reasons, the epidemic is under reported and clearly, the region's population is vulnerable.

I could go on citing facts and figures the alarming jump in Russia and other parts of Central and Eastern Europe, the resurgence in developed countries, including some sectors of the US population, where complacency has crept in, based on assumptions of success in controlling the epidemic but I'm sure there is no need. The basic point is that the problem is large and growing larger; that HIV/AIDS is a truly global crisis and that urgent global action is needed to address it.

And that is the background to the calling of a Special Session of the General Assembly to address the HIV/AIDS pandemic in all its aspects. The idea is to raise the level of international awareness of the scope of the problem and implications of its impact, to propose concrete actions to deal with it at national, regional and international levels and, particularly importantly, to mobilise resources to fund those actions.

Of course, because HIV/AIDS has been on the international agenda for nearly two decades, a great deal of work has been done, across a wide range of specialised areas: health, human rights, scientific research, including work on a possible vaccine (an area where Australia is also playing a leading role); work on its prevention, care and treatment; on the factors that contribute to its spread; on identifying the most vulnerable groups; on how best to protect them.

Special mechanisms and organisations to deal with the pandemic have been established in many countries and in the United Nations system itself, notably the unique UNAIDS organisation, which brings together a group of UN agencies, including the World Health Organisation (WHO), the United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNFPA), the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Development Programme (UNDP), the World Bank, the United Nations Drug Control Programme (UNDCP), combining their experience to produce more powerful, interlocking strategies to combat the epidemic. Many governments, my own included, have developed sophisticated national programmes and strategies and some, both developed and developing countries, have succeeded in reversing spiralling infection rates (eg. Brazil, Thailand, Uganda, Senegal and Australia) and in reducing the level of infection.

We know, absolutely, that infection can be prevented but we know, equally absolutely, that there are huge obstacles to achieving this. The Special Session is a political call to action in this respect, which it is hoped will generate the

political will and economic and financial muscle that is needed to overcome these obstacles. The plan is to bring together political leaders – not just health ministers, but heads of government, presidents, prime ministers, ministers for education, transport, development, foreign affairs, trade and industry – to emphasise that the crisis impacts on all aspects of social and economic life, and to have them reach agreement on a ‘declaration of commitment’, which will set concrete targets and timetables for action to be taken, not just by governments and the UN system, but by the private sector, civil society, a host of stake holders.

And that is where I come in, together with my co facilitator, the Ambassador and Permanent Representative of Senegal to the UN. We have been appointed by the President of the General Assembly, Holkeri of Finland, who will preside over the Special Session to manage the preparatory process – and in particular the achievement of agreement on the declaration. Normally, when the UN membership decides to hold a special session, a long, formal, and elaborate process of preparation is involved, taking several years to negotiate the issues and agreed outcomes. In this case, because of the urgency of the problem, we have been catapulted into an unusual preparatory process: there is no bureau, no formal ‘committee of the whole’, no ‘prepcoms’ – just the two facilitators, supported by UNAIDS (serving as both the secretariat of the Session and as the source of expert advice to us and to Member States), steering a process of informal consultations with the Member States and others (NGOs, pharmaceutical companies, interested foundations).

We had a politically difficult organisational meeting in February to hammer out agreement on the actual format of the Session (including four round tables) and the terms of NGO involvement and participation; one week of informal discussions in March, and we will have another at the end of May. On our own responsibility, we prepared a first draft declaration in April and having received comments and reactions to it (and been inundated with written submissions also) are working on a revision of that now. Of course, we are not doing this full time – we both have a range of other commitments, representing our government's interests across the UN agenda, so the work has largely been done at – and through – long nights and weekends.

In doing this, we have tried very hard to keep the declaration as short, clear, and concise as this complex project will allow, to strip it of as much of the classic ‘UN ese’/UN jargon as we could, to make it readable to non diplomats and non experts, to keep the focus on action and not rhetoric and on HIV/AIDS, and not become sidetracked into difficult debates on wider issues, chronic areas of contention between governments in the UN. Many of these, such as debt relief, poverty reduction, the empowerment of women, human rights, international trade law, transfer of technology, do have implications for dealing with the HIV/AIDS pandemic, but we have to stay focused and, with such little time available, not become sidetracked. Nor can we hope to solve all



the issues subjects like the cost of drugs, which has threatened at times to hijack the whole conference and could still do so are immensely complex, both technically and politically, and will require concerted attention and follow up after the session.

Sadly, I think that we will have great difficulty, once we produce the second draft, in avoiding contentious, if not acrimonious discussions and negotiations and I fear, as one who cherishes clear, unambiguous expression and dislikes intensely the tortuous 'fudges' and 'language fixes' we have to resort to as negotiators, trying to find compromises and to reach consensus among 189 member states (plus observers, such as the Holy See) that the minute we start, we will be pulled inexorably into a vortex of qualification and additions. I see a string of "as appropriates", "as requireds" and "taking into account different national circumstances" etc. looming ahead, but maybe such contorted and qualified language is the stuff of lawyers' dreams?

Actually, although this is frustrating, it is necessary in an intergovernmental process. Much more difficult will be the political and cultural sensitivities that surround the subject of HIV/AIDS.

For here, talking about sex and sexual behaviour and many intensely personal matters, we enter the realm of real taboos, of community customs and traditions, of profound cultural and religious differences, of discussing some subjects, eg. men having sex with men, that in some societies are actually illegal and cannot be mentioned and some others, which cause considerable discomfort or raise acute sensitivities. Some of these take us on to familiar battle grounds: dealing with the empowerment of women, reproductive rights, family planning, sex education for adolescents, the role of the family, etc., but others are less familiar and have been much less discussed in large international forums. When we have a segment of the international community that does not or is unable to acknowledge a problem, it makes discussing responses and solutions especially difficult. It also makes the very necessary discussion about silence, stigma, discrimination and denial especially challenging.

We must, of course, handle these matters and these differences (where they are genuinely held and not contrived) with dignity and delicacy, but at the same time, we cannot allow them unreasonably to block action there is too much at stake; the Special Session must shine some light onto subjects in the shadows.

Human rights is, of course, a subject of particular interest to many lawyers, especially those like you, who are actively interested in international affairs. Dealing with HIV/AIDS is, in many respects, fundamentally about human rights.

The recognition of the importance of human rights in the context of HIV/AIDS has a short but interesting history, dating effectively from an international

consultation organised by the WHO in 1988, on health legislation and ethics in the field of HIV/AIDS. It advocated bringing down barriers between people who were infected and those who were not infected and placing actual barriers, such as condoms, between individuals and the virus. (I should note that we face problems in even having the “C word” mentioned in the text, as well as a large number of phrases which might imply or suggest the idea of providing contraception and condoms, such as “services”, rather than “care”!)

But back to the brief history. Shortly afterwards, the World Health Assembly passed a resolution on the “avoidance of discrimination in relation to HIV-infected people and people with AIDS” which underlined how vital respect for human rights was for the success of national AIDS prevention and control programmes and urged member states to avoid discrimination in the provision of services, employment and travel. The following year, in 1989, came the first international consultation on AIDS and human rights, which proposed the elaboration of guidelines. There followed, in 1990, regional workshops on the legal/ethical aspects of HIV/AIDS, in Seoul, Brazzaville and New Delhi. The first of these developed guidelines to evaluate current and elaborate future legal measures for the control of HIV/AIDS, to be used as a checklist for countries considering legal policy issues. The WHO convened further consultations on HIV, law and law reform during 1995 for Europe, Eastern Europe and Central Asia, whilst the UNDP held inter country consultations on ethics, law and HIV in the Philippines and in Dakar and organised regional training workshops on HIV law and law reform in Asia and the Pacific, in Colombo, Beijing and Nadi.

Law reform programmes focusing on human rights have been ongoing in my own country, Australia, in Canada, the United States, South Africa and in the Latin American region, together with networks of legal advocates, practitioners and activists at governmental and community levels. One concrete achievement of such groups has been the successful lobbying for general anti discrimination legislation at national and local levels which defines disability broadly and sensitively enough to explicitly include HIV/AIDS. Such civil legislation exists, once again, in my own country, Australia (which is recognised internationally as representing “best practice” and being at the forefront of a number of HIV/AIDS related policy areas and actions), in the UK, New Zealand and Hong Kong. In France, such a definition is contained in the penal code. Some countries have constitutional guarantees of human rights with practical enforcement mechanisms, such as in the Canadian charter of rights.

The issue has gradually, if laboriously, like a mountain climber scaling the face of the Eiger, gained footholds in the UN in 1990 and 1991, UNGA resolutions emphasised the need to counter discrimination and to respect human rights and recognised that discriminatory measures drove HIV/AIDS underground, making it more difficult to combat, rather than stopping its spread.

Since 1989, the UN Sub Commission on Prevention of Discrimination and Protection of Minorities<sup>1</sup> has adopted resolutions on discrimination against people living with HIV/AIDS. The Special UN Rapporteur of the Sub-Commission on Discrimination against HIV infected people and people living with AIDS presented a series of reports in the early '90s, highlighting the need for programmes to create a genuine climate of respect for human rights in order to eradicate discriminatory practices contrary to international law. The Special Rapporteur made specific reference to the vulnerable situation of women and children in the spread of HIV; that aspect has since been taken up in many forums and conferences on women. The UN Commission on Human Rights (the one to which the US has just failed to be re elected, for the first time since 1947 in my view a terrible development for the US, for the UN, and for the US/UN relationship), at its annual sessions since 1990 has adopted numerous resolutions on human rights and HIV/AIDS, which, *inter alia*, confirm that discrimination on the basis of HIV/AIDS status, actual or presumed, is prohibited by existing international human rights standards.

There have also been prestigious academic international studies of HIV/AIDS and human rights, including work by the Harvard School of Public Health, the Pan American Health Organisation and by the Georgetown/John Hopkins university programme in law and public health. Numerous 'soft' law charters and declarations which specifically or generally recognise the rights of people living with HIV/AIDS have been adopted at national and international conferences and meetings.

The most significant publications I have sighted are three: a small list of ethical principles, to guide international, community and individual responses to HIV/AIDS; a handbook for legislators on HIV/AIDS and human rights (the executive summary can easily be obtained from the internet (<http://www.unaids.org/publications/documents/humanlaw/ipuexesue.html>)); and the international guidelines on HIV/AIDS and human rights organised by the office of the UN High Commissioner for Human Rights and by the joint UN programme on HIV/AIDS in 1996.

The introduction describes the guidelines as the "product of 50 years of international human rights machinery and 15 years of practical experience in responding to HIV/AIDS." The consultations, which were chaired by admired Australian human rights activist and former head of the International Commission of Jurists, Justice Michael Kirby, now on the Australian High Court, brought together 35 experts in the field of AIDS and human rights, including representatives of national and regional networks on ethics and law, whose purpose was to assist states in translating international human rights norms into practical observance in the context of human rights. The guidelines are in two parts: first, the human rights principles underlying a positive

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<sup>1</sup> Now renamed the Sub-Commission on the Promotion and Protection of Human Rights

response to HIV/AIDS, and second, action orientated measures to be employed by governments in the areas of law, administrative policy and practice that will protect human rights and achieve HIV related public health goals. The guidelines recognise that states bring to the epidemic different economic, social and cultural values, traditions and practices and emphasise that it is the responsibility of states to identify how they can best meet their human rights obligations and protect public health within these specific cultural, political and religious contexts.

In our draft to present to member states later this week [May 2001], we have advocated use of the guidelines, but I expect this will generate a difficult debate. Already, in preliminary discussions on the first draft, we have been told that in several areas it is considered by some delegations to be “pornographic”, “offensive” and “unacceptable”. Although not spelled out, presumably the explicit references to sex, ie. to men having sex with men and to sex workers, fall into this category. It would seem that after nearly two decades of effort on these matters, we will still have difficulty including specific references to these vulnerable groups in the Declaration to be adopted by political leaders.

In addition to these contentious references we confront further difficult debate on what constitutes a human right we already have a not fully resolved debate on ‘the right to development’ some delegations are determined to expand the definition of human rights to include some new categories: the right not just to health but to affordable drugs and access to treatment.

This has a ‘rights’ angle, but also takes us into the second difficult area I thought might be of interest to members of this group and that I would therefore highlight this evening, namely that of access to drugs. This, of course, has been a major subject taken up by the media hardly a day goes by here in New York without another article on the issue.

A principal preoccupation for some time was the South African court case: as some of you may know, the pharmaceutical industry took the South African government to court in 1998 to dispute the legality of a 1997 amendment to the South African Medicines Act. The 1997 amendment contains a number of new measures to control health care costs and improve drug access. These new measures include a provision requiring generic substitution of drugs no longer under patent unless otherwise indicated by the doctor or patient. Another new measure, section 15(c) of the amendment, gives powers to the Minister of Health to ensure the supply of affordable medicines in certain circumstances in the interest of public health, notwithstanding anything to the contrary in the national patent law.

The case was due to go to the High Court in Pretoria in early March, but because the lobby group ‘Treatment Access Campaign’ (TAC), was given



permission to participate in the proceedings, the Court granted the industry an extension of time to prepare. The TAC submitted affidavits to the court on behalf of South Africans infected by HIV and health care workers unable to provide HIV drugs because they are too expensive. The pharmaceutical industry challenged the 1997 amendment on numerous grounds. It claimed that the generic substitution unfairly discriminates against their products, even though it only applies to off patent drugs. The TAC pointed out that many industrialised countries have similar laws that actively promote generic drug substitution.

The industry also claimed that the powers given to the Minister to Health under the provision I cited are too broad, allowing the Minister to override the patent law through parallel importing and compulsory licensing in a manner that is inconsistent with TRIPS. This brings us and the Special Session smack bang into another tricky area of the law, ie. trade law and intellectual property rights.

The World Trade Organisation agreement on “trade related aspects of intellectual property rights” (TRIPS) came into force on 1 January 1995. It greatly strengthened global norms for patents and intellectual property protection, but has been viewed as one of the more controversial WTO agreements. TRIPS sets minimum norms that bind all 140 members of the WTO to a 20 year patent term for technology, including pharmaceuticals. Developed and developing countries have different deadlines for compliance with TRIPS least developed countries have until January 2006 to comply fully (and further extension is possible).

As for the effect of TRIPS on access to HIV drugs, it provides for patents and other intellectual property protections that give companies that first develop HIV drugs exclusive rights over their use. These protections obviously serve as an incentive for innovation, for companies to invest in research and development of new HIV drugs, including vaccines, but they can also contribute to high drug prices not affordable to the vast majority of people living with HIV by giving the company exclusive control over pricing and by precluding generic competition.

There ARE openings under TRIPS to increase access to HIV drugs. TRIPS permits, either expressly or implicitly:

- (a) voluntary licensing the grant of a license by the patent holder on agreed terms;
- (b) compulsory licensing in countries where product is otherwise protected by patent, governments can authorise its production and use without prior notification of the patent holder in the case of: national emergency; circumstances of extreme urgency; and for public non commercial use (article 31. This same article 31, however, also requires the authorities to



comply with certain conditions, eg. the licensee must be required to pay “reasonable remuneration” to the patent holder, and judicial review must be available).

- (c) patentability standards that include public health concerns;
- (d) early working of generic medicines which I understand is similar to the US “Bolar Amendment”, permitting companies to undertake initial research and preparations, in advance of the expiry of a patent, so that generic production can begin as soon as the patent expires;
- (e) the possible extension of the period for TRIPS compliance, ie. “TRIPS transition periods” for LDCs (less developed countries);
- (f) parallel importing, ie. the importation, without the consent of the patent holder, of a product legally marketed by the patent holder in another country. The practice occurs because drug companies often sell their products at different prices in different countries. It is interesting to ask why the TRIPS safeguards have not been used more readily to increase access to HIV drugs?

The answer seems to be in part that in the many developing countries that did not offer patent protection prior to TRIPS, recourse to the TRIPS safeguard was not necessary since no patents were in effect. Applications for compulsory licences can also involve lengthy and complex procedures and legal disputes.

Recalling my earlier comments about the devastation HIV/AIDS is wreaking on many countries, notably in southern Africa, there is clearly room, under article 1, to claim that the epidemic represents a “national emergency”. Yet, in the case of South Africa, President Mbeki declined to declare HIV in South Africa a national emergency, suggesting that the government, for political reasons, did not want to invoke this particular TRIPS safeguard as a basis for compulsory licences.

In the end, the South African case did not proceed and a settlement was reached. Media commentators suggested that the pharmaceutical companies were concerned about the adverse media attention the legal proceedings were attracting. Reportedly, UN Secretary General Kofi Annan was in touch, in the days prior to the settlement being announced, with South African leaders and with the pharmaceutical companies. Whatever his role or interest in this particular case, there is no doubt the UN is taking a keen interest in the overall issue as are the member states and NGOs and HIV activists. Regrettably, there is a lot of emotion washing around the issue and a lot of misunderstanding, misinformation maybe even disinformation as parties and interests position themselves, often through the headlines, for battles to come.

From my perspective, as a formal facilitator of the special session with a responsibility to keep the negotiations positive and constructive and to ensure some good, practical results from the Session, including useful language in the Declaration of Commitment, it seems vitally important to ensure that everyone involved understands the issues and has access to unbiased information, so that we can move away from the politics of reproach, recrimination, threats and confrontation - to a point where the pharmaceutical companies are involved positively in the global response to the HIV AIDS crisis. I suspect serious efforts, including high level diplomacy (largely invisible to many) are under way to help bring this about.

Just as with the discussions over a rights based approach, however, we are in for some very difficult exchanges. The mix of political and commercial ingredients, of trade competition, both current and looming, especially in the area of production of generic drugs, of differing interpretations and application of international trade law and the efforts to link this to new forms of human rights relating to public health and an individual's right to health, is certainly a potent, if not explosive one.

Apart from those two "big" issues, both directly affecting national and international law, the question of resources will be another, if not the, major preoccupation of the session. For the epidemic to be reversed or even slowed and reasonable treatment and care provided for the millions already infected and affected a massive amount of resources would have to be mobilised. Latest estimates from UNAIDS, based on examination of the costs of proven responses to date and an effort to cost some of the concrete targets and measures we hope the leaders attending the Special Session will commit to, suggest that a target of spending ten billion dollars per annum by the year 2010, for/in lower and middle income countries only, will be necessary. Whether the international community governments, the private sector, wealthy individuals, foundations are ready to make such a commitment is not clear, although there are some positive signals from some directions.

On this subject, as with the others I chose to mention, I believe that interested and informed associations like [the Bar Association of New York] have an important role to play in bringing the issues involved into public forums and generating more discussion and reflection on them. I promise you will be hearing and seeing much more about the forthcoming Special Session as the end of June draws closer and HIV/AIDS activists and lobbyists from the United States and around the world converge on New York.



# Diversity, Strength and Desolation: perceptions of Burma during time as a volunteer on the Thai-Burma border



Ms Jessie Wells is a PhD student in Ecology at the University of Queensland. Ms Wells recently spent time travelling and working in Burma, following her longstanding interest in the political unrest in the country.

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Burma is a place of immense diversity, from the ecological diversity of marine systems, river deltas and mountain rainforests, to a population of 48 million people who represent more than 100 ethnic groups. Burma was once considered the rice bowl of the world, yet today the vast majority of its people live in poverty and fear, under one of the most repressive regimes on earth.

August 2001 marks the 39<sup>th</sup> year of military rule in Burma. It is the 13<sup>th</sup> anniversary of (i) the 8.8.88 pro democracy uprising; (ii) attempts to crush the uprising through violence, imprisonment and displacement; and (iii) the formation of the State Law and Order Restoration Council (SLORC) military junta. The State Law and Order Restoration Council renamed itself the 'State Peace and Development Council' (SPDC) in 1997, still determined to silence any form of dissent. These lengths of time are striking both for the duration that unjust and illegitimate rule can last, and for the strength of those who can continue their opposition and aspirations for change. These two aspects rendered the time I spent as a volunteer on the Thai Burma border the most disheartening, and the most inspiring, of my life.

My interest in Burma began six years ago, when I first read of Burma's ancient and recent history, its ethnic, linguistic and ecological diversity, and the myriad concerns for its present and future. Seeking further information and the chance to act on these concerns, I joined Amnesty International and Burma Support NZ, and took part in letter writing and public advocacy on the human rights violations and ecological damage occurring in Burma.

I was struck by the intensity of suffering, and by the role of human actions in its causes. Many areas of Burma suffer through direct armed conflicts and the 'scorched earth' strategy of the Burmese military Tatmadaw in a civil war that has continued at varying scales and intensities since 1948. Many of the 'cease fire' areas are still deeply war torn, in the presence or absence of direct military conflicts.

People from all areas of Burma are subject to military violence, extortion,

torture, rape and forced labour.<sup>1</sup> A process of forced relocation has affected millions, in association with militarisation, development and infrastructure projects, logging concessions, and the creation of 'protected' areas. Ethnic minorities suffer many of the harshest forms of oppression, including discrimination, and cultural and religious oppression.<sup>2</sup> Photographs documenting many of these problems can be seen at [www.earthrights.org/pictures.html](http://www.earthrights.org/pictures.html) and <http://imagesasia.org/photogallery.html> Refugees continue to flee into Bangladesh, India and Thailand and around one million internally displaced persons live in hiding in the mountainous jungles of Burma's border states. Many refugee camps have been set up along Thailand's border since 1984, and currently hold over 100,000 people.

### **A more direct form of involvement: travelling to Thailand as an ecologist-volunteer March May 2001**

Last year [2000] I thought more and more of Burma and of the possibilities for more direct contact and involvement. At the earliest, I could take three months between finishing an honours degree in ecology in New Zealand and commencing PhD research in Queensland. I wrote to several NGOs (Non Governmental Organisations) based in Thailand to ask if I could be of any help in their work on Burma and its extensive border areas. Their responses, and the many possibilities for volunteer work, reflected a wide range of the problems and efforts to address them.

And so, in a state of culture and climate shock, yet optimistic, I arrived in the burning season heat of March, and joined the environment section of a small NGO based in Chiang Mai. This NGO, 'Images Asia', began as an alternative media organisation, and has become involved in many rights and development issues in co operation with several partner organisations. Its objective is to document and disseminate information both within Burma and among migrants and the international community, and to co ordinate training in fact-finding, advocacy and multi media production.

The Environment Desk where I worked is a semi independent office for co ordination, research and education. Burma presents a dramatic example of the interdependencies of human rights and environmental concerns. The need for their simultaneous consideration, and for organisations to work at many levels from grass roots to international, was central to all of the work undertaken at the 'E desk'. Burma was also the focus for the formation of 'EarthRights International', an NGO for the joint defence of human rights and the environment, in 1994.

At the Environment Desk I was involved in a range of tasks, giving opportunities to work with members of diverse organisations and from several of Burma's many ethnic groups which included Pan Kachin Development Society (an international network of ethnic Kachin), Karen Refugee Camp

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<sup>1</sup> Asian HRC 2000

<sup>2</sup> Smith 1994; Mon Info. Service 1998

Women's Development Group, and others. Contrasts and inter connections between global and local levels were often made, and I encountered the extremes of this spectrum in the border town of Mae Sot. In the one morning, another volunteer and I went from speaking about international co ordination and advocacy with U Maung Maung Aye, the National Coalition Government for the Union of Burma (NCGUB)'s Minister in exile for Information and Public Relations, to a discussion with a local women's group on their plans for a safe house for immigrant workers and the innumerable Burmese orphans who were living on the town's streets. Coincident with the diversity of scales was the diversity of languages spoken in interviews, training sessions, and everyday life. I wished so often that I could speak more than English, some Thai, and fragments of Kachin and Karen. However, awareness of language and the need for constant interaction, translation and re expression, meant that any conversation became a very conscious search to understand one another.

### **Research into environmental and community impacts of mining: recurrent patterns of change and loss**

The main project I worked on concerned the community and environmental impacts of gold mining in Kachin State, northern Burma. As with other projects, the research was based on combining information from sources within Burma from interviews with migrants, and documentation missions into Burma and secondly, from sources such as environmental and human rights NGOs in other parts of the world, for example on health and environmental impacts of mining techniques and chemicals.

During this research I came in contact with many more issues, and came to see a more complete picture, both of the complexities and of the recurrent patterns of social and environmental problems. Recent decades have seen the pollution, alteration and destruction of ecosystems, through logging, mining of minerals and fossil fuels, dam construction, depletion of fisheries, unsustainable intensive agriculture, and increased impacts from erosion, floods and drought. There has been a dramatic acceleration of exploitation of minerals, fuels, fish and forests since 1988; for example, annual deforestation rates have doubled since the late 1980s, to reach a minimum estimate of 1.4%.<sup>3</sup> Economic gains have been channelled to military expansion, military leaders, some members of ethnic cease fire groups, and foreign companies.

Even actions ostensibly in the name of development and bio diversity conservation can become instruments of oppression, through militarisation and displacement. Key examples are the Myinmolekat Nature Reserve and Yadana and Yetagon gas pipeline projects in Tenasserim Division. The parallel Yadana and Yetagon pipelines carry natural gas from the Andaman Sea to Thailand through Tenasserim rainforests. The projects are led by an international consortium, including Unocal (United States) and Total (France), and have

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<sup>3</sup> World Bank 2000



caused extensive human rights abuses and environmental destruction.<sup>4</sup> Despite the green washing of the SPDC and its projects, concurrent with offensives against ethnic Karen and Mon peoples, no protective reserve has been formed, and resource depletion and clearance continues to threaten forests and wildlife.<sup>5</sup>

In Kachin State, gold mining formerly consisted of small scale panning by hand. The growth of a gold mining industry began in 1994, after a 1993 cease-fire between the SPDC and Kachin Independence Organisation (KIO). The last 34 years have seen a sudden expansion of many forms of mining, from riverbank and floating river mines to open cast and shaft mines. Despite the dangers and difficulties of gaining information, evidence from photographs and personal accounts indicate extensive and highly visible damage to forests, valleys, rivers and streams. Further, less visible, forms are highly likely: for example, dangerous levels of heavy metals due to acid mine drainage and direct use of toxic mercury left to wash into valleys and streams. From every source, there appeared a recurrent combination of impacts: through environmental degradation, loss of livelihoods, health and access to natural resources, forced labour, displacement, poverty, expansion of the drug trade, and transmission of diseases including HIV. The two outcomes of this research were directed, respectively, to advocacy and awareness among the international community, and to informing people within Burma of the current situation and of the dangers posed by mining and mercury.

### **Strength and desolation: refugee camps and towns on the Thai-Burma border**

A second area of my work at the Environment Desk involved helping with proposals for the Karen Nature Conservation Group, plans for refugee camp community gardens, and articles for *Thulei Kawwei*, a Karen language environmental magazine. I spent many hours working with a young Karen man called Miy Eh. He took on this new name because, as a Karen, he was 'stateless'. The Karen National Union (KNU) has not signed an SPDC dictated cease fire, so Miy had no identity papers and no right of residency or movement in Thailand, beyond the tentative asylum offered within the refugee camps. I helped him to study English, Thai, and environmental science, and listened to him speak about Karen culture, livelihoods and Karen understanding of an 'environment' that cannot be isolated or distanced. Miy had fled the destruction of his village, lost contact with his father and brother, both KNU soldiers, and had lived in a refugee camp for five years. He felt he could have no place in the world other than through his work for peace and conservation. When I left, he wrote to me: "I know my life that I should try hard to reach other people."

As part of an environmental education and research programme, I was given the chance to spend time at Mae Ra Moe and Mae La refugee camps on the Thai border. SPDC forces have been at war with the army of the Karen National Union since the SLORC's first offensive in 1991. Manerplaw, in Karen State,

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<sup>4</sup> Nation 2000

<sup>5</sup> ERI 2000

acted as a centre for co ordination and activity for many opposition organisations, until it fell to SPDC control in 1996. The conflict in Karen State exemplifies the SPDC's scorched earth and 'four cuts' strategies to cut off insurgent groups from food, finance, information, and recruits. Areas are secured through forced displacement and burning of villages, then declared 'black areas' or 'free fire zones', off limits to anyone but the army. Villagers face relocation to camps, forced portering and other labour.<sup>6</sup> More than 100,000 Karen have fled from villages and camps to refugee camps along the Thai border.

Thailand has not signed the UN Convention on the Rights of Refugees, so those fleeing Burma are called economic migrants. They must accept whatever levels of assistance, security and shelter the Thai authorities decide to grant them, or continue to flee. Denial of entry and threats of repatriation also occur. In the camps, they receive rice, salt and oil, and build all structures from bamboo. Sometimes, international or Thai relief agencies donate candles, clothes, or educational materials. Many refugees are compelled by poverty to seek work outside the camps in farms or towns, risking punishment and deportation as illegal migrants. Often, families have become separated. Many women bear sole responsibility for their children, makeshift homes and schooling, and some suffer from domestic violence, or abuses by camp guards.<sup>7</sup>

As we travelled toward Mae La, a young Karen man pointed to charred and overgrown fields, and told me that he had lived in a refugee camp there. I was stunned, and yet this happened a further two times. These camps were attacked and destroyed by troops from the Burmese army or allied military groups, to terrorise the refugees and to eliminate refuge or support for the Karen ethnic opposition. The refugees fled further to Mae La, which has now grown to 30,000. For many refugees, the attacks on camps paralleled their experiences within Burma of sudden forced relocation and reduction of their villages to ash.

The closeness of SPDC forces was even more tangible at Mae Ra Mo, as a fortress could be seen across the Salween River on the Burma side. Some of the refugees at the camp were former soldiers who had defected from the Tatmadaw. Despite enormous spending on the military – estimates of 30 to at least 50% of government spending<sup>8</sup> – recruits are often conscripted, under age, malnourished and subject to abuses and ill health.<sup>9</sup>

Over this time in the camps, I was continually impressed by the resilience and resourcefulness of the people around me – whether listening to an elderly woman give advice on medicinal plants, speaking to the Karen Nature Conservation Group (KNCG) about community gardens or sustainable forest resources, watching school classes, listening to a women's development group

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<sup>6</sup> Smith 1994; Selth 1996

<sup>7</sup> ERI Women's Rights Project

<sup>8</sup> Selth 1996; World Bank 2000

<sup>9</sup> Images Asia 1998, Coalition on Child Soldiers 2000

meeting, or attending a distance education graduation. I was stunned that people who appear to have almost nothing, from which so much has been taken, could have such capacity to give to others. Only through the efforts of many networks of individuals and groups could people in the camps give their lives some semblance of sufficiency and security.

When speaking to young people in the camps, many expressed a sense of optimism and motivation to act on behalf of their people and Burma, at the same time as a sense of desolation over their confinement to the camp, the impossibility of returning to places that no longer exist, and the limited opportunities open to them as refugees. I saw this most clearly in Maw Bhu, a young man whose efforts for the Karen Nature Conservation Group were set against what he saw as the emptiness of his own future, without further education or opportunity for movement. A tension between present and future appeared many times. For the current moment, life could be accepted, there could be chances to smile and to enjoy some things. Yet tomorrow there might be another military incursion, relocation or cholera outbreak. And years into the future, what possibilities would there be for change, and could they have an active part in deciding alternatives?

In the border town of Mae Sot, next to a major checkpoint into Karen State, I was fortunate to work with an organisation called 'Ethnic Co operation for Human Rights and Environment'. The ECHRE was formed in 1999 by young people of many ethnicities who met during a one year course at the EarthRights School. Their objectives were to strengthen co operation, understanding and peaceful direct action, through education and advocacy. I helped them to run a two day workshop on globalisation and the environment, again reflecting links between economics, social justice, media, human rights and environmental concerns. Participants from ECHRE and several other organisations represented many different perspectives. However, they identified many shared experiences and commonalities in the problems they face, relating to both causes and solutions. A further shared aspect was the strength and commitment they demonstrated in their activities for peace and community centred development.

As I left Mae Ra Mo, the monsoon rains began. The smoke of wildfires and burned rice fields cleared from the air and sky, giving a sudden increase in perception of colour and distance. Mountains, monsoon, forests, rivers and wildlife could be seen in more vivid colour – the health and viability of these systems seemed even more intensely threatened, and even more closely tied to the future of these people.

### **A thousand contrasts, and the strangeness of leaving**

An unforgettable aspect of volunteering in Thailand was how frequently my eyes were opened to contrasting extremes, and often a full spectrum between them. Many examples related to time, as a counterpoint of ancient and contemporary, stasis and sudden change, or to abject poverty versus concentrated wealth and power. Several examples of this related to legislation

that was draconian and arbitrarily enforced (for example, on freedoms of movement, assembly, and expression) versus legislation that appeared relatively enlightened yet unimplemented (such as aspects of the 1995 *Forest Act* and 1994 Conservation laws). Some of the most glaring contrasts were between SPDC attempts to present Burma as a peaceful Buddhist land replete with natural resources and the reality of conflict, oppression through terror and poverty, and the loss or transformation of ecological systems.

The time I spent in Thailand and on the border seemed an almost constant stream of 'strangeness' and unexpected realisations, yet somehow leaving felt even stranger still. I suppose that living or working there could never feel 'finished' and I do not know when I can next return. One of the hardest questions was always "when are you coming back?" in whatever language it was spoken.

### **Current developments and a need for continuing advocacy and involvement**

Since mid 2000, SPDC officials have engaged in some form of dialogue with Daw Aung San Suu Kyi, co leader of the National League for Democracy (NLD), who was first placed under house arrest by the SLORC in 1989 for "endangering the state".<sup>10</sup> So far, almost none of the content of these sporadic meetings has been revealed and severe restrictions on freedoms of association, expression and movement remain in place. The new Special Rapporteur appointed by the United Nations Commission on Human Rights recently made a three day visit to Rangoon, however the extent to which it is opening to investigation remains uncertain.

From a cynical perspective, these developments can be viewed as an attempt to deflect criticism, and to legitimise continuing SPDC rule in the eyes of regional and international organisations and governments. As Burma's economy continues in a spiral of decline, the SPDC is clearly motivated to seek the ending of sanctions on investment, and resumption of development funding. In a heavily criticised move, the Japanese government decided on 21 June to provide an Official Development Assistance (ODA) grant for the repair of Baluchaung Hydroelectric Power Plant in Karenni State. This is a project that has been linked in the very recent past to extensive displacements, militarisation, forced labour and environmental degradation.

However, the talks may give some cause for optimism, as a demonstration of the junta's awareness of international pressure and concern. It is therefore vital for this pressure to continue and intensify, and for oppositional pressure to be complemented by support and encouragement for movements that advocate democracy, human rights, ethnic and environmental concerns.

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<sup>10</sup> Despite her detention, and its effective extension since her 'release' in 1995, Aung San Suu Kyi has continued as a voice for peaceful dissent, democracy and reconciliation. Daw Aung San Suu Kyi became a Nobel Peace Laureate in 1991.

There cannot be a return to a Burma that existed at some past time, as a country or system of government, even if the physical freedom of return could be offered to the thousands of refugees or displaced persons. Key concerns must be for the regeneration of lands that have been devastated by conflict and exploitation. Equally, there must be thoughts for reconciliation and the restoration of human and civil rights for Burma's many peoples who have experienced devastating violence, dispossession and displacement, and continue to call courageously for change.

The vast number and magnitude of concerns can appear overwhelming. Yet it would be sadder still if those who are fortunate to have the freedom to act were 'daunted' into inaction. For those with knowledge and experience in law, there are many opportunities to help in the design and eventual implementation of a constitution and legal system elements vital to the realisation of a federal Union of ethnic nationalities, based on equality of rights, responsibilities and freedoms.





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## Sources of further information and opportunities for involvement

- Burma Lawyers’ Council: [www.ned.org/grantees/blc](http://www.ned.org/grantees/blc) email: [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com)

EarthRights International (ERI):  
[www.earthrights.org/links/Burma/index.html](http://www.earthrights.org/links/Burma/index.html) ,  
[www.earthrights.org/about/contact.html](http://www.earthrights.org/about/contact.html)

- Images Asia: <http://imagesasia.org> email: [info@imagesasia.org](mailto:info@imagesasia.org)  
[images@loxinfo.co.th](mailto:images@loxinfo.co.th) [images@cm.ksc.co.th](mailto:images@cm.ksc.co.th)

Lawyers’ Information Network and National Coalition Government for the Union of Burma (NCGUB) offices in USA, Europe, Thailand, India and Australia: [www.link.org](http://www.link.org)

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Orchestra Burma: [www.orchestraburma.org](http://www.orchestraburma.org)

# A Tribute to Aung San Suu Kyi



Ms Louise Paw was born in Burma, where she lived and studied for much of her life, acquiring degrees in English and law. Ms Paw now lives in New York but still feels deeply concerned about the people and the political situation in Burma, and has written this poem to honour the spirit and courage of Aung San Suu Kyi in her quest to restore peace and democracy in Burma.

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The golden land of Burma, beloved land of our birth,  
Blest richly by Nature, a bright spot on earth.  
Her forest clad mountains rich in gems and precious ore,  
Her streams and winding rivers, with food for all and more.  
From the plateau to the plain her fields ripe with golden grain.  
A happy breed of people by Nature thus endowed, with little of want and little care,  
Light work and simple pleasures were their daily fare.

Then a dark night descended,  
Their freedom lost, they toiled in pain,  
Their beloved land was bound by an alien's chain.

In her good time Fate intervened,  
For our people their freedom redeemed,  
Only to lose it once again,  
Alas! to an enemy from within,  
Our very own blood and kin.  
More cruel than the foreign foe,  
Striking with a heavier blow,  
Turning brother against brother,  
Brought to her knees their sacred Mother.

There was no room for truth,  
Voices were silenced, pens were crushed,  
The precious blood of our patriot youth  
On the streets like a river rushed.  
Our motherland, once a jewel bright,  
Her spark now rendered dim,  
Waiting in grief and shame the undoing  
Of the grip of the tyrant's whim.

Then in the midst of our darkest hour,  
High in the sky a star appeared,

A symbol of grit in one scarcely fit  
The image of a warrior.  
A frail figure with a heart of steel,  
Marked by Destiny to lift the oppressor's heel,  
A charge to fulfil, her people to free,  
Braving the bloody path to liberty.  
Her road fraught with heartbreaks and dangers unknown,  
Fearless, head unbowed, stands alone,  
If there were tears we do not see,  
If there were groans, we do not hear.

Sequestered, muzzled, her freedom denied,  
Her foes' frivolous terms, she sternly deride.  
In bondage she thrived, *in absentia* she led,  
A lesser spirit would surrender instead.  
Her captors confounded by her unbreakable will,  
Themselves became her captives,  
Shackled and shamed in a long standstill.  
The Nobel Peace Laurel on her was conferred,  
The free world looked on and heartily cheered;  
Nations in bondage with fresh hopes imbued,  
Their struggle for freedom with new life renewed.

A hero father's blood runs hot in her vein,  
A mother's last words echo again and again  
    *"Be true for there are those who trust you,*  
    *Be pure for there are those who care,*  
    *Be strong for there is much to suffer,*  
    *Be brave for there is much to dare."*  
Herself a mother of two stalwart sons,  
And bonded to her mate, suffering has not undone,  
A painful sacrifice the foursome share,  
Apart in body, one in courage rare!

The years drag on, in chains her resolve unbent,  
Her people languish, their spirits well nigh spent,  
The tyrant's hold unbroken still,  
To grind to dust the people's will.  
Through the prison wall her spirit spoke,  
Her people heard 'though their ragged ranks broke,  
Her unconquerable soul still cries, "Hang on! Hang on!  
The darkest hour comes just before the dawn!"

Ye gods in heaven, give us your ears,  
Turn light out of our darkness,  
And laughter out of our tears,

Help us to see ourselves the kind of people we are,  
And the kind we ought to be.  
Keep our spirits burning, our hopes churning out  
Fresh dreams for a better people,  
More worthy and strong for a better day.  
Keep stout the heart of one who waits with us,  
For victory over man's inhumanity to man,  
When at last the long awaited dawn breaks,  
May she find just reward for the task  
Gallantly done for her people's sake.  
Dignity and freedom restored with simple pleasures of yore  
And justice, peace and plenty they had known before.  
In the annals of our race,  
Her name be given an honoured place,  
At last together with her people stand,  
Heads held high with pride in our Motherland.  
Once more to walk the earth with footsteps light,  
Renewed in spirit, fair dreams in sight,  
A song in each heart, sunshine on each face,  
What more could we ask of heaven's grace.





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# Pakistani Women and the Quest for the Promised Land: The Struggle for Egalitarian Islamic Laws



Mr Hamid Mirza is a student at the University of Queensland and has written the winning paper for the WATL Student Paper Competition 2001.

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## Introduction

“The mesmerising rhythm of beating tublas, mystical fragrances that soothe the senses, lavish gifts and gold ornaments. At the centre of this carnival the beautiful Cinderella – the inept, bashful, gauche, distant bride decorated with gold and silver paraphernalia, a pearl necklace and draped in glamorous fine red silk.

A bride who looked so unusual, so romantic that she might have belonged to some remote Mediterranean or Bedouin time, when such lavishness, pomp and ceremony was the vogue. She hardly belonged to so apparently a rational and rationalised era as ours, a period in the West in which the intriguing and mystical princess is almost as extinct as the pterodactyl.”<sup>1</sup>

At her wedding the Pakistani woman holds centre stage. What a form of temporary reprieve it must seem for her from the everyday political, social and legal climate. A climate in which laws relating to women resist the winds of change and continue to perpetuate a monolithic version of Islam that is essentially authoritarian and patriarchal and mostly in direct conflict with the spirit of Qur’anic laws.

This paper neither claims nor denies that Islamic law, as revealed in the Qur’an and Sunnah (the words and deeds of the Prophet Muhammad), is good law. Rather, it seeks to expose how under the banner of ‘Islamisation’, episodes of military rule have both dissuaded women from pursuing their basic Qur’anic rights and allowed outdated androcentric and misogynistic cultures and customs to be replicated in the ‘public’ sphere. Laws relating to the Constitution, evidence, crime and inheritance rights will be used to highlight how the policy of ‘Islamisation’ has reduced the legal status of women to that of perpetual minors left at the doorstep of religion.

The paper then acknowledges the Pakistani woman’s unique battle on two fronts – against mounting pressure from the West to jettison her religion and

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<sup>1</sup> Natalie Collins, *Guide To Travel Pakistan*, London: Zenith Books, 1994, at 17.

self identity on the one hand, and to resist conforming to the dictates of groups who seek to preserve the *status quo* of the male hegemony through political agendas cloaked in religious discourse on the other.

### **The Elusiveness of Substantive Equality**

Pakistan is an ideological state that came into existence on the basis of an Islamic identity in 1947. It has a hybrid legal system, with secular English common law and Islamic law operating in parallel. The former governs the 'public' sphere, including matters of State, administrative matters and financial regulations, while the latter operates personally as between Muslim citizens in the 'private' sphere, such as in the domain of family law and succession.

The preambles of Pakistan's three Constitutions (1956, 1962 and 1973) required that all Islamic laws conform to the Qur'an and Sunnah.<sup>2</sup> In relation to women the Islamic purity of these laws, when compared against these sources, has been significantly compromised as a process of selective adaptation has taken place effect has been given to Qur'anic injunctions that are compatible with cultural norms favouring men while those conferring rights on women have been ignored.

For example, Article 25 of the Pakistani Constitution states that:

1. All citizens are equal before law and are entitled to the equal protection of law;
2. There shall be no discrimination on the basis of sex alone; and
3. Nothing in this article shall prevent the State from making any special provision for the protection of women and children.

Article 25 can be used in the context of education to argue that both Pakistani males and females have equal access to schooling. The Qur'an (with which the Pakistani Constitution is to conform) demands as much, since the right to education for both sexes is a cardinal principle of the Qur'an, which asks: "Can they who know and they who do not know be deemed equal?"<sup>3</sup>

Yet in 1996 the male literacy rate in Pakistan stood at 50% while the female literacy rate was 25%, and the number of male schools outnumbered female schools by three to one.<sup>4</sup> This inequality between the sexes with respect to a fundamental Qur'anic right was largely the legacy of General Zia's martial law regime between 1977-1988, which held as its goal the 'Islamisation' of Pakistan in accordance with the Sharia (the socio cultural law of Islam). The exact meaning of 'Islamisation' of the laws of Pakistan was deliberately left vague by General Zia because Islamic scholars since the time of the Prophet Muhammad had failed to define the exact meaning of an Islamic law. The Sharia too could not provide an immutable definition of an Islamic law because the very term

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<sup>2</sup> Article 198, Constitution of Pakistan 1973.

<sup>3</sup> The Qur'an, verses 951: 1-5.

<sup>4</sup> Shaheen Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?*, The Hague: Kluwer Law International, 2000, at 119.

'sharia' literally means a flowing stream.<sup>5</sup> Hence, the very notion of Islamic law is a dynamic one.

Faced with a diversity of different religious schools of thought in Pakistan that attached different meanings and interpretation to verses in the Qur'an, General Zia alone assumed the mantle of chief interpreter and imposed his own monolithic and immutable version of Islamic law. Alarming for women, this version endorsed patriarchal practices designed to preserve the male hegemony by denying them social and economic opportunities.

Pakistani women thus became the chief victims of the 'Islamist' paradox: Islam was used to underpin and justify, in absolute terms, rules that were local and specific yet which either clearly contravened or could not be attributed to Islam. For instance, the institutionalisation of *pardah* (the notion that a woman should be veiled and kept within the confines of the four walls of the house) was justified on the grounds that it would help replicate the ideal Islamic community that existed during the times of Prophet.<sup>6</sup>

The 'Islamists' ' nostalgia for *pardah*, though, was misplaced. The practice of veiling and secluding women was originally derived from affluent Byzantine societies that existed a century and a half after the arrival of Islam.<sup>7</sup> The 'Islamists' falsely attributed *pardah* to the Qur'an yet beneath their misplaced faith lay an ulterior motive:

"As with other post colonial states, Pakistan's rapid transformation of economic and social structures has resulted in a state of confusion and lack of control by men. In this shifting and bewildering reality, the only area where control is possible is the domestic sphere, hence the compelling need to exercise it over women."<sup>8</sup>

*Pardah* therefore gave public legitimacy to the control males exercised over females in the 'private' sphere. The 'Islamists' justified it as a protective measure to uphold women as the last bastion of the Pakistani Muslim identity and as repositories of cultural authenticity.<sup>9</sup> The effect of *pardah* was far more destructive, though, because it preserved feudal tribal cultures that denied rather than promoted potential rights of women under the Qur'an.

In the context of the right to education, the institutionalisation of *pardah* violates Article 25 of the Pakistani Constitution which guarantees, at least formally, gender equality and a special protected status for women. The injustice in the eyes of Pakistani women lies in the fact that cultural practices like *pardah* that

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<sup>5</sup> *Ibid.* at 19.

<sup>6</sup> Khawar Mumtaz and Farida Shaheed (eds.), *Women of Pakistan: Two Steps Forward, One Step Back?*, London: Zed Books, 1987 at 30.

<sup>7</sup> *Ibid.*

<sup>8</sup> Khawar Mumtaz, 'Fundamentalism and Women in Pakistan', in V. Moghadam (ed.), *Identity, Politics and Women*, USA: Westview Press, 1994 at 235-236.

<sup>9</sup> Fatima Mernissi, *Beyond The Veil*, Cambridge, Massachusetts: Indiana University Press, 1987 at xxviii.

have no basis in Islam are justified as “special provisions for women” which in fact formalise women’s subservient status.

Raised in an atmosphere of segregation and seclusion, new generations of Pakistani women too have been unable to envision alternative methods of pursuing their full Constitutional or Qur’anic rights. *Purdah* as a form of control denies them access to education, inhibits them from informing themselves about the lives of others and immobilises them economically, socially and politically. It also makes women dependent on male relatives and indoctrinates them into believing that:

“...as ‘good’ mothers, women socialise their children into unequal gender relations; as ‘good’ wives and managers of their households, they are rewarded for their co operation in the ‘patriarchal bargain’, and as ‘good’ sisters they selflessly advance their brothers’ aspirations.”<sup>10</sup>

### **The Hudood Ordinance**

Feminist discourse recognises that public morality tends to mimic private norms already in existence and gives licence to underlying social sentiments. In Pakistan, women, as the bearers of cultural authenticity, while often being privately abused were still held out as public ‘objects’ of respect. That was to change with the ‘Islamists’ ’ introduction of the Hudood Ordinance in 1979 that was to lead to free reign in the denigration of Pakistani women in the ‘public’ sphere.

The Hudood Ordinance makes adultery and rape offences against the state and prescribes maximum punishments of stoning to death for married persons and 100 lashes for unmarried persons.<sup>11</sup> The level of proof required to establish a case of rape is the testimony of four Muslim male adults of good repute who are eyewitnesses to the act of penetration.<sup>12</sup> The maximum punishment for rape cannot be inflicted on the basis of evidence provided by females.<sup>13</sup>

The Hudood Ordinance therefore distinguishes, in terms of admissibility of evidence, between the evidence of males and females. This distinction bears no resemblance to the Qur’an, which stipulates that testimonies are to be obtained from “four believers from amongst you” and does not specify the gender of the witnesses.<sup>14</sup>

Not only does the Hudood Ordinance fail to comply with the Qur’an, it also suffers from severe logical and practical flaws. It is most unlikely that anyone would actually commit the offence of rape in the presence of four Muslim male men of good repute. Although it is more plausible for a woman to be raped in

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<sup>10</sup> Mahnaz Afkhami and Erika Friedl (eds.), *Muslim Women and the Politics of Patriarchy*, New York: Syracuse University Press, 1997 at xv.

<sup>11</sup> Section 5(2), Hudood Ordinance, 1979 Pakistan.

<sup>12</sup> Section 8 (b), Hudood Ordinance, 1979 Pakistan.

<sup>13</sup> *Op cit.* n.6 at 101.

<sup>14</sup> *Ibid.*



the presence of several other women, despite the number of female witnesses present, their evidence is inadmissible.

The logical defect in the Ordinance is that it converts those women who are victims of rape into women later accused of adultery while the perpetrator of the rape walks free. Nowhere is this more alarmingly illustrated than in the *Safia Bibi* case.<sup>15</sup> In 1983, a blind 18 year old girl, Safia Bibi, was sentenced to three years' imprisonment and lashings in public for the offence of adultery. In a police statement Safia Bibi claimed that she was raped, first by her landlord's son and then subsequently by the landlord himself. As a result she became pregnant and conceived an illegitimate child, who later died. The landlord and his son were acquitted of the charges of rape because the act was not committed in front of four Muslim male adults. However, to the dismay of women around the country, Safia Bibi's self confessed pregnancy was also used as evidence of adultery solely against her.

### **Economic Disempowerment**

The ability to enter into financial arrangements is one of the cornerstones of economic empowerment that is so critical to the rights of an autonomous citizen.<sup>16</sup> The Law of Evidence introduced on 28 October 1984 retracted this right from women and effectively reduced the Pakistani woman's status to half that of the Pakistani male. Article 17 of the Law of Evidence provides that:

“In all matters pertaining to financial and future obligations, providing these are reduced to writing, the evidence of two men or one man and two women will be required, so that if one should forget, the other may remind her.”<sup>17</sup>

As a bare minimum, Article 17 requires that financial or future obligations, even if they arise between two women, must be made in the presence of at least one man if they are reduced to writing. This law is peculiar in that in an oral transaction a woman can be a full witness, yet her evidence is worth half when there is a written financial instrument. It also represents a much more stringent requirement than the Qur'anic verse relating to financial obligations, which requires the testimony of one woman only, whether the transaction be verbal or written.<sup>18</sup>

Other laws that were discriminatory against women and yet which were at a variance with the Qur'an were also enacted using the pretext of Islam. For example, sections 96 and 97 of the Law of Qisas and Diyat declared abortion in all cases illegal and prescribed a punishment of seven years' imprisonment. This is contrary to Qur'anic injunctions that allow abortions in the case of

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<sup>15</sup> *Safia Bibi v The State* NLR 1985 SD 145.

<sup>16</sup> *Op. cit.* n.6 at 109.

<sup>17</sup> Article 17, The Law of Evidence 1984 (Pakistan).

<sup>18</sup> *Ibid.* at 110.

physical danger to the mother.<sup>19</sup> Section 25 (b) of the same law provided that compensation to the family for a female victim of an unintentional murder was to be fixed at half that of the amount of compensation for a male victim. Again, this law was contrary to the Qur'an, which omits fixing a greater or lesser amount of compensation on the basis of the sex of the victim.<sup>20</sup>

### **Is the Pakistani Woman *Sui Juris*?**

As Ali contends, even where both Islam and formal law confer rights on women, their denial by sheer force of custom invariably prevails.<sup>21</sup> Nowhere is this more prevalent than in the North West Frontier Province (NWFP) of Pakistan in relation to an adult Muslim woman's right to marry and her rights of inheritance.

In 1997 the landmark decision of *Saima Waheed*<sup>22</sup> was handed down by the Lahore High Court. In that case, an adult Muslim woman contracted a marriage in 1996 without the knowledge or approval of her parents. Her father claimed that the marriage was void *ab initio* as he, as her male guardian, had not given his consent to the contract of marriage. The Lahore High Court held that an adult Muslim woman had legal capacity to enter into a valid contract of marriage without the consent of her male guardian.

This decision however fails to make any profound impact on ancient patriarchal perceptions that an adult Muslim female is not *sui juris* and which continue to defer the legal choices and decisions of an adult female to her closest male relative. In the NWFP adult women are regarded as legal non entities because of:

“... the belief that the birth of a daughter was a source of degradation or that the daughter belonged to her would be husband's family and hence was an alien to her natal family”.<sup>23</sup>

Yet another reason is that women in the NWFP are viewed as commodities that can be traded, exchanged and sold to bolster the economic position of their male relatives. Ali highlights the pertinent example of 'exchange' marriages and how brides were disentitled to the dowry (the financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract).

“A woman is married to a man on the condition that a man in her family will marry a woman in her husband's family... The supposed rationale behind such exchange marriages is that these were economical and dowries and dower was not an issue. The real objective of exchange marriages is, no doubt, quite sinister since the only gain achieved is the denial of any economic empowerment to two women. By denying a

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<sup>19</sup> *Op cit.* n.6 at 112.

<sup>20</sup> *Ibid.* at 111.

<sup>21</sup> *Op. cit.* n.4 at 174.

<sup>22</sup> *Abdul Waheed v Asma Jehangir* PLD 1997 Lah 301.

<sup>23</sup> *Op.cit.* n.4 at 176.

woman her dower, a flagrant violation of Islamic law is being made by both husbands; similarly by not making any gift of a dowry, the parents also participate in her economic disempowerment.”<sup>24</sup>

Cultural practices also dictate that this state of economic disempowerment continue beyond her husband's death, and indeed for the remainder of the woman's life. All property of the deceased husband transmits to the nearest male agnate, bypassing all female relatives. This practice is even more limited than the Qur'an, which at least provides that one half of the share given to a male from a deceased's person's estate must pass to a female relative.<sup>25</sup>

### **Choosing a Framework for Emancipation**

In response to the disempowerment of Pakistani women, political lobby groups such as the Women's Action Forum (WAF) have been nascent, espousing women's rights and the integration of the rural poor into the feminist movement. Having secured formal equality under the Constitution, they are now at the crossroads in their struggle to convince the adult, free, Muslim male legal benchmark of their need for substantive gender equality in both the 'public' and 'private' spheres. Should these groups deploy theories of Western feminist discourse, or instead clutch the Qur'an close to their chests and advance a more ethically egalitarian version of Islam than that offered by the 'Islamists'? As Mumtaz<sup>26</sup> argues, as long as Islam plays a central role in Pakistani culture, an Islamic framework is the only means through which the male hegemony is likely to 'concede' rights to women.

There are two reasons why Western feminism is of limited utility to Pakistani women. The first is that Western feminism primarily expresses the concerns and fears of urban bourgeois women that are quite different to those of the victimised rural and urban poor women of Pakistan. That is, like Maivan Clech Lam, Pakistani women are "Feeling Foreign in Feminism":

"I certainly do not assert here that white bourgeois feminist accounts of their own lives are filmic; I state only that theirs of mine, on the occasions when they presumptively universalise their accounts of the lives of women, often are."<sup>27</sup>

The second is that Pakistani women will risk being associated with the West in an atmosphere that is becoming increasingly anti colonialist.

The West bemoans the status of Muslim women and its media has painted the distorted image of the Muslim woman as the symbol of Islamic fundamentalist villainy. Western feminists argue that to liberate themselves, women in non western cultures must give up their native cultures.<sup>28</sup> As Mumtaz<sup>29</sup> recognises,

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<sup>24</sup> *Ibid.* at 177.

<sup>25</sup> *Op cit.* n.4 at 181.

<sup>26</sup> *Op cit.* n.6 at 154.

<sup>27</sup> See Amrita Basu and Patricia Jeffery (eds.), *Appropriating Gender*, USA: Routledge, 1998 at 158.

<sup>28</sup> *Op cit.* n.4 at 6.

Western feminists fall foul of the same error committed by the 'Islamists' who attempted to formally subordinate the status of women because:

"Those who see the women's movement and Islam as diametrically opposed forces tend to confuse Islam as a religion with patriarchy as a social structure, seeing the latter as a direct consequence of the former, whereas in fact there is a juxtaposition of the two, or a superimposition of one on the other."<sup>30</sup>

To realise rights entitled to them under Islam, Pakistani women must pierce layers of accretions that over the centuries have added class, ethnic and cultural biases to the 6660 (out of the total of 6666) general and gender neutral verses of the Qur'an. If cultural practices that discriminate against women can be exposed as just that, and can be separated from Qur'anic injunctions by showing, for example, that *pardah* violates the fundamental Qur'anic principle of equal access to education for all, then Pakistani people are more likely to let go of mere customs than of Islam.

The challenge for Pakistani women, as Afkhami predicts, is not as simplistic as it seems: "They must question the commonsense truths by which their communities function: the family, the village, the workplace, the city, male-female relationships. They must dare to displease those who are near them emotionally and on whom they depend in times of need."<sup>31</sup>

## Conclusion

The successful emancipation of Pakistani women will entail disturbing the equilibrium and the status quo of the patriarchal hegemony. It will involve questioning the very structure of the Establishment, the free Muslim male benchmark archetype created by the 'Islamists' under the pretext of Islam. As the terms of the first female Prime Minister Benazir Bhutto cruelly exposed, it cannot be confined to a bourgeois struggle borrowed from the West, nor can it fail to ruffle class divisions and make those of the urban poor and rural masses "Feel Foreign in Feminism".



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<sup>29</sup> *Op. cit.* n 6.

<sup>30</sup> *Ibid.* at 153.

<sup>31</sup> *Op cit.* n 10 at xiii.

# Abstracts of papers submitted to the WATL Student Paper Competition 2001



## Refugees: Welcome Home

Susan Anderson

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On Tuesday 18 September 2001 Junior Finance Minister Peter Slipper told the Sydney Morning Herald that: "There is an undeniable link between illegal immigrants and terrorists." When asked to support this claim, Mr Slipper said, "Many came from Afghanistan." I agree with Mr. Slipper that there is a connection. Many of the people accepted as refugees from Afghanistan may have been the victims of terrorists.

Mr Slipper's statement is a stark example of the propaganda used by government officials to deflect attention from the fact that Australia is not meeting its international obligations with regard to the treatment of refugees. These types of comments are completely unsupported by documentation. This paper explores the myths surrounding asylum seekers with an unemotional examination of the treaties voluntarily entered into by Australia and the obligations thereby created on behalf of the Australian people.

## The Ritual Suppression of Women's Sexuality

Zara Spencer

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This paper examines the practice of female genital mutilation (FGM), theoretical approaches to interventions, Australia's international obligations and Queensland's response to FGM. In 1994 the Queensland Law Reform Commission recommended that the practice of female genital mutilation be made a specific offence, however the *Criminal Code Act 1899* (Qld.) has only recently been amended to specifically criminalise FGM under sections 323A and 323B. An estimated 135 million of the world's girls and women have undergone genital mutilation and 2 million girls a year, approximately 6,000 a day, are at risk of FGM. Female genital mutilation is practised in more than 40 countries. Although there is a lack of empirical evidence of the performance of FGM in Queensland, programme co ordinators of the Family Planning Queensland FGM Education Programme have received anecdotal information about incidences of the practice being performed in an area north of Cairns and of children having the procedure performed whilst on holiday in their country of birth.



## Equality Theory and Justice Theory: A Critical Assessment

Andrew Stumer

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This paper outlines the inadequacy of equality theory as the centrepiece of attempts to achieve meaningful and valuable reform for women. It is argued that a justice based analysis is more appropriate and more theoretically consistent than an equality based analysis. In particular, the paper argues that the theories of justice developed in the work of Iris Marion Young and Joseph Raz ought to be elevated and utilised as a framework for promoting feminist goals and projects.

The paper discusses the shortcomings of equality theory on the theoretical and practical levels. The adoption of justice theory does not entail the abandonment of the *goal* of equality, but rather provides a new tool for approaching questions that have become lost in the morass of contradictory claims made under the auspices of equality. It is argued that the theory of equality is inherently limiting and ultimately will not facilitate the advancement of women's rights.

## Hate Speech and the United States Appellate Courts (or How to Perpetuate an Institutionalised Wrong)

Jonathan Crowe

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Drawing upon Jean-François Lyotard's writings on the *différend*, I argue that the way the US appellate courts have used the First Amendment to strike out recent hate speech ordinances is substantively unjust.

In the case of *RAV v. St Paul* and *American Booksellers' Ass'n v Hudnut*, the US courts invoked the concept of 'viewpoint discrimination.' It was held that, by prohibiting 'fighting words' targeted at certain personal characteristics, while allowing other types of threatening speech, the ordinances in those cases discriminated illegitimately between viewpoints. The courts thought it immaterial that the characteristics protected by the ordinances were disproportionately employed by perpetrators of hate speech in selecting their victims.

By proscribing legislation which targets hate speech aimed at specific attributes, the US courts obscure, and thereby perpetuate, the institutionalised patterns of discrimination which frequently underpin such speech. The unique disempowerment of societal groups institutionally oppressed by hate speech is denied legal recognition.





