

Pandora's Box 2003



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

Pandora's Box

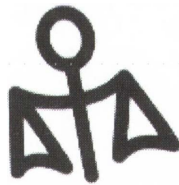
2003



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"Different Women, Different Lives, Same Struggle"



Editors

Megan Breen

Amy Lee

Catherine McDougall

Katrina Piva

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Editorial



In the end, anti-black, anti-female, and all forms of discrimination are equivalent to the same thing – anti-humanism.
– Shirley Chisholm

Editing this year's *Pandora's Box* has been a pleasure. We have aspired to provide a united feminist forum for all women. We were amazed that such diverse articles seemed to have a unifying theme – how women adjust to change and their responsibility in changing the world.

This year's theme "Different Women, Different Lives, Same Struggle" recognises that despite the significant differences in the status of women across the world all women share a universal struggle, for equality. From as far as Iran, to Indonesia, we have received contributions encouraging proactivity, and highlighting the responsibility of women in changing the world.

The contributions confirm that women experience discrimination in varying ways and to varying degrees. Australia is by no means an ideal society, and some groups of Australian women suffer more than others as a result of societal inequalities. Many of this year's articles make it clear that some women experience discrimination that is hard to imagine from our leafy campus in Brisbane. We were honoured to receive work from women who have taken great risks in questioning societal boundaries, and we acknowledge their courage.

We would like to thank all the contributors to and sponsors of Pandora's Box 2003. We would also like to express our appreciation to Associate Professor Carole Ferrier for facilitating our access to the (Other) Feminisms Conference held at the University of Queensland in July this year. Thank you Carole, we appreciated your invitation to attend the conference and your interest in *Pandora's Box*. The commitment of Carole and the Women's Department at the University of Queensland to feminism continues to be an inspiration!

Hopefully, Pandora's Box 2003 has been a positive expression of consciousness-raising!

Editors
Pandora's Box 2003

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Foreword



Jacqueline Jago is the founding President of the Women and the Law Society (WATL) and currently is an Equity and Diversity Specialist for the Brisbane City Council. Jacqueline has a Master of Laws from the University of British Columbia, Vancouver and in 2001, was admitted to the Queensland Bar.

It's very exciting to write the foreword to this year's edition of Pandora's Box. It's also hard to know what to say. Who I am writing for, and why would anyone want to listen to me anyway? This thirty-one year old finds herself trying to cross a reach of time to write to the woman she thought she was at twenty-one: fully aware that ten years ago I had less idea about who that is than even now.

Here are some ideas. I guess that means that what follows is theoretical. But I am beset now as then by a sense of confusion about what's the difference between theory and practice. More to the point, I am keenly aware that there is no such thing as a theorist who practices what she preaches. None of us has a life which is perfectly consistent with its aspirations. The mysterious void between theory and practice is filled with confusion and longing; argument and counter-argument.

In ten years I have learned and forgotten a lot of theory. There have been points in my academic study where I have dwelled ecstatically in a mind that was furnished with beautiful ideas, some of which were not even borrowed. Ideas are like homes for me. I take refuge in them from time to time, especially, I notice, when there is no sense to be made of the work of my hands or the weeping song of my heart. Then there is escape through the void into the chimeric certainty of the mind. How comforting is the sense of being in the right and of being angry from the wrong side of power.

This collection of articles is diverse in its scope and its subject matter. I am glad to see that Pandora still blurs the boundary between the law and other disciplines. I admire the commitment of her editors to varied points of view, because this mosaic of thought and work and disciplines fills the fecund void between opposites (subjectivity/objectivity; law/non-law; right/wrong, theory/practice) with the possibility of really connecting.

Ten years ago, Kathleen Mahoney, the distinguished Canadian lawyer, gave us a tool for filling this void. She urged us in Brisbane (and indeed, in the first edition of Pandora's Box) toward an "aggressive open-mindedness". For lawyers, this commitment to viewpoints other than one's own leads away from a legal objectivity that never existed. It leads toward a conversation that is never over, but always influences mutually.

In 2003, I would amend her advice to suggest vigilance rather than aggression: God knows, we women are hard enough on ourselves. For me, the endpoint of theory or practice is the cultivation (theory) and realization (practice) of understanding. So turns theory to practice, and practice to theory. I am starting to see that the point at which I understand least is the point at which I am most right. In other words, the point at which I am most objective is the point at which I am least able to lean into the viewpoint toward which my political commitment impels me.

I acknowledge my debt to Indigenous friends and colleagues in taking refuge in mutual influence as a theory and a practice, rather than the triumph of any point of view. What a relief that is, since there is no way of assuring myself of ever being right or even fully honest.

Re-thinking 'traditional' perspectives: Women's associations in post-revolutionary Cambodia



Trudy Jacobsen A version of this paper was presented at (Other) Feminisms: An International Women's and Gender Studies Conference, 12-16 July 2003, in Brisbane, Australia, organised by the Australian Women's Studies Association. Correspondence should be directed to the author at the School of History, Philosophy, Religion & Classics, University of Queensland.

'In Cambodia, women are traditionally not as respected as men,' [the sponsor of an international beauty pageant] explained. 'When you get married, you stay home. But now, women are becoming freer and more confident, and this contest is a celebration of that.' In addition, [she] said the Miss Tourism contest will promote Cambodia's own tourism and will give women the opportunity to interact with the international and regional community. 'It will encourage women to look after themselves,' she said.¹

Notwithstanding the questionable legitimacy of beauty pageants as vehicles of empowerment, the director of Lux Cosmetics echoed the sentiments of many women who encourage their Cambodian counterparts to pull themselves out of their unemancipated predicament through Western-style collective action. Appraisals of women in Cambodia after 7 January 1979 almost inevitably include a warning that gender equity will only be possible when Cambodian women 'themselves organise in their mutual interest',² that development initiatives will be lop-sided and detrimental to future generations of women until they 'themselves voice their dissatisfaction with existing gender imbalances'.³ The achievements and processes of women elsewhere in the world are held up as models for the mobilisation of Cambodian women.⁴ Consultants assert that Cambodian women 'perpetuate the rules of servility and subservience from one generation to the next'⁵ and that Cambodia's social problems stem from a lack of 'gifted social leaders with the necessary skills, training, and political or social connections to allow them to be effective advocates and change agents'.⁶ No women feature in the 'who's who' of post-revolutionary Cambodia as established by political scientists.⁷ The participation of women in post-revolutionary women's advocacy and development initiatives have been consistently trivialised or ignored.

Picking up the pieces: January 1979 – April 1989

On 7 January 1979 Vietnamese forces marched into Phnom Penh, scattering the remnants of the Democratic Kampuchea regime, or Khmer Rouge, to the most remote provinces in Cambodia. Cambodians who had managed to escape death through starvation or the purges of an increasingly paranoid and brutal regime faced the reconstruction of their country. Tragically, those who were most necessary in this process – that is, the educated and experienced – were those who had been targeted for execution and ill-treatment between 1975 and 1979. Over a million people died during those years.⁸ Hundreds of thousands fled as refugees.⁹ Over half, and perhaps as many as 65%, of the survivors that remained in Cambodia were women.¹⁰

¹ Stubbs, F. 'Pageant strives to open door for all Cambodian women', *Cambodia Daily*, Wednesday, December 11, 2002, p. 20.

² Aafjes, A. and Athreya, B. *Working women in Cambodia* (Phnom Penh: Asian American Free Labor Institute, 1996), p. 3.

³ Gorman, S with Dorina, P and Kheng, S. *Gender and development in Cambodia: An overview* (Phnom Penh: Cambodia Development Resource Institute, Working Paper 10, 1999), p. 6.

⁴ Note 2 at 27 28.

⁵ Zimmerman, C. *Plates in a basket will rattle: Domestic violence in Cambodia, Part II: Causes and excuses the setting of domestic violence* (Phnom Penh: Project Against Domestic Violence, 1995), p. 31.

⁶ Curtis, G. *Cambodia reborn? The transition to democracy and development* (Washington, DC: Brookings Institution Press; Geneva: United Nations Research Institute for Social Development, 1998), p. 120.

⁷ Gottesman, E. *Cambodia after the Khmer Rouge: Inside the politics of nation building* (New Haven; London: Yale University Press, 2003), pp. xxi xxv.

⁸ Some estimate as many as three million Cambodians died between 1975 and 1979.

It is therefore surprising that so few women were appointed to high-profile political positions in the new government, called the People's Republic of Kampuchea (PRK). Only eight of the 162 full members of the Communist Party of Kampuchea (CPK) attending the Fourth Congress in May 1981 were women,¹¹ and only one woman, Men San An, was appointed to the twenty-two member CPK Central Committee for Organisation.¹² Three years later the Central Committee for Organisation admitted its second female member, Mean Saman.¹³ The following year saw many women in key party positions. Men San An was appointed President of the Central Committee for Organisation as well as the Central Committee for Propaganda and Education. Other women occupying key political positions included Ho Non (Deputy Council Minister), Som Kim Suor (editor of the state newspaper); and Lak On (Party Secretary, Ratanakiri province).¹⁴

People were encouraged to join state-controlled associations in the PRK as a means of contributing to the restructuring of the country.¹⁵ The Women's Association was second in importance only to the trade unions.¹⁶ Established in mid-1979, its official membership was 922,628 in October 1983.¹⁷ Despite this apparent popularity, which accounted for some 15% of the population, an observer remarked in 1981 that the Women's Association was not addressing women's issues: 'It does not yet seem to exert much influence on vital decisions concerning women's economic and social well-being.'¹⁸ Many visitors to Cambodia in the early 1980s commented that the main activity of the Women's Association appeared to be propounding the policies and programmes of the new government rather than promulgating a developmental agenda.¹⁹ Perhaps this is a reflection of the disparity between urban and rural activities.²⁰ Urban women received advice, informal marriage counselling, and help in emergencies.²¹ Programmes aimed at redressing poor literacy, improving education and vocational training for women were implemented. Material assistance was also provided in the form of capital for the establishment of small enterprises or in cases of severe hardship.²²

These activities were integral to the reconstruction of Cambodian society. Communities and the extended family had provided advice and assistance before the revolution; now, with family members separated or dead and communities irrevocably fragmented, people needed somewhere to turn. Similarly, the Women's Association in the refugee camps along the Thai-Cambodian border determined entitlement to supplementary food and organised the distribution of additional goods for births, deaths and marriages. The social workers that made these decisions were usually young women.²³ Until the first post-revolutionary elections in May 1993, the Women's Association made recommendations to the legislature of both the PRK and its successor, the State of Cambodia (SoC), regarding women's legal rights, marriage and divorce, and family planning policy.²⁴

The Women's Association maintained a presence throughout Cambodia.²⁵ At times this presence put representatives at risk. In 1981, Khmer Rouge soldiers arrested a sub-district president of the

⁹ Note 6 at 4; Mysliwiec, E. *Punishing the poor: The international isolation of Cambodia* (Oxford: Oxfam, 1988), p. ix; Vickery, M. *Kampuchea: Politics, economics and society* (Sydney; London; Boston: Allen & Unwin, 1986), p. 3.

¹⁰ Mysliwiec, E. *Punishing the poor: The international isolation of Cambodia* (Oxford: Oxfam, 1988) at 30; Shawcross, W. *The quality of mercy: Cambodia, the holocaust and modern conscience* (Bangkok: DD Books, 1985), p. 37.

¹¹ 'Full' designates members with full voting rights. The CPK established the post revolutionary government that became known as the People's Republic of Kampuchea in conjunction with the socialist government of Vietnam. Vickery, *Kampuchea*, p. 64.

¹² Vickery, M. *Kampuchea: Politics, economics and society* (Sydney; London; Boston: Allen & Unwin, 1986), at 74.

¹³ Mean Saman had been the national president of the Women's Association since 1979.

¹⁴ See note 12 at 80-81.

¹⁵ See note 7 at 59.

¹⁶ The full name of this association was the National Association of Women for the Salvation of Kampuchea.

¹⁷ See note 12 at 118.

¹⁸ Boua, C. 'Women in today's Cambodia', *New Left Review*, 131 (1982), p. 52. This comment may have been apropos of a senior (female) member of the Women's Association suggesting that men be permitted two wives in order to ease the economic burden and loneliness of women.

¹⁹ See note 18 at 59; Mysliwiec, E. *Punishing the poor: The international isolation of Cambodia* (Oxford: Oxfam, 1988) at 61.

²⁰ This distinction has always been present in Cambodian society, growing out of the patron-client relationships that existed between court-dwelling elites and agricultural communities tied to their service.

²¹ See note 18 at 59.

²² Mysliwiec, E. *Punishing the poor: The international isolation of Cambodia* (Oxford: Oxfam, 1988) at 61.

²³ Ledgerwood, J. *Changing Khmer conceptions of gender: Women, stories, and the social order* (PhD thesis, Cornell University, 1990), p. 225.

²⁴ Desbarats, J. *Prolific survivors: Population change in Cambodia, 1975-1993* (Tempe, Arizona: Program for Southeast Asian Studies, Arizona State University, 1995), p. 59.

²⁵ See note 23 at 225.

Women's Association in Stung Treng. She was held captive for two months, during which time she was tortured and sexually assaulted.²⁶ Levels of rural participation in Women's Association projects probably varied, but the rural population all participated in the state initiative of *krom samaki*, 'solidarity groups' or 'co-operatives' comprising between five and twenty families each.²⁷ Each *krom samaki* was allocated an equal amount of good and bad land for cultivation, owned in common. Equipment and animals were owned by individuals, according to their means, but other members of the same *krom samaki* were entitled to their use. In return, owners received an extra portion of the harvest.²⁸ Women participated in leadership roles in the *krom samaki*, although some have commented that this probably reflected the high ratio of female to male survivors.²⁹



Fig. 1
Rural women selling food by the roadside.
Kompong Speu province, May 1989.

Women aged between sixteen and twenty-eight were also encouraged to join the Youth Association,³⁰ described in 1981 as having 'more drive and impact than the Women's Association'.³¹ Perhaps this was due to the comparative youth and energy of its constituents. The Youth Association expounded political propaganda; its official publication, *Yuvajun-yuvaneary Kampuchea*, provided pages of information about governmental ideology and initiatives in a 'frequently asked questions' format. The backs of the booklets were printed with inspirational songs, complete with musical score, or photographs of people working industriously in rice paddies.³²

The post-revolutionary government installed in January 1979 searched survivors camping outside Phnom Penh for educated and experienced people whom they could educate and utilise in national reconstruction.³³ Reflecting the urgency with which the process of rehabilitation was regarded, people with hardly any formal education were sent on training courses lasting from one month to one year in duration, and sent to the provinces for 'fieldwork'.³⁴ The School of Pedagogy offered a one-month training course before dispatching graduates to schools.³⁵ Some of the training was conducted by government officials.³⁶ Chhouk Chhim, vice-president of the Women's Association, lectured on 'Qualities of a cadre trained in the mores of a revolutionary' in 1981.³⁷ Government positions were popular; women working in the markets complained that they could not take government jobs as they could not stop working long enough to attend the training period.³⁸ Women were enthusiastic about their contribution to national reconstruction. A nursing student finishing her course in 1981 said: 'When we finish the course we shall serve the people well – and just as competently as the men do!'³⁹

²⁶ Boua, C. 'Observations of the Heng Samrin government, 1980-1982', in *Revolution and its aftermath in Kampuchea: Eight essays*, Chandler, D.P. and Kiernan, B. (eds) (New Haven: Yale University Southeast Asia Studies Monograph Series No. 25, 1983) p. 264.

²⁷ See note 18 at 49; See note 7 at 91.

²⁸ See note 26 at 261.

²⁹ See note 22 at 30.

³⁰ The full name of which was the National Association of Young Men and Young Women for the Salvation of Kampuchea.

³¹ See note 18 at 59.

³² *Yuvajun yuvaneary Kampuchea*, 3 (1981) and 6 (1982).

³³ Ayres, D.M. *Anatomy of a crisis: Education, development, and the state in Cambodia, 1953-1998* (Honolulu: University of Hawai'i Press, 2000), p. 129; See note 7 at 39.

³⁴ See note 18 at 51. This consisted of explaining the national political philosophy and how it differed from that of Pol Pot, reassuring people of their security, and encouraging participation in collective initiatives.

³⁵ See note 7 at 75.

³⁶ Including the present prime minister, Hun Sen.

³⁷ See note 26 at 287.

³⁸ See note 18 at 49.

³⁹ See note 18 at 56.

Training initiatives, although intensive, were successful. Writing in 1982, Chanthou Boua remarked: 'The accelerated short-term training has already produced numerous, surprisingly forceful and capable cadres. Among them, there are many women, but, as yet, very few occupy important positions.' There was only one woman of ministerial rank in the PRK in 1981, but women were employed as heads of departments in health and industry and throughout the public sector.⁴⁰ Women did not feel that they were discriminated against. One woman said, 'I think I am treated equally to my male colleague; I have enough knowledge to perform the task and so does he.'⁴¹ The government supported an official policy of gender equity. Articles of the 1981 Cambodian Constitution protected women and children and espoused the principle of equality between men and women.⁴² Female government officials were entitled to two months' paid maternity leave and access to a special maternity hospital. Some ministries organised day care for their employees' young children, as did factories.⁴³ A woman employed by the Ministry of Agriculture between 1980 and 1997 recalled 'we were working hard, working together; in return, the government looked after our children and gave us food. We felt like we were helping, like this was the way it should be.'⁴⁴

Sitting down with glue: April 1989 – May 1993

In April 1989, the PRK adopted a number of amendments to the constitution as part general liberalisation policies. The name of the country was changed to State of Cambodia (SoC); the flag and national anthem were altered; collective initiatives such as the *krom samaki* were abolished; and state-owned concerns were partially or completely privatised.⁴⁵ This set the scene for political reconciliation, eventually leading to the signing of the Paris Peace Accords in 1991. There were significant social and economic consequences, however. Privatisation re-introduced the practice of patronage.

Consequently, memberships of state-sponsored associations fell. People realised that more opportunities were to be found in establishing (or, in some cases, re-establishing) support networks with powerful individuals. Simultaneously, public sector workers began seeking employment in the more lucrative private or mixed sectors. As a result, many state-run organisations were discontinued. Amongst the first to go were the Women's and Youth Associations.⁴⁶ Rural women were affected by the abolition of the *krom samaki* in that they lost authority and decision-making opportunities. More demands were placed upon rural households, predominantly headed by women (see Fig. 1), as resources were precluded from collective use.⁴⁷



Fig. 2

Entry in a national human rights poster competition.
Phnom Penh, 10 December 1992.

Western intervention in a pre-existing conflict usually results in multi-party elections in a neutral environment wherein people are guided to respect Western values implicit in unlimited individual

⁴⁰ See note 18 at 52; note 26 at 260; Shawcross, W. *The quality of mercy: Cambodia, the holocaust and modern conscience* (Bangkok: DD Books, 1985), at 266.

⁴¹ See note 18 at 52.

⁴² See note 18 at 61; See note 24 at 58.

⁴³ See note 18 at 58; Boua, 'Observations of the Heng Samrin government', p. 273.

⁴⁴ Sao Sophorn, pers. comm., 5 May 2001.

⁴⁵ Kato, T., Kaplan, J.A., Sophal, C. and Sopheap, R. *Cambodia: Enhancing government for sustainable development* (Manila: Asia Development Bank, 2000), p. 30; See note 33 at 145.

⁴⁶ See note 7 at 329.

⁴⁷ See note 6 at 124; Ledgerwood, J. *Analysis of the situation of women in Cambodia: Research on women in Khmer society* (Phnom Penh: UNICEF, 1992), p. 14.

free choice.⁴⁸ The 1991 Paris Peace Accords resulted in the mobilisation of the United Nations Advanced Mission in Cambodia (UNAMIC), followed by the United Nations Transitional Authority in Cambodia (UNTAC), consisting of nearly 20,000 people from all over the world. A positive consequence of this was that many *khmei khieu*, or Cambodians who had been living overseas, perceiving Cambodia to be safe, returned. A negative consequence, and one that tends to be dwelt upon in histories of the period, is that the sudden appearance of wealth and foreign influences led to inflation, corruption, nepotism, widespread prostitution, and the spread of HIV/AIDS.⁴⁹

The stability of the UNTAC era and the subsequent influx of donor funding saw the creation of many interest groups in addition to political parties.⁵⁰ Human rights groups, fostered by the work of the UNTAC Human Rights Component, were the most prolific of these. Many human rights groups had women's issues as core objectives.⁵¹ Women were enthusiastic patrons and members of these organisations (see Fig. 2).⁵² The creation of these interest groups during the UNTAC era belies Robert Muscat's assertion that Cambodian society has shown little tendency towards, or tolerance for, interest groups or other extra-familial associations.⁵³

Glazing the cracks: May 1993 – July 1997

Cambodia in the period immediately after the UNTAC elections was one of disillusionment. The official election results – showing a majority declaration for the Front Uni Nationale pour un Cambodge Independent, Neutre, Pacifique et Cooperatif (FUNCINPEC), headed by Prince Ranariddh – were rejected by the Cambodian People's Party (CPP), lead by Chea Sim and Hun Sen. Eventually, they persuaded to agree to a power-sharing arrangement. Other political parties were accorded places within the framework of the coalition government.⁵⁴ Less than three months after the elections, however, all parties were beset by internal dissensions.⁵⁵ The withdrawal of UNTAC personnel resulted in an economic slump in privatised concerns such as hospitality, tourism and real estate, although development of service and industry sectors led to an average growth rate of 6% over the next three years. Unemployment, corruption and politically motivated violence increased. On the weekend of 5-6 July 1997, fighting escalated between CPP and FUNCINPEC factions of the Cambodian armed forces. Prince Ranariddh fled the country and Hun Sen assumed control. The disapproval of the international community was registered in the suspension of humanitarian assistance and a massive decrease in tourism, leading to economic growth of only 2.6% and 1.3% in 1997 and 1998.⁵⁶

A consequence of the political environment between May 1993 and July 1997 was that no group or association was believed to be non-partisan. Many groups established under the auspices of UNTAC were unable to survive. One scholar has commented that the development of civil institutions in Cambodia 'has been in part determined by the degree to which the elite is prepared to permit them to develop'.⁵⁷ The elite were members of the royal family or the government, and therefore politicised. However, although their activities were conducted quietly, women's associations seem to have weathered the years between the 1993 elections and the events of July 1997 better than most. In 1995, there were enough local women's organisations to form the Amara Women's Network, an umbrella organisation that oversaw the co-ordination of activities.⁵⁸ The same year, Koh Kor Island, a resettlement program for abused women, was established. The women-run community supports itself through farming and sewing and elects its own leaders.⁵⁹ Khemara, one of the first organisations specifically aimed at women's issues, has run outreach

⁴⁸ Roberts, D.W. *Political transition in Cambodia 1991-99: Power, elitism and democracy* (Richmond, Surrey: Curzon, 2001), p. 29.

⁴⁹ Shawcross, W. *Cambodia's new deal: A report* (Washington, DC: Carnegie Endowment for International Peace, 1994), p. 15. These were certainly present in Cambodia before 1991, but were exacerbated during the UNTAC period.

⁵⁰ See note 6 at 119.

⁵¹ See note 49 at 59.

⁵² One group, LICHADO, was established by a woman, Kek Galabru, on 10 December 1992.

⁵³ See note 5 at 124.

⁵⁴ Including the Buddhist Liberal Democratic Party (BLDP) and the Sam Rainsy Party (SRP).

⁵⁵ For a comprehensive overview of the details of internal politics during this period, see note 48 at 150-163.

⁵⁶ See note 45 at 9.

⁵⁷ See note 48 at 179.

⁵⁸ Larsson, K. *Country gender profile: Cambodia* (Stockholm: Swedish International Development Cooperation Agency, 1996), p. 25.

⁵⁹ Kihara, D. and Ana, P. 'Program lets women regain control of lives', *Cambodia Daily*, Thursday, March 8, 2001, pp. 1, 9.

workshops since 1995.⁶⁰ When a young woman died in 1996, an NGO worker came to inform her family of their rights and how to lay charges.⁶¹ In October 1996 the Khmer Women's Voice Centre (KWVC) conducted a national awareness programme in women and family law.⁶²

The behind-the-scenes approach of women's associations during this period was reflected in political participation and state initiatives for women. Although the percentage of women candidates on the ballot for the 1993 elections was small (5%), many women were indispensable at the grassroots political level.⁶³ The Supreme National Council of Cambodia officially signed the Convention on the Elimination of All Forms of Discrimination Against Women on 22 September 1993.⁶⁴ Shortly thereafter, the Secretariat of State for Women's Affairs was established. Following the 1995 Fourth World Conference on Women in Beijing, the Secretariat was expanded into a Ministry. However, no women occupied ministerial positions, although they constituted a large percentage of government employees.

Letting it dry: July 1997 – July 2003

The political environment in Cambodia since July 1997 has been relatively stable. This stability, in addition to the resurgence of confidence on the part of the international community, has allowed interest groups to emerge from the shadows. The activities of women's associations since July 1997 have continued addressing issues such as prostitution and sexual health. Dany, a young woman from the provinces, had no idea of the dangers of HIV until she arrived in Phnom Penh in 1999 and learned from the Indradevi Association, a Cambodian NGO working in AIDS prevention, about HIV and other STDs. She said that she received training from Indradevi on how to coax a client into using a condom.⁶⁵ This is reflected in state initiatives for women. The Ministry of Women's and Veteran's Affairs runs a volunteer outreach programme, in which existing midwives or other community workers receive training in disseminating information that can assist women in exercising their reproductive rights.⁶⁶

Dissemination of women's rights and opportunities for women's participation in social and political representation has been of particular interest in recent years. L'Association des Droits de l'Homme du Cambodge (ADHOC) published a booklet entitled *Cambodian women and human rights* in 2001.⁶⁷ The KWVC publishes an eponymous bilingual magazine every month.⁶⁸ Cambodian girls are encouraged to join the non-partisan Cambodian Girl Guides, run by a woman, Chea Vannath.⁶⁹ The Democratic Front of Khmer Students and Intellectuals, formed in January 2000, has as its spokesperson and vice-president a woman named Sun Sokunmelea, who led hundreds of students through the streets of Phnom Penh in January 2003 following the registration of the party for the July 2003 elections.⁷⁰ The Women's Media Center of Cambodia has addressed media representations of women. Their mission statement is 'to raise awareness of social issues in Cambodia and to improve the situation of women for the benefit of Cambodian society.' They also strive 'to improve the participation and portrayal of women in the mainstream media' through their radio station and television programming on three of the four national channels.⁷¹ The WMC has also carried out a series of gender analyses.⁷²

⁶⁰ 8 March, 1998, p. 11.

⁶¹ See note 5 at 54.

⁶² KWVC, *Women and family law: October 96 – March 97 advocacy project report* (Phnom Penh: KWVC, 1997).

⁶³ Boua, C. *Cambodia's country report: Women in development*, prepared for the Second Asia Pacific Ministerial Conference, Jakarta, 7–14 June 1994 (Phnom Penh: Secretariat of State for Women's Affairs, 1994), p. 14.

⁶⁴ See note 2 at 6.

⁶⁵ O'Connell, S. and Saroeun, B. 'National security crisis feared from AIDS', *Phnom Penh Post*, May 12 25, 2000, p. 16.

⁶⁶ *Partners for the advancement of women* (Phnom Penh: United Nations Cambodia, 2000) p. 17.

⁶⁷ *Satrei khmei neung setthi manus* (Phnom Penh: ADHOC, 2001).

⁶⁸ Khmer Women's Voice Centre, PO Box 590, Phnom Penh, Cambodia.

⁶⁹ McKinney, M. 'Scouts' honor: World scouting says the local version is too political', *Cambodia Daily*, 28–29 April, 2001, pp. 12–13. Chea Vannath is also the president of the NGO Centre for Social Democracy.

⁷⁰ Nara, L. 'Students enter political fray', *Phnom Penh Post*, 3–16 January 2003, p. 3. The author witnessed this procession.

⁷¹ *Womens Media Centre of Cambodia* information leaflet, Phnom Penh, 2001. In the possession of the author.

⁷² *Gender in election and female leadership at the communal level* (Phnom Penh: Women's Media Centre of Cambodia, April 2000); *Gender and behaviour towards love* (Phnom Penh: Women's Media Centre, June 2000); *Gender in writings* (Phnom Penh: Women's Media Centre of Cambodia, September 2000).

Significant changes have arisen in the public sector. Women in high-profile governmental appointments reached an apogee in 1998, with two female ministers, four female secretaries of state and four under-secretaries.⁷³ The government is pursuing an active policy of encouraging women 'to participate in making decisions outside the home, in the community.'⁷⁴ In 1998 the first female minister, Mu Sochua, was appointed to the Ministry of Women's and Veteran's Affairs.⁷⁵ Princess Bopha Devi was appointed Minister of Fine Arts and Culture the same year.

Rethinking 'traditional' perspectives

The fate of women's associations in Cambodia seems inextricably linked to levels of political participation engaged in by women. The first phase of post-revolutionary Cambodia (January 1979-April 1989) saw a relatively egalitarian approach to gender and political participation. It was not until the second phase (April 1989-May 1993) that women began to disappear from high-profile party positions. However, the first female ministerial appointment did not occur until the fourth phase (July 1997-present). State-sponsored organisations were efficacious and popular in the first phase. This enthusiasm was transferred to interest groups advocating egalitarianism and social redress during the second phase. These groups became less open about their activities during the third phase, reflecting the general climate of suspicion and fear that characterised the period between May 1993 and July 1997. Since then, women's associations have 'gone public', addressing a myriad of issues that concern Cambodian women. This mirrors the increased presence of women in high-profile government positions from 1998.

A number of factors explain the difficulty in gaining widespread acceptance for women's associations and high-profile public sector positions in post-revolutionary Cambodia. The first of these is the legacy of pre-revolutionary Cambodia. Fewer women than men went on to secondary education in the 1950s and 1960s and fewer still to tertiary institutions.⁷⁶ Although there were more women than men left alive after the fall of Democratic Kampuchea, most had not completed secondary school. Women would have benefited the most from the intensive short-term training initiatives of the PRK. However, because so many men had died, the burden of income-generation and labour fell to women. Women were, by and large, the primary breadwinners in the early 1980s, dominating the official and black markets. Rural women would travel to the provincial capital in order to purchase goods that they could then sell in their villages. The first restaurants to be re-established in the towns were operated by women.⁷⁷ Consequently, many women were unable to stop working long enough to upgrade their skills for government positions.

In contrast to the violence and upheaval of the 1970s, pre-revolutionary Cambodia was (and still is) remembered as a 'golden age'. Gender roles during the 1950s and 1960s were defined by the nineteenth-century *Cbpab srei*, or 'Code for women', memorised by second-year high school students in the 1960s.⁷⁸ This text, written by king Ang Duong in 1837 and revised by two (male) commentators over the next century, enjoined women to attend to their husbands, houses and children above all else. Drawing attention to oneself was considered inappropriate.⁷⁹ Women who did not conform to the expectations of the *Cbpab srei* were 'asking for trouble'. This is reflected in popular Cambodian literature of the 1960s.⁸⁰ In 1982 Chanthou Boua believed that the ingrained

⁷³ *Partners for the advancement of women*, p. 6.

⁷⁴ 8 March, 1998, p. 9

⁷⁵ See note 58 at 18.

⁷⁶ There were not many of these, in any case. The first university was opened in 1964.

⁷⁷ Shawcross, W. *The quality of mercy: Cambodia, the holocaust and modern conscience* (Bangkok: DD Books, 1985), at 203.

⁷⁸ See note 23 at 87.

⁷⁹ A friend's grandmother, born in 1937, recalled that her aunt would scold her for walking audibly or singing as she worked, saying the only women who made noise were prostitutes attempting to attract customers.

⁸⁰ *Kang Kam Kang Kaev*, published in 1967, tells the story of a young woman who was well educated, well off, and went out alone. On one of these excursions she was drugged and raped, a natural consequence, the narrator emphasised, of her deliberate flouting of social convention by not staying at home. This story initially came to the attention of the author in note 23 at 114. When asked, several Cambodian friends' family members have recounted slightly different versions of the story.



Fig. 3

Kesar kuol besaj ('Spirits of the flowers').
P'sar th'mei, Phnom Penh, May 2001.

perception of women as submissive and unassertive was a key reason for the absence of women in the highest positions of the PRK government.⁸¹

This perception was not dispelled by the return of Cambodians who had spent at least a decade outside Cambodia. Those who had left before 1975 were, for the most part, members of the educated elite. The majority were men, reflecting pre-revolutionary educational trends. These returnees were seen as integral to the reconstruction of Cambodia. High-profile public and mixed sector opportunities were made available to them to ensure their continued participation. The returning elite brought with them their own nostalgia for pre-revolutionary Cambodia. However, whereas the PRK had precluded a return to practices deemed 'royalist' rather than populist – such as patronage, nepotism, and, to some extent, chauvinism – they formed an integral part of the memories of many returnees. This underlying perception of women sat uneasily with official policies of gender equity, as Cambodian leadership culture struggled to accept Western notions of democracy.⁸²

The friction between the role of women as 'remembered' from the pre-revolutionary period and that propounded in official government policy has resulted in a fragmented perception of women in Cambodian society. Bookstalls in the markets display *The role of women in human rights* next to *Treatise on the seclusion of pubescent girls*, while a reprint of the 1964 *Good manners for men and women* jostles for position with lurid thrillers, whose covers show half-naked young women (see Fig. 3). Women are encouraged to work, but they should also fulfil their 'traditional' domestic responsibilities. Men are legally precluded from taking a second wife, but it is a fairly common practice.⁸³ Perpetrators of domestic violence are officially castigated, yet studies reveal an alarming prevalence of the practice,⁸⁴ largely because, according to 'traditional' mores, the wife must be at fault, or the husband would not need to beat her.⁸⁵

The plurality of representations of Cambodian women explains, to some extent, Western perceptions of Cambodian women as browbeaten and submissive. This assessment is accentuated by 'marriage migration'. Cambodian men living in overseas acquire 'traditional' brides raised in Cambodia, as they are likely to be more obedient.⁸⁶ Furthermore, there is a perceived absence of Cambodian women in the international and regional media. This is not significantly different to the level of international media attention directed at Australian politicians who happen to be women. Yet the assumption is that Cambodian women have been incapable of contributing to their own emancipation, that because their methods have been largely unseen and unappreciated by international observers they have not been successful in designing and implementing ameliorative or advocacy strategies, and that because women's associations and political participation have not mirrored the development of women's liberation movements in the West, they are somehow inadequate.

⁸¹ See note 18 at 52. A purely domestic existence does not tally with the recollections of Cambodian women, however. Many women in Phnom Penh and some in the provincial capitals worked outside the home, maintaining servants or family members to deal with housework and childcare. Rural tasks were not differentiated according to gender, apart from ploughing and climbing palm trees.

⁸² See note 33 at 160; See note 7 at 219.

⁸³ See note 6 at 130; Marie Alexandrine Martin, *Cambodia: A shattered society*, trans. Mark W. McLeod (Berkeley; Los Angeles; London: University of California Press, 1994), p. 274; See note 22 at 59.

⁸⁴ One in six women surveyed in the 2001 Project Against Domestic Violence had suffered domestic violence (WMC, *Gender and behaviour towards love*, p. 14).

⁸⁵ *Gender and behaviour towards love* (Phnom Penh: Women's Media Centre, June 2000); *Gender in writings* (Phnom Penh: Women's Media Centre of Cambodia, September 2000) at 21; See note 5 at 25.

⁸⁶ Fitzgerald, M.H., Ing, V., Ta, T.H., Heang Hay, S., Yang, T., Duong, H.L., Barnett, B., Matthey, S., Silove, D., Mitchell, P. and McNamara, J. *Hear our voices: Trauma, birthing and mental health among Cambodian women* (Paramatta, NSW: Transcultural Mental Health Centre, 1998), p. 51. Some Western men have also adopted this practice.

'Feminism' is regarded with suspicion in some circles in Cambodia as a Western product that is inappropriate to the Cambodian context.⁸⁷ Given the failure of the Western democracy in Cambodia, some might see good reason to avoid the adoption of further Western ideology. A Buddhist leader gently reminded an international forum of NGOs in 1996 that they should not seek to create local groups in their own image.⁸⁸ The director of ADHOC has commented that 'foreigners find it difficult to understand [Cambodia] and try to force co-operation....[They] impose models of development...and control their growth and direction.'⁸⁹ Observers assign Cambodian men and women a static identity in which levels and spheres of participation are assessed according to Western notions of importance. This conceptualisation fails to appreciate the complexity and fluidity of Cambodian society.⁹⁰

Cambodian women's advocacy groups have operated within the constraints of a constantly evolving political and cultural environment since 1979.⁹¹ This approach was epitomised by the Minister of Women's and Veteran's Affairs on 30 November 2002. At a concert organised to promote awareness of violence against women, Mu Sochua began her keynote address by saying 'I would like to suggest to men – please do not violate women, or think that they are not valuable.'⁹² Cambodian women know their worth; the fact they are travelling the road to gender equity in traditional *sampot*, not fatigues, should not be held against them.

⁸⁷ See note 3 at 6; See note 58 at 25.

⁸⁸ See note 6 at 136.

⁸⁹ 'The way ahead to civil society', *Phnom Penh Post*, 26 January – 8 February 1996, p. 7.

⁹⁰ See note 23 at 19.

⁹¹ See note 3 at 6.

⁹² Green, C. 'Men get message', *Phnom Penh Post*, 6 19 December 2002, p. 15.

Protecting the United Nations in the National Interest¹



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Since the Security Council's refusal to endorse a United States-led war on Iraq there have been attempts by supporters of that action to discredit the role of the United Nations. Government, academic and media commentators have waged a deliberate campaign to undermine the UN's credibility, arguing it is no longer relevant and even predicting its demise.

We need to recognise this as a political response from those determined to justify the decision to attack Iraq. This is predictable given that the Coalition of the Willing was so isolated by the global community which rejected war. In the General Assembly only a few speakers endorsed the United States decision to attack Iraq, Australia being one of the minority of countries to line up for war. Most speakers supported a continuation of weapons inspection and dialogue to resolve the impasse. In countries around the world thousands of men, women and children took to the streets to demonstrate their opposition to war.

While President Bush has declared the war 'won', the Iraqi people are still suffering from the devastation and armed conflict continues. Despite alleged 'intelligence' reports confirming weapons of mass destruction, none have been found and many people are suspecting that the war was in fact based on weapons of mass distraction. Major enquiries are now underway in the US, UK and Australia to ascertain the veracity of the evidence cited by political leaders prior to the invasion of Iraq.

Those who allege UN 'failure' would do well to examine the charter and mechanisms of the United Nations. To fully appreciate the strengths and weaknesses of the UN as a player in global politics it is essential to recognise that the United Nations can only be as strong as its 191 member governments allow. If the UN 'fails' it is because governments fail. Secretary-General, Kofi Annan, is an impressive leader in his advocacy of rational conflict resolution, but ultimately he has no power to implement his reasoned approach. He is in effect an employee with 191 bosses, though of course the permanent five members of the Security Council – the UK, the US, Russia, China and France – are the masters who control the direction of decision-making because of their final veto power.

Given this uneven and complex power structure it is a tribute to the vision and persistence of some government and UN leaders that the United Nations has been able to influence and set standards as effectively as it has over more than 50 years. Rather than accusing the UN of failure we should be applauding its determination to uphold international law.

Central to the criticism of the United Nations is the role of the Security Council in refusing to endorse the war against Iraq. Yet one of the UN's fundamental roles is to keep the peace and attempt to achieve negotiated agreements between States in conflict. Despite enormous pressure from the world's superpower, the Security Council reflected both international law and global opinion. It was the Coalition of the Willing that failed to understand that warfare is never the answer, as it inevitably provides impetus for more questioning of power relationships between

¹ Byrnes A and Charlesworth H, 'The Illegality of War Against Iraq' (2003) 22/1 Dialogue
Dominic Bascombe, *Anti Terrorism Legislation in the Commonwealth*, London, Commonwealth Human Rights Initiative, May 2003

feuding States. Unless these questions are resolved the cycle of violence, anger and recrimination continues.

It is certainly disturbing that since the Security Council refused to authorise war, the United States' administration has marginalised the role of the United Nations in the reconstruction of Iraq and the ongoing search for weapons of mass destruction. It is not helpful in global relations generally for one country to set itself above all others in conflicts of this kind. Similarly, the United Kingdom is on the defensive in its criticism of the United Nations with the Foreign Office recently issuing a pious statement about the need to 'rebuild the credibility of the United Nations'. This comes at a time when any reasonable observer would be more concerned about opinion polls reflecting the damaged credibility of Prime Minister Blair, who is seen by the electorate as misrepresenting the facts in his strident case for war. In Australia, Foreign Minister Alexander Downer argued that there was no need for an Australian enquiry into the intelligence used by the Prime Minister in his justification for joining the Coalition of the Willing, because there were already enquiries underway in Washington and London! This suggests that Australia is still a mere satellite of the US and UK and abrogates any need for its own independent assessment.

In recent years there has been prime consideration of 'national interest' in Australian foreign policy priorities. As a middle-ranking power what can Australia best contribute to stable international relations? Traditionally, Australia has been able to exert a reasonable level of influence in global politics, largely because governments have valued and contributed to United Nations efforts to prevent conflict and to set standards. Many Australians and their elected representatives have contributed to this process for over 50 years. Yet in just a few years we have witnessed Australian Government ministers being extremely critical of the United Nations when it dares to challenge Australian policy on indigenous rights and the arbitrary detention of asylum seekers. If Australia can bypass international law and flout United Nations conventions then this is not only damaging to Australia, it also undermines the very mechanisms that we have assisted in developing.

International lawyers have argued that the war against Iraq was illegal and did not comply with fundamentals of the Geneva Convention.

Andrew Byrne and Hilary Charlesworth closely scrutinise the Australian rationale for joining the Coalition of the Willing and state:

"The arguments advanced to support the lawfulness of the Government's action are unpersuasive. They depend on a distorted reading of the language of the relevant Security Council resolutions and of the context in which they were adopted. They also neglect the rationale of the role of the Security Council under the Charter in dealing with threats to international peace and security."

Debate at the time of impasse in the Security Council focussed primarily on the interpretation of its 1990 authorisation of the 'use of force' resolutions which related to the need for Iraq to withdraw from Kuwait at the time. Thirteen years later this language was not being applied in comparable circumstances.

The Australia Government not only accepted this rationale for war, it also went on to argue that sending 2,000 troops to Iraq was in the national interest. Serious consideration of this assertion would suggest that if Australian security really depended on military involvement then surely greater numbers would be warranted! In reality we have jeopardised our national interest and perhaps our future security by associating ourselves with a military campaign judged to undermine international rules of engagement.

Furthermore, this precedent could have disturbing consequences for Australian service personnel if the Australian Government persists in following the United States into wars which are not sanctioned by the United Nations. Australian servicemen and women have an outstanding international reputation as professional peacekeepers. However we must not allow them to be placed in conflicts where there is any chance that their role could be challenged under the *Geneva Convention*.

It is also disturbing to find that there has been no scrutiny by the Australian Government of the way in which terrorist suspects have been held indefinitely without charge at Guantanamo Bay.

David Hicks, an Australian citizen, has not received any official support from his Government in ending his arbitrary detention which defies the fundamental principles of the rule of law and United Nations human rights conventions. This attitude is also reflected in Australia's anti-terrorism legislation which proposes that suspected associates be held without charge.

In Iraq the United Nations' role has been marginalised and the conflict continues. Since the official 'end' of the war over forty US personnel have died in their attempts to 'keep the peace', but President Bush rejects the possibility of international peacekeepers. Meanwhile, the number of civilian casualties grows both as a result of ongoing conflict and totally inadequate medical and health infrastructure. Rehabilitation programs are slowly materialising with most contracts so far having gone to the United States, which wants to play both aggressor and saviour, a very uneasy position for personnel expected to achieve this balance.

In the current global climate it is essential that Australians seriously review the direction of our current foreign policy. The 'war on terrorism' dominates both national and international attention and of course we must be realistic about future attacks. Yet since the tragedies of September 11 and the Bali bombings, we have lost our capacity to act independently to work for greater understanding between nations. Prime Minister Howard has locked Australia into a suffocating embrace with the Bush Administration which is not in the national interest nor is it any guarantee for our security.

The Australian/American alliance is one of strategic friendship based on many years working cooperatively for mutual benefit. But this should not automatically dictate that we be rigidly following the current US Administration in all aspects of foreign policy. In doing so we risk jeopardising our independence and respect, especially in the Asia-Pacific Region. Despite vigorous protestations from the Australian Government, many people in diplomatic circles are surprised that Australian foreign policy so closely mirrors that of the United States. In Geneva recently at the United Nations Commission on Human Rights, I heard from several officials and diplomats the same messages:

'Why does your country always follow the United States?'

'Doesn't Australia have an independent view of the world?'

'Does your Prime Minister want to be seen as the lap dog of President Bush?'

These are disturbing comments from people well versed in international relations. They are not expressed with any malice, but reflect the concern that Australia is no longer proactive in asserting its individual identity in international forums.

This sharply contrasts with the image Australia projected as recently as 2000 when we hosted the Sydney Olympics and presented to the world a spontaneous message of successful multiculturalism. The following year our commitment to protect the people of East Timor was highly respected by the international community as it watched a country take a firm stand to protect the human rights of its neighbour.

However in the past two years Australia has attracted only negative attention for its selfish behaviour in rejecting asylum seekers rescued by the Norwegian ship 'Tampa'. Furthermore, the images of caged asylum seekers in desert camps have seriously damaged Australia's reputation as a tolerant nation.

International respect for Australia has been eroded by the actions of the Australian Government. Its failure to show strong leadership as an independent nation with deep commitment to the *United Nations Charter* has alarmed both Australians and international communities.

The undermining of the role of the UN as a vital force for international peace and justice cannot be tolerated.

The question is not whether the United Nations has failed us - but whether we have been complicit in failing the United Nations. In doing so we are actually failing to protect Australia's long-term investment in the United Nations and therefore risking both our national interest and future security.

Personal Reflections: **Being an Australian Muslim Woman post-September 11**



Ghena Krayem graduated from Sydney University in 1998, and worked for a year for Justice Windeyer at the Supreme Court of NSW. She commenced her PhD in 2000, in the area of Comparative Law, in particular the interrelationship of Islamic Family Law and Australian Family Law in Australia. Whilst undertaking her research, Ghena taught at Macquarie University in Constitutional law, Contracts, and Conflicts of Laws. In 2003, she was appointed at Sydney University as an Associate Lecturer and is teaching Federal Constitutional Law.

There is little doubt that September 11 and the Bali tragedy have changed the world we live in, but for many Australian Muslim women it has meant that life has been considerably affected. They live with the challenge that their religion, their source of empowerment, is seen as something to be feared. What do I mean? Perhaps the following anecdotes will help illustrate their experiences:

"Is it safe?"

"Sorry?"

"Is it safe to come?"

"Um yeah, of course it is"

This is the end of a recent phone conversation between a new mum of a one-week-old baby and an early childhood nurse arranging an appointment for the baby's first check up. The nurse is enquiring about the safety of her home visit. Why you may be wondering?

No, there isn't a violent husband around.

No, the new mum did not threaten her in any way.

The new mum had just told the nurse that her son's name was Mohamad. The impact of such a comment by a health care professional was certainly felt by the young mother.

Recently a young Muslim woman waiting at a train station with many bags at her feet, was startled by a concerned passer-by who felt it necessary to stop and peer into her bags before walking on. This passer-by had definitely got the message to 'be alert'.

These little anecdotes, are just some of many highlighting the recent experiences of Muslim women in Australia. Experiences that reflect changes in society in the last 18 months, changes not anticipated by anyone. Suddenly, it is OK and even fashionable (especially according to talk-back radio hosts) to vilify Islam and Muslims. It is justifiable to call them "the sewerage of humanity" and other obscene descriptions.

Newspapers and radios are full of 'experts' on Islam, who argue that it is an oppressive religion with no respect for human rights, in fact there is something very uncivilised about it.

Unfortunately, the backlash felt by the Muslim community has not been limited to verbal vilification, discrimination, and at times outright racism, it has also manifested itself in a physical way.

Since September 11, mosques have been attacked in five States across Australia, a Brisbane school bus was stoned by passers-by and there have been countless reports of acts of violence committed against Muslim women.

Why have recent world events impacted on Muslim Women in Australia?

Quite simply, Islam and indeed Muslims are the only visible signs of an enemy in the 'War Against Terror'. Whether it is the perpetrators of the World Trade Centre attacks, the Taliban in Afghanistan, or 'the enemy' in Iraq, they are all known to be Muslim. Yes, of course Bush, Blair and Howard have said that it is not 'a War against Muslims', but that is certainly not how it is felt at a community level.

I think most would recall the suggestion by Fred Nile, a NSW Member of Parliament, that the dress of Muslim Women should be banned in public places because of the 'security threat' it poses.

In a world of heightened fear and a 'War on Terror', where the 'enemy' can only be identified as being Muslim, it is quite an expected response that all Muslims would be tarnished with the same brush. This is quite interesting, because heinous crimes have been committed throughout history, but it generally has not reflected on the religion of those that commit them.

The perpetrators of the recent terror attacks should not be labelled as Muslim, any more than other criminals are known by their religion, because such crimes against innocent people have no justification in any religion, and certainly not in Islam. They are nothing short of criminals; we should not honour them with an association with any religion.

You may be thinking: *"but these people used religion to justify their actions"*. Indeed, you may have read that the Koran instructs people to act in this way, or heard that Islam was spread by the sword, after all: *"isn't that what 'Jihad' is all about?"*.

In fact, nothing can be further from the truth. It is beyond the scope of this discussion to adequately address these many misconceptions, but suffice to say that in Islam, to kill one person is as if you have killed the whole of humanity, and that Australia's closest Muslim neighbours (Indonesia and Malaysia) accepted Islam through an appreciation of its teachings, not by any military force.

It is a grave injustice to Islam when people misquote verses from the Koran or any religious text, without a full and comprehensive understanding of the faith. I do not mean that people can't and shouldn't be critical of the actions of Muslims where appropriate, but this should not automatically translate into an attack on Islam unaccompanied by any real knowledge about the faith.

From a personal perspective, the most disturbing effect of recent times was the feeling that I needed to constantly defend my faith against such misconceptions, as if in some way all Muslims were to shoulder the blame. Why couldn't I grieve for the loss of lives, why couldn't I express my sorrow, why was it automatically assumed that I didn't lose a friend in Bali, why couldn't I simply be an Australian? For the first time in my life I felt that I didn't belong, not because I didn't want to be part of society, but because the society around me appeared as if they didn't want me. This brought with it incredible feelings of loss and loneliness.

As time goes on, I have realised that these tragic events are just another challenge for society to deal with. A challenge that can only be overcome with respect and understanding of each other's differences, so that such differences do not create fear and animosity but promote peace and goodwill.

“We the Peoples”: Challenging the Public/Private Distinction in International Law and Extending International Legal Protection to Victims of Domestic Violence



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‘I can not say that I think you very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist upon retaining an absolute power over Wives.’
- Abigail Adams, 1776¹

Introduction

Although rights were proclaimed on behalf of humanity in documents such as the *Declaration of Independence* (1776) and the *Declaration of the Rights of Man and Citizen* (1789), it was not until the late nineteenth century that women were first granted the right to vote. Similarly, the United Nations Charter affirmed in 1945 that international legal institutions were created for “we, the peoples”² of the United Nations, however women were initially not included in the law-making processes of the United Nations.³ This exclusion of women from the processes of international law resulted in the marginalisation of their issues and concerns and international law remained largely unresponsive to the plight of the world’s women for some time.⁴

Despite this historic failure of international law to address the concerns of the world’s women, over the past ten years, increasing attention has been paid to women’s rights in international law. For example, equality models have developed from a ‘formal’ approach to equality as adopted in the United Nations Charter⁵ to an approach informed by cultural and dominance feminism.⁶ Another major development in relation to women’s rights at the international level has been the increased recognition and prosecution of acts of sexual violence through the mechanisms of international criminal law.⁷ These developments indicate that international law is becoming more responsive to

¹ Abigail Adams, writing to her husband, John Adams; cited in Hernández Truylol, B.E. “Human Rights through a Gendered Lens: Emergence, Evolution, Revolution” in Askin, K and Koenig, D. (eds), *Women and International Human Rights Law*, Transnational Publishers, New York, 1999 at 3.

² Preamble to the United Nations Charter.

³ Writing in 1992, Gayle Kirschenbaum surveyed the lack of women in the decision making bodies of the United Nations: “UN Expose: Inside the World’s Largest Men’s Club” (1992) (September) *MS* 16. Similarly Hilary Charlesworth revealed the “sorry record on the employment of women” in “Transforming the United Men’s Club: Feminist Futures for the United Nations” (1994) 4 *Transnational Law and Contemporary Problems* 421, particularly at 440.

⁴ Charlesworth, H and Chinkin, C. “Feminist Approaches to International Law” (1991) *American Journal of International Law* 613; Charlesworth, H. “Feminist Methods in International Law” (1999) *American Journal of International Law* 379.

⁵ For example Article 1 Paragraph 3 of the United Nations Charter, which embraces a liberal notion of equality, requiring that states treat everyone equally under the law. See also Article 1 Paragraph 1 of the Universal Declaration of Human Rights and Article 26 of the 1966 International Convention on Civil and Political Rights.

⁶ Cultural feminism is evident in Article 5 Paragraph A of CEDAW, which encourages states to take measures to “modify the social and cultural patterns of conduct of men and women” (emphasis added). Dominance feminism is evident in, for example, Article 4 Paragraph 1, which allows for “temporary special measures aimed at accelerating de facto equality between men and women”. The third goal of the Millennium Development Goals (MDGs) urge that states “promote gender equality and empower women” (emphasis added). See also the UNIFEM report, “Progress of the World’s Women: Gender Equality and the Millennium Development Goals” (2002, Volume 2) (requiring at 63 that “[p]ublic policy for the empowerment of women has to focus on new ways of including women and enabling them to shape the institutions that structure their lives”). See generally Preston and Ahrens, “United Nations Convention Documents in Light of Feminist Theory” (2001) *Michigan Journal of Gender Law* 1.

⁷ On the recognition and punishment of acts of sexual violence by the ICTY and ICTR, see generally Meron, T. *War Crimes Law Comes of Age*, Clarendon Press, Oxford, 1998 at 209. On the expanded recognition of acts of sexual violence against women in Article 7 of the Rome Statute, see Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute*, Kluwer International, The Hague, 1999 at 364ff.

the issues which have traditionally been regarded as 'private' and beyond the purview of 'public' international law.

This paper focuses on the recognition in refugee law jurisprudence that women who suffer domestic violence (a traditional 'private' harm) are to be granted asylum if their state has failed to protect its female population from domestic violence. 'Failure of state protection' (which is largely a product of international human rights law) was recognised in refugee law jurisprudence most notably in the House of Lords decision, *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another ex parte Shah*⁸ ('*Islam; ex parte Shah*'). The High Court of Australia adopted the approach taken in *Islam; ex parte Shah* in the 2002 decision, *Minister for Immigration and Multicultural Affairs v Khawar*⁹ ('*Khawar*'). These decisions, which extend international legal protection to women who have been subjected to domestic violence (a 'private' harm) through the inaction of 'public' organs of the state, challenge traditional concepts of the public/private distinction in international law.

Part One of this paper considers the centrality of the public/private distinction to feminist theorising and the replication of the distinction in international law. This part also considers how the failure of the state to protect individuals from harm by non-state actors can be attributed to the state. Part Two of this paper examines the application of the principle of the 'failure of state protection' in international refugee law jurisprudence, such that female victims of domestic violence can, in certain circumstances, be granted international legal protection if the state has failed to protect these women from such harm. This part examines the jurisprudence of the United Kingdom and Australia in this regard (*Islam; ex parte Shah*¹⁰, *Khawar*¹¹, *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs*¹² and *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs*¹³). This part further considers the impact these decisions will have upon the application of the category "membership of a particular social group" under Article 1A of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') in conjunction with other grounds under the Refugee Convention. This part concludes by observing that these decisions have the potential to broaden the scope of the 'social group' ground, such that other acts of private 'harm' may be recognised as a basis upon which an individual may fear persecution (eg female genital mutilation, sexual slavery, trafficking and sterilisation).

I. THE PUBLIC/PRIVATE DISTINCTION AND INTERNATIONAL LAW

Public/Private: 'What the feminist movement is about'¹⁴

The public/private distinction is central to feminist theorising and is the force behind much of the feminist critique of the law (both of domestic and international law). The public/private distinction has been described as a characteristic of western, liberal thought.¹⁵ Margaret Thornton traces the distinction back to Greek thought, which distinguished between the public (the *polis*) and the private (the *oikos*).¹⁶ Aristotle's vision of women also contributed to the demarcation of the roles of men and women.¹⁷ The distinction was further entrenched by enlightenment thinkers, who

⁸ [1999] 2 AC 629

⁹ [2002] HCA 14 (11 April 2002)

¹⁰ [1999] 2 AC 629

¹¹ [2002] HCA 14 (11 April 2002)

¹² [2002] FCA 565 (10 May 2002)

¹³ [2002] FCA 1022 (26 August 2002)

¹⁴ Pateman, C. "Feminist Critique of the Public/Private Dichotomy" in Gaus, G and Benn, S. *Public and Private in Social Life*, Croom Helm, London 1983 at 281.

¹⁵ See for example Charlesworth, H. "The Public/Private Distinction and the Right to Development in International Law" (1992) *AYBIL* at 190.

¹⁶ Thornton, M. "The Cartography of Public and Private" in Margaret Thornton, *Public and Private: Feminist Legal Debates*, Oxford University Press, 1995 at 2.

¹⁷ Aristotle observed in *Politics* (Book I, Chapter 13 at 1260b 28 31) that "the woman has [deliberative faculty *bouleutikon*], but is without authority (*akuron*) ... so it must necessarily be supposed to be with the moral virtues also; all should partake of them, but only in such a manner and degree as is required by each for the fulfilment of his duty". This view combined with his view that a woman's role was in the home (*Politics*, Book VII 16 1335b 27 29) embodied "separate spheres" thinking (see Maryanne Horowitz, "Aristotle and Women" (1976) *Journal of the History of Biology* 183 at 207ff). Margaret Thornton states that Aristotle's views on women had implications for the roles males and females were to adopt, and this in turn led to a greater division between the 'public' and 'private'

espoused the view that the proper sphere for women was at home with the family.¹⁸ The schism between public and private became even more pronounced with the growth of the nation-state and the market in the nineteenth century¹⁹ – State power needed defined limits to ensure the protection of the individual's sphere of privacy.²⁰

Public and Private in International Law

International law embodies a variant form of the public/private distinction.²¹ International law was initially created to regulate public power between states, while private transactions were to be regulated through the principles of private (national, or international) law. While the recognition that individuals possessed rights after the Nuremberg Trials did permeate this boundary somewhat,²² the distinction between the 'public' and 'private' still exists as international law still distinguishes between 'external' and 'internal' matters.²³ As Martti Koskeniemi writes, domestic jurisdiction is a 'concept which translates the liberal distinction between the "public" and the "private" realms into international legal language'.²⁴ This delineation between the public and private spheres in international law is perhaps most apparent in Article 2(7) of the United Nations Charter.²⁵ The distinction is also apparent when considering the topics regulated by international law, and the exclusion of the 'private' realm from the purview of international law. For example, some feminist theorists query why the International Convention on Economic Social and Cultural Rights (ICESCR) grants a right to remuneration for 'production' however there is no such similar remuneration for housework.²⁶ Another example of the distinction in international law is that many cultural practices are often classified as an internal matter and not regulated by international law.²⁷

While the distinction between 'public' and 'private' is, as Deborah Rhode asserts, largely 'illusory',²⁸ the public/private distinction is perhaps useful in feminist theorising because it enables us to see how the delineation between the two spheres has shaped the development of the law as it relates to women.²⁹ With an awareness of this historical development of the public/private distinction, greater and more critical consideration can be given to the proper scope of each type of public and private power.³⁰

realms (Margaret Thornton, "The Cartography of Public and Private" in *Public and Private in Feminist Legal Debates*, Oxford University Press, 1995, 2 at 3).

¹⁸ Locke for example drew a distinction between the public and private characteristics of reason and passion, knowledge and desire, mind and body. The distinction became gendered with the view that women were inferior to men. For example, Locke wrote that women were "naturally" inferior to men and that the wife was in a "subordinate relation[ship]" to the "master of the family" (John Lock, *Two Treatises of Government*, Goldie, M. (ed), Everyman, London, 1993 at 157). See also Charlesworth, H. "The Public/Private Distinction and the Right to Development in International Law" (1992) *AYIL* 190; Pateman, C. "Feminist Critiques of the Public/Private Distinction" in Gaus and Ben (ibid n16) at 281ff; Naffine, N. "Sexing the Subject of Law" in *Public and Private in Feminist Legal Debates*, Margaret Thornton (ed), Oxford University Press, 1995, 18 at 24.

¹⁹ Horwitz, M. "The History of the Public/Private Distinction" (1982) 130 *University of Pennsylvania Law Review* 1423.

²⁰ Romany, C. "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) *Harvard Human Rights Journal* 87 at 107 (pointing out that the need to respect an individual's privacy later developed into the need to resist totalitarianism).

²¹ Charlesworth, H. "The Public/Private Distinction and the Right to Development in International Law" (1992) *AYIL* 190 at 191 (pointing out that the distinction in international law is different from Locke's distinction, above).

²² Knop, K. "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293 at 330.

²³ Charlesworth, H. *The Boundaries of International Law*, Manchester University Press, Manchester, 2000, at 621ff.

²⁴ Koskeniemi, M. *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers' Publishing, Helsinki, 1989 at 214ff.

²⁵ Walker, K. "An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law" (1994) *New York Journal of International Law and Politics* 173 at 179ff.

²⁶ Barbara Stark makes this point in "The 'Other' Half of the International Bill of Rights as a Postmodern Feminist Text" in Dallmeyer (ed), *Reconceiving Reality: Women and International Law*, American Society of International Law Studies in Transnational Legal Policy, No 25, 1993 at 19. See also Wright, S. "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1992) 21 *AYBIL* 241.

²⁷ Kim, N. "Towards a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism" (1993) *Columbia Human Rights Law Review* 49 at 69ff. See also Funder, A. "De Minimis Non Curat Lex: The Clitoris, Culture and Law" (1993) 3 *Transnational Law and Contemporary Culture* 41.

²⁸ Rhode, D. "Feminism and the State" (1994) *Harvard Law Review* 1181 at 1187 (arguing that what constitutes public and private is ultimately determined by the state and furthermore, the two spheres influence each other).

²⁹ See the five reasons why the distinction should be maintained in feminist theorising by Engle, K. "After the Collapse of the Public/Private Distinction: Strategizing Women's Rights" in Dallmeyer, D. (ed) *Reconceiving Reality: Women and International Law*, The American Society of International Law, Washington, 1993 at 147).

³⁰ Higgins, T. "Reviving the Public/Private Distinction in Feminist Theorizing" (2000) *Chicago Kent Law Review* 847 *passim*.

Transcending the Public/Private Distinction: Non-State Actors and Private Harm

A significant aspect of the public/private distinction in international law is that international law traditionally has not concerned itself with the activity of non-state actors and therefore does not regulate those non-state actors who perpetrate violence against women in the 'private' sphere. Even though acts of violence may be perpetrated against women in the 'private' realm, the state may be held accountable for this harm if it can be shown that the state failed to protect its female population from harm. The decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez*³¹ is instructive on this point. This case concerned the 'disappearances' of government opponents in Honduras in 1981. The Court found that Honduras has violated (*inter alia*) Article 1(1) the American Convention on Human Rights, obliging Honduras to ensure that Mr Velásquez could freely and fully enjoy his human rights under the Convention. Significantly, the Court emphasised that although violations of human rights by private persons or unidentified persons are not directly imputable to a state:

[such acts] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.³²

States have an obligation to respond to potential violations of human rights, and are required to:

'organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention and, moreover, if possible attempt to *restore the right violated and provide compensation as warranted for damages resulting from the violation*'.³³ (emphasis added)

Rebecca Cook³⁴ notes that because the Convention on the Elimination of Discrimination against Women (CEDAW) uses the same wording as the American Convention (both documents require states 'to ensure' respect for human rights), the reasoning in *Velásquez* can be applied when interpreting CEDAW.³⁵ Principles of state responsibility could also be extended to attribute conduct of such actors to the state where the state fails to protect women from harm by private actors and punish perpetrators (for example, under the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*).³⁶ Another (perhaps more theoretical) illustration of this principle can be drawn from Fernando Teson's writings on (what he describes) the Kantian theory of international law.³⁷ He suggests that a state should be held liable for failing to criminalise acts of violence against women because the failure of the state to protect individuals from violence within the family constitutes a failure to treat those individuals with the degree of dignity and respect required a Kantian theory of international law.³⁸

II. THE FAILURE OF STATE PROTECTION AND REFUGEE LAW

While the notion of 'failure of state protection' is largely a product of international human rights law, it is being incorporated into refugee law jurisprudence to extend asylum to victims of 'private' violence.³⁹ The House of Lords recognised the applicability of this principle in refugee law in the

³¹ 28 ILM (1989) 294 (Judgment of 29 July 1988).

³² Paragraph [172]. Although the Court did find that Mr Velásquez disappeared at the hands of agents acting under the cover of public authority, the Court did emphasise, at Paragraph [182], that it would have come to the same conclusion if Mr Velásquez had disappeared at the hands of a private non state actor.

³³ Paragraph [166].

³⁴ Cook, C. "State Responsibility for Violations of Women's Human Rights" (1994) 7 *Harvard Human Rights Journal* 125 at 153.

³⁵ It is worth noting that the Commission on the Elimination of Discrimination against Women General Recommendation Number 19 asserts that 'states may also be responsible for violations for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation' (CEDAW Recommendation Number 19 GAOR 47th Session Supp No 38 A/47/38/ 1992 (this is to be contrasted with the General Assembly Declaration on Violence against Women (DEVAW), asserting responsibility regardless of whether violence is perpetrated by the state or non state actors see Article 2(1)(b) and 2(1)(c) of DEVAW). See also *X and Y v The Netherlands* 91 Eur. Ct. H. R. (ser A) (1985).

³⁶ Romany, C. "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 *Harvard Human Rights Journal* 87 at 110 and 113, referring to the then UN Draft Code of State Responsibility.

³⁷ See Teson, F. "The Kantian Theory of International Law" (1992) 92 *Columbia Law Review* 53.

³⁸ Teson, F. "Feminism and International Law" (1993) *Virginia Journal of International Law* 647 at 660.

³⁹ This trend has been highlighted by Anker, D. in "Refugee Law, Gender and the Human Rights Paradigm" (2002) *Harvard Human Rights Journal* 133ff. It should be noted however that this principle is adopted with slight variation: in international human rights law the purpose of the concept is to hold the state responsible for the acts of the non state agent, whereas the goal in refugee law is to provide surrogate protection to individuals fleeing states that fail to provide protection.

1999 decision, *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another; ex parte Shah*.⁴⁰ The High Court of Australia affirmed the approach of the House of Lords in *Minister for Immigration and Multicultural Affairs v Khawar*⁴¹ ('Khawar'), holding that the failure of the state to protect the female population from domestic violence can constitute persecution under the 1951 Convention Relating to the Status of Refugees (the 'Refugee Convention'). Previously, claims for asylum by women on the basis that they had been subject to domestic violence largely went unnoticed because domestic violence was considered a 'private harm'.⁴²

These two decisions are also significant because they both recognise that women can constitute a 'particular social group' under Article 1A of the Refugee Convention – a particularly significant development given that Article 1A of the Refugee Convention does not explicitly recognise gender as an attribute upon which an individual may fear persecution. These decisions affirming La Forest J's *obiter dictum* comments in *Canada (Attorney General) v Ward*,⁴³ where His Honour identified the touchstone for 'social group' ground in 'anti-discrimination notions' that can be located in international human rights law.⁴⁴

The House of Lords Decision: *Islam; Ex parte Shah*

The 1999 House of Lords decision *Islam; ex parte Shah*⁴⁵ concerned two Pakistani women whose applications for asylum in the United Kingdom had been rejected. They argued that they feared persecution in Pakistan because they had been the victims of domestic violence. Both applicants also feared that if they were returned to Pakistan, they would be accused, charged and punished for adultery under *sharia* law. In the landmark decision, the Law Lords (per Lord Steyn, Lord Hoffman, Lord Hope of Craighead and Lord Hutton, Lord Millett dissenting) affirmed *Canada (AG) v Ward*⁴⁶ and recognised that women such as Mrs Shah and Mrs Islam belong to a 'particular social group' and that their fear was 'for the reasons of' being a member of that social group. Lord Hoffman (who provided the most detailed decision) found that the Refugee Convention was concerned with 'discrimination inconsistent with principles of human rights'. Finding that women in Pakistan did constitute a 'social group'⁴⁷, His Honour went on to find that discrimination, on the ground of being a woman, 'offends against their right as human beings to equal treatment and respect'.⁴⁸ His Lordship proceeded to find that the appellants did have a basis for fearing persecution, as they suffered harm and the state failed to protect them (making reference to the 1988 *Gender Guidelines for the Determination of Asylum Claims in the United Kingdom*, which provided that 'Persecution = Serious Harm + The Failure of State Protection'⁴⁹). Importantly, violence or the failure of state protection alone, would not automatically constitute persecution – the nature of the state's failure to protect members in the 'particular social group' must be discriminatory to found a claim of 'persecution'.

⁴⁰ [1999] 2 AC 629.

⁴¹ [2002] HCA 14 (11 April 2002).

⁴² Macklin, A. "Cross Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender Related Asylum Claims" (1998) 13 *Georgetown Immigration Law Journal* 24 at 49ff. See also paragraph [11.23] of the Australian Law Reform Commission Report No 69, "Equality before the Law".

⁴³ [1993] 2 SCR 689.

⁴⁴ At 734. His Honour found that 'particular social group[s]' are those that are:

- a) defined by an innate or unchangeable characteristic;
- b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- c) associated by a former voluntary status, unalterable due to its historical permanence. (at 740)

In this first category, La Forest J made reference to, *inter alia*, gender.

⁴⁵ [1999] 2 AC 629.

⁴⁶ [1993] 2 SCR 689 at 740.

⁴⁷ drawing upon the finding of the United States Board of Immigration Appeals in *In re Acosta* 19 I&N Dec 211 in which it was stated that a social group was one distinguished by:

'an immutable characteristic that is either beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.' (19 I&N Dec 211 at 232)

⁴⁸ See note 47

⁴⁹ See page 5 of these guidelines. These guidelines were published by the Refugee Women's Legal Group in July 1988. A new set of guidelines has been issued (see note 66 below)

Decision of the High Court of Australia in *Khawar*

Similar facts arose for consideration before the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Khawar*⁵⁰. There the majority of the High Court (per Gleeson CJ, McHugh and Gummow JJ and Kirby J, Callinan J dissenting) affirmed the decision in *Islam; ex parte Shah* and found that the Refugee Review Tribunal should have considered evidence of the level of discrimination directed against women in Pakistan. This was necessary because the failure of the Pakistani police to enforce criminal laws may have amounted to persecution.⁵¹ Chief Justice Gleeson found that the toleration and condoning of domestic violence by the local police in Pakistan, and the failure of the state to prosecute the offenders of such violence provided a reason why the respondent would have a well-founded fear of continuing persecution.⁵² The Chief Justice also affirmed that women can constitute a particular social group.⁵³ McHugh and Gummow JJ found that 'the persecution in question lies in the discriminatory inactivity of state authorities in not responding to the violence of nonstate actors. Thus, the harm is related to, but not constituted by the violence.'⁵⁴ Kirby J made reference to a number of international treaties and decisions in common-law jurisdictions. He noted that the ICCPR and CEDAW require that women be treated equally before the law, and that state-sponsored discrimination by the state is unacceptable. Citing *Canada (Attorney General) v Ward*⁵⁵ with approval, Kirby J found that persecution need not emanate from the state. As La Forest J stated in *Ward*, at the time the Refugee Convention was drafted, the very people it had in mind was people who are not afforded protection by the state.⁵⁶ Citing the criteria enunciated by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 71427/99*⁵⁷, the state is involved in persecution when it is either:

- a) committed by the state concerned
- b) condoned by the state concerned
- c) tolerated by the state concerned
- d) not condoned or not tolerated but nevertheless not prevented because the state either refuses or is unable to offer adequate protection.⁵⁸ (emphasis added)

Subsequent Application of *Khawar*: SDAV and SBBK

The principles applied in *Khawar* have been further applied in two subsequent Federal Court decisions concerning feared persecution on the basis of domestic violence. The Federal Court decision, *SBBK v Minister for Immigration and Multicultural Affairs*,⁵⁹ concerned a woman who claimed to have been subject to domestic violence in Iran. On occasions she was beaten three times a day and sexually assaulted. Tamberlin J (the primary judge)⁶⁰ adopted the views of Kirby J in *Khawar*, stating that:

'that the RRT [Refugee Review Tribunal] had dismissed, without any consideration, the possibility that the applicant could be a member of a particular social group which may be either women in Iran or divorced women in Iran ... Furthermore, the RRT decision does not make a determination as to the availability of protection by the State or State agencies against violence or threatened violence to women in Iran.'⁶¹

The judge found that although the applicant had received police assistance to access her son and divorce her husband, these acts do 'not take into account the possibility that she may again be severely assaulted by her husband without the protection of the State or State agents if she and

⁵⁰ [2002] HCA 14 (11 April 2002).

⁵¹ Paragraph [77] per McHugh and Gummow JJ (considered below).

⁵² Paragraph [29]

⁵³ Paragraph [35]

⁵⁴ Paragraph [87]

⁵⁵ [1993] 2 SCR 689 (see above)

⁵⁶ [1993] 2 SCR 689 at 717.

⁵⁷ Unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [60] (decisions of RPG Hains QC and L Tremewan).

⁵⁸ Paragraph [114]. Callinan J dissented and agreed with Hill J (who also dissented in the Full Court of the Federal Court in this case at (2000) 101 FCR 501 at 504[10]), who found that persecution requires the "doing of a deliberate act, rather than inaction" (at Paragraph [149]). His Honour also considered that a finding that women, or "half of the humankind" of a country, were members of a "particular social group" would result in too broad a category. See generally also Bacon, R. and Booth, K. "Case Note: Persecution by Omission: Violence by Non State Actors and the Role of the State under the Refugee Convention in *Minister for Immigration and Multicultural Affairs v Khawar*" (2002) 24 *Sydney Law Review* 584.

⁵⁹ [2002] FCA 565 (10 May 2002) per Tamberlin J.

⁶⁰ This decision was appealed on other grounds in *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs; Minister for Immigration and Multicultural and Indigenous Affairs v SBBK* [2003] FCAFC 129 (13 June 2003).

⁶¹ Paragraph [29]

the child are returned to Iran'.⁶² Tamberlin J stressed that persecutory conduct occurs where states are so inactive in protecting individuals that their inaction is discriminatory.⁶³

*SDAV v Minister for Immigration and Multicultural and Indigenous Affairs*⁶⁴ concerned a woman who had married in Iran in about 1987 or 1988. Her husband would physically and psychologically abuse her. She left Iran in January 2001, without her husband's consent. Von Doussa J found that the Refugee Review Tribunal's finding that the applicant did not belong to a 'particular social group' was 'plainly wrong' in light of the decision in *Khawar*. His Honour confirmed that the applicant had not received the benefit of state protection in Iran. On the second occasion that she made a complaint to the police (after having withdrawn her first complaint), the police took no action because her husband's employer had bribed the authorities to ignore her complaint.⁶⁵

Gender as a Separate Ground for Feared Persecution?

With the recognition that women can constitute a 'particular social group' and the publication of guidelines to assist decision makers in relation to gender issues in asylum claims⁶⁶ there is perhaps no need for the refugee definition be amended to include gender as a separate ground (either in the *Migration Act* 1958 (Cth) or in the Refugee Convention itself).⁶⁷ While women can frame their arguments in terms of their membership in a 'particular social group' there still remains the question whether claims are best suited to this category or the other categories recognised under the Refugee Convention, such as race, nationality, religion or political opinion. As many commentators have suggested, an individual's opposition to certain social practices or institutionalised discrimination can be conceived as a political activity.⁶⁸ Crawley argues that an individual's actual or imputed political opinion is generally a more appropriate basis to found a claim than gender, *except* in cases where gender is an integral component of the persecution (such as, for example, instances involving female genital mutilation). However she warns against the overuse of the 'political opinion' ground because this may further entrench the traditional 'public' preoccupation of refugee law and stifle further developments recognising gendered experiences of persecution.⁶⁹

Broadening the Scope of the Category "Membership of a Particular Social Group"

While domestic violence is the only form of gendered harm to be recognised under the notion of 'failure of state protection' there is scope for the reasoning in *Khawar* to extend to cover other instances of gendered 'harm', such as female genital mutilation (as has been recognised, for example, in the United States in *In re Kasinga*)⁷⁰, sexual slavery⁷¹, trafficking, sterilisation⁷² and the

⁶² Paragraph [35].

⁶³ Paragraph [34].

⁶⁴ [2002] FCA 1022 (26 August 2002).

⁶⁵ [2002] FCA 1022 (26 August 2002), Paragraph [21].

⁶⁶ The "Guidelines on Gender Issues for Decision Makers" was issued in July 1996 by the Department of Immigration and Multicultural Affairs, and acknowledges at Paragraph [4.33] that women may constitute a social group (noting however that at the time, no court or tribunal had recognised this in practice). These guidelines are republished in the 1997 Special Issue of the *International Journal of Refugee Law* (Annex I, at 195ff) (also available on line at <http://www.uchastings.edu/cgrs/law/guidelines/aust.pdf>). Canada, the United States and the United Kingdom have also adopted guidelines. Canada was the first to issue such guidelines (the current version is available online at http://www.cisr.gc.ca/en/about/guidelines/women/index_e.htm). The United States' "Considerations for Asylum Officer Adjudicating Asylum Claims From Women" were issued in May 1995 (a copy is available on line at <http://www.uchastings.edu/cgrs/law/guidelines/us.pdf>). Extensive guidelines were issued in November 2000 in the United Kingdom (see <http://www.iaa.gov.uk/gender.pdf>). (All web sites were accessible on 1 August 2003).

⁶⁷ See the Australian Law Reform Commission Report No 69, *"Equality before the Law"* at para [11.30] (observing also that it would be difficult to obtain international consensus on this point); see also Macklin, A. "Refugee Women and the Imperative of Categories" (1995) 17 *Human Rights Quarterly* 213 at 257ff (an citations therein). Although specific enumeration of gender persecution would go towards proper recognition of gender based persecution (see Macklin at 306) there are perhaps persuasive jurisprudential reasons against such an amendment. In the context of the Canadian provisions, Macklin argues that such an amendment may lead to Canada's progressive jurisprudence being disregarded as 'different'.

⁶⁸ Macklin, A. "Refugee Women and the Imperative of Categories" (1995) 17 *Human Rights Quarterly* 213 at 260.

⁶⁹ Heaven, C. *Refugees and Gender: Law and Process*, Jordans, Bristol, 2001 at 77.

⁷⁰ 21 I & N Dec 357.

⁷¹ Raghu, M. "Trafficking of Thai Women and the United States Asylum Law Response" (1997) *Georgetown Immigration Law Journal* 145.

⁷² See Brown, T. "Forced Abortions and Involuntary Sterilization in China: Are the Victims of Coercive Population Control Measures Eligible for Asylum in the United States" (1995) 32 *San Diego Law Review* 745 and Gomez, A. "The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China" (1996) *North Carolina Journal of International Law and Commercial Regulation* 621 (both articles argue that the administration of the 'one child policy' in China constitutes persecution and that women subject to this policy should be entitled to asylum in the United States).

failure of women to conform to government gender-specific laws.⁷³ Expanding the scope of the 'social group' ground will not necessarily open the 'floodgates' to claims. Not every woman from a country which practices such discrimination will necessarily be recognised as a refugee. An applicant would still need to establish that she actually *feared persecution* (ie had a well-founded fear accompanied by anticipated serious harm in circumstances where the state has failed to protect the female population). Furthermore, other recognised grounds in the Refugee Convention (ie race, political opinion, religion) are themselves expansive categories and potentially apply to an indeterminate number of individuals. In addition, as Crawley⁷⁴ notes, arguably not all women in a country which fails to protect its female population from harm will necessarily experience discriminatory policies the same manner – much may depend on the individual's socio-economic circumstances.

Conclusion

The feminist critique of the public/private distinction in international law has exposed, and will continue to expose, areas of international law that do not adequately address the issues and concerns of women. Gendered harm in the 'private' sphere is one such area that has been exposed to the feminist critique and has resulted in the acknowledgement that states can be held responsible for their failure to prevent harm occasioned in the 'private' sphere (which can be achieved through for example the enactment and enforcement of criminal sanctions). Unfortunately, however, a large number of the world's women live in states which do not seek to prevent gendered harm in the private sphere. The jurisprudence of international refugee law in a number of jurisdictions has responded to this reality, and extends international legal protection to female victims of domestic violence who flee states that fail to afford them any protection through public institutions. It is envisaged that the reasoning in *Khawar* and similar decisions will gradually be applied to recognise a range of acts states will be required to prevent from being perpetrated against women. Such recognition is perhaps inevitable if refugee law is to address the real issues and concerns of a large number of the world's women.

⁷³ Graves, A. "Women in Iran: Obstacles to Human Rights and Possible Solutions" (1995) 5 *American University Journal of Gender, Social Policy and the Law* 57 (discussing the United States decision, *Fatin v Ins* [12 F. 3d 1233 (3d Cir. 1993] which concerned "Iranian women who refuse to conform to the government's gender specific laws and social norms" [at 84]).

⁷⁴ Crawley, H. *Refugees and Gender: Law and Process*, Jordans, Bristol, 2001 at 73.

Women and the International Law of Self-Determination



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The international law of self-determination asserts that "all the peoples" have the right to self-determination, allowing them to freely determine their own political status and pursue their economic, social and cultural development.¹ The text of the law therefore permits and supports the participation of *all* in the achievement of self-determination, yet many nations practice a policy of oppression towards the female members of their society who form a significant part, and often the majority, of "all the peoples". The alienation of women has been achieved through keeping the voices of women muted, principally by excluding them from representative positions of influence and power. Women are therefore effectively disengaged and barred from directly participating in processes that would allow them to exercise their will as part of "all the peoples", or more disturbingly as people at all.

One of the most recent and public examples of the exclusion of women from positions of power was the composition of the interim government of Afghanistan that operated from 2001-2002. The Administration ruled for six months to establish a traditional grand council (*Loya Jirga*) that would then select a larger representative regime to govern for a further two years while an election process is developed. Out of the 30 positions open to the Afghan people to serve on the interim government, only 2 positions were held by women, Dr. Sima Samar (Deputy Prime Minister and Women's Affairs) and Dr. Suhaila Seddiqi (Public Health). One of the justifications for the war in Afghanistan by US forces and their allies was given as an opportunity to rid Afghanistan from the Taliban regime, a ruling power that forced women to live behind closed doors, purely within the private sphere separated from domain of men: politics, paid work and education. Now that the Taliban has been dismantled surely the next step in emancipating women is to guarantee their participation with the governing body of Afghanistan. A ruling power that allows women to remain unrepresented within a central government body will undoubtedly perpetuate the past treatment of this part of "all the peoples", silencing their voices and excluding them directly from the process of self-determination.

Over the last ten years there has been an increasing volume of work produced by feminist scholars directed towards critiquing this dominant trend of interpreting the international law of self-determination in line with views that maintain the supremacy of a patriarchal and state-centric social structure, ultimately opposed to women achieving substantive equality. The work of feminist writers has not only drawn attention to the gender bias inherent in the international formulation of the right to self-determination itself, but has also offered detailed analysis of how women have been systematically isolated from participating within the decision-making processes and interpretation of the right on a domestic level and on an international level.

Feminist scholarship has attributed the ousting of women from the process of self-determination to many key themes that are found within both the domestic and the international psyche. The main

¹ Common Article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*:

1. All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Approved by the General Assembly in 1966 and entered into force 1976. Hereinafter *ICCPR* and *ICESCR*.

issues that have been discussed concern the effective barring of women from the "public" (national and international) sphere, the reluctance of the international community to acknowledge the rights of women and the current widespread view that places women who do participate in the self-determination processes within a role that is conditional and expendable. Feminist work has also focused on a rethinking of the interpretation of the international law of self-determination to consider the possible way ahead to meet the practical needs of both men and women by widening the focus of self-determination to take into account a more integrated approach towards economic and cultural issues rather than purely focusing on political aspects of the right.

Self-Determination in the Public Sphere Away From the Reach of Women

The exclusion of women's voices and experiences from the decision-making process is directly linked to their exclusion from the public sphere in general. Without the opportunity for women to participate in the public sphere of politics and education women remain mute, marginalised and ultimately unable to contribute to the process of self-determination. Feminist theory has been used to identify possibilities for change by taking women seriously and by exposing the "silences" inherent in the fundamentally skewed nature of international law.² One of the main identified causes for the silences has been the containment of women within the private sphere while international law is deemed to be the property of the public (male heterosexual)³ sphere: "Modern international law rests on and reproduces various dichotomies between public and private spheres, and the "public" sphere is regarded as the province of international law."⁴ A striking example of women's exclusion from the public sphere can be found in the low level of female involvement within the international legal system's organizational and normative structures.

Organizational structures are perceived to perpetuate male dominance by continually creating and reflecting a male perspective of the world. As states and international organisations are the primary subjects of international law, women's participation within them will ensure that their voices are likely to be heard. Yet power structures within state governments impede women's participation, as they are "overwhelmingly masculine".⁵ As a result, women are either unrepresented or underrepresented within the national and global decision-making processes.⁶ When women are given a role within an organization it is comparatively insignificant and subordinate in comparison to that of their male counterparts.⁷ Feminist scholars thus argue, that within the UN itself where the achievement of near universal membership is commended as a major success, this push for universality does not extend to women's participation in decision-making.⁸

The invisibility of women is especially evident within the bodies that perform special functions regarding the creation and progressive development of international law such as the ICJ,⁹ and UN human rights bodies.¹⁰ The single committee that contains *all* women members (CEDAW), thus providing women with an opportunity to participate within the decision-making process has been

² Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 615.

³ Any further references to "male" are intended to refer only to the heterosexual Western male subject, as it is this subject that is envisioned by international law and all who do not resemble him are confined to a fixed subordinated position enforced by dichotomies and perceived as the 'other', less than equal and oppressed. Wayne Morgan 'Queering International Human Rights Law' in Stychein & Herman (eds) *Sexuality In The Legal Arena* (2000) 208.

⁴ See note 2, at p625.

⁵ See note 2, at p622.

⁶ In March 1991, women headed their country's government in 4 of the 159 member states of the UN. In mid 1989 at a cabinet level only 3.5% of the ministries in 155 countries were held by women, and 99 nations had no women ministers. *UN Dept. of Public Information, United Nations Focus: Women in Politics: Still the Exception?* (November, 1989). Cited in *Ibid*, n.56.

⁷ See note 2, at p622.

⁸ See note 7, at p622.

⁹ See note 2, at p623.

¹⁰ In 1991 (and previously 1989) there were a total of 13 women out of 90 "independent experts" within the UN human rights system, excluding the membership of the Convention on the Elimination of Discrimination Against Women ("CEDAW") Committee. A break down of these figures indicate that there were only 2 women out of 18 (members) on the Economic, Social and Cultural Rights Committee, 1 out of 18 on the Committee on the Elimination of Racial Discrimination, 2 out of 18 Human Rights Committee, and 2 out of 10 on the Committee Against Torture. The subcommission on the Prevention of Discrimination and Protection of Minorities has 6 women out of 26 members. Andrew Byrnes, 'The "Other" Human rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale Journal of International Law* 1, 8, n.26. Cited in *Ibid*, p 624, n.67.

heavily criticised for its "disproportionate" representation of women by the UN Economic and Social Council.¹¹ As a result of this criticism feminist writers assert that any efforts to increase the representation and effective or real participation of women within the UN are continually being undermined while the common dominance of men throughout all levels of state governments and within international organisations "goes unremarked".¹²

The continual marginalisation of women to positions devoid of power has been identified by feminist scholarship as a result of the implementation and enforcement of the constructed public/private dichotomy, which exists to exclude women from all levels of decision-making within domestic and international organisations and therefore operates to prevent women from participating within the process of self-determination. Without women being able to participate in decision making at the same level as men, women will never be acknowledged as crucial and a legitimate part of "all the peoples".

Self-Determination as a Choice for Women Between Nationalist Agendas and Women's Equality

One of the tensions in movements for self-determination is associated with a decision many women have to make either to commit their full support and efforts to nationalist movements for self-determination or to abandon the nationalist agenda in an effort to fight for the recognition of women's formal equality. The struggle of the Palestinian women highlights this tension.

Palestinian women have maintained various prominent positions and roles in the struggle for self-determination throughout their involvement within oppositional movements and international campaigns against external occupation.¹³ Although the efforts of these women have been of great importance to the national cause, their accomplishments have not been formally acknowledged.¹⁴ After the 1967 war Palestinian women in the West Bank and Gaza came together to resist Israeli occupation and were at times imprisoned.¹⁵ Since this time the Palestinian feminist movement has formed amongst the urban and middle class intellectuals¹⁶.

Recognition and encouragement of the women's organization was eventually given by the *intifada*.¹⁷ The *intifada* also caused the Palestinian women to commence their struggle for equality by ousting some of the traditional social relationships, women's dependence on men, traditional belief structures and the activities/roles that were forced upon them by society.¹⁸ As a result women engaged in roles within the *intifada* that were usually reserved for men.¹⁹ In contrast to the progress of the women within the *intifada* the imagery used to communicate their role within "nation-building" was deeply entrenched within stereotypes depicting women as maternal figures of the nation or heroic mother types protecting their sons from Israeli atrocities.²⁰ Despite these setbacks the participation of two Palestinian women in the peace talks of 1991-92 brought the women's movement into the "mainstream" of politics that was unique to the world.²¹

While the Palestinian women had made exceptional achievements within the traditionally defined public sphere of the male through their political involvement in the struggle for self-determination,

¹¹ See note 2, at p624.

¹² See note 2, at p624.

¹³ L. Brand, *Palestinians in the Arab World: Institution Building and the Search for a State*, New York, Columbia University Press, (1988) 196-203. Cited in Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, Manchester, UK (2000) 156, n.197.

¹⁴ See above, note 13, at 156.

¹⁵ C. Cervenak, 'Promoting inequality: gender based discrimination in UNWRA's approach to Palestinian refugee status', (1994) 16 *Human Rights Quarterly* 300, 361. Cited in *Ibid*, p 157, n. 199.

¹⁶ N. Abdo, 'Women of the intifada: gender, class and national liberation' (no.4 1991) 32 *Race and Class* 19, 32. Cited in *Ibid* at 157, n. 202.

¹⁷ See note 16, at p157.

¹⁸ C. Cervenak, 'Promoting inequality: gender based discrimination in UNWRA's approach to Palestinian refugee status', (1994) 16 *Human Rights Quarterly* 300, 362-3. Cited in *Ibid* at 157, n. 203.

¹⁹ See note 18, at p157

²⁰ See note 16, at p157, n. 204.

²¹ See note 16, at p157.

women's continued political participation in the political process during a transition to a self-governing Palestine was not assured.²² This was most probably due to the fact that the women refrained from directly challenging the patriarchal structures within their society.²³ The end of the *intifada* also brought an end to the Palestinian women's activism for equal rights. As the *intifada* gained ground in achieving independence, pressure was placed on women to give priority to upholding the unification of the nationalist political struggle instead of breaking away to continue with their own separatist agenda for social justice.²⁴ As a result only a few women were given tokenistic positions within the power structures of Palestine.²⁵ The PLO leadership's support for the rights of women under the CEDAW convention, *only* when they do not conflict with Islamic law, further illustrates the marginalisation of women within Palestine.²⁶ The experiences of the Palestinian women ultimately demonstrates the willingness of the male dominated state to use women to serve as "fuel for the national flame",²⁷ on one hand and on the other an overwhelming reluctance of national liberation movements to move towards the extinguishment of gender discrimination.

A review of the experiences of the Palestinian women as a case study illustrates one of the main issues highlighted in the work of feminist scholars, specifically the exclusion of women in general from the "all the peoples" requirement under the international law of self-determination. The exploration of the Palestinian women's struggle for not only the self-determination of all the Palestinian people but also women's own self-determination for substantive equality emphasises another key issue under the international legal system, the power of the public/private dichotomy to exclude women from achieving gender equality.

Rethinking Self-Determination: What Should Our Priorities Be?

The work of feminists on self-determination has also discussed the possibility of reformulating international law to focus on the right to sustenance as the essential element of any modification of self-determination.²⁸ This "right" is deemed as essential due to the fact that "the capacity of a people to exercise rights of self-determination in a political sense is inextricably connected to economic and cultural integration".²⁹ Thus without the basics of the rights to existence in the form of food, shelter, clean water and security of future subsistence there can be no assertion of civil and political rights as there would be no "self" in either an individual or communal sense to be "determined".³⁰ The reformulation of the right to self-determination so that it can assist in removing the hunger trap is extremely relevant to women, as they are the largest group affected by the lack of sustenance worldwide.

Feminist scholars perceive the existing definition of self-determination as narrow and inadequate, due to its focus on the political aspects of the right to the detriment of a more efficient integrated approach (as described above).³¹ It is argued that self-determination cannot solely be based on principles that confine the "self" within physical concepts of territory, boundaries and political institutions.³² Feminists argue that "[w]here political, economic and social institutions based on the requirements of masculinist and excessively patriarchal elites are allowed to spiral out of control,

²² See note 16, at p158.

²³ S. Dajani, 'Between national and social liberation: the Palestinian women's movement in the Israeli occupied West Bank and Gaza Strip', in T. Mayer (ed.) *Women and the Israeli Occupation: The Politics of Change* Routledge, London (1994) 179, 42. Cited in *Ibid*, p 158, n. 206.

²⁴ E. Kuttab, paper given at conference organised by the Gaza Centre for Human Rights, September 1994. Cited in *Ibid*, p 158, n. 208.

²⁵ In 1994, 1 woman judge out of a total of more than 30 judges was appointed to the Gaza judiciary and only 1 woman minister out of a total of 16 was appointed to the Palestinian Authority under the portfolio of social affairs. In the 1996 elections for the Palestinian Legislative Council 5 women and 83 men were elected, see above, note 24, at 158.

²⁶ See note 24, at p158.

²⁷ S. Sharoni, 'Middle East politics through feminist lenses: toward theorizing international relations from women's struggles', (1993) 18 *Alternatives* 15, see above, note 24, at 159, n213.

²⁸ Christine Chinkin and Shelley Wright, 'The Hunger Trap: Women, Food and Self Determination' (1993) 14 *Michigan Journal of International Law* 262, at 264.

²⁹ See note 28, at p264.

³⁰ See note 28, at p264.

³¹ See note 28, at p293.

³² See note 28, at p293.

the first sufferers will be women and children".³³ Thus the needs and rights of the members of the group to food, shelter, clean water and a healthy environment, peace and a stable existence must be addressed as the first priority in defining the "self" within self-determination.³⁴ The above rethinking and reformulation of the international law of self-determination offered by feminists is extremely innovative and promises real outcomes for both men and women who suffer due to the promotion of the right to self-determination as a civil and political ideal instead of perceiving the right in terms of physical survival.

Conclusion

A review of feminist works on the right to self-determination reveals a diverse range of innovative theories that challenge international law's inherent exclusion of women's experiences. Feminist scholars often express the same key issues in their analysis such as critiquing self-determination in terms of enforcement of the public/private discourse, self-determination as a choice for women between nationalist agendas and women's equality, and self-determination as a combination of civil, political and economic, social and cultural rights. A review of the feminist scholarship within this area also exposes opportunities for a rethinking of the right of self-determination to ensure that women will no longer remain silent within its provisions.

³³ See note 28, at p294.

³⁴ See note 28, at p294.

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Reconciliation Business: Women and Citizenship in Australia¹



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Lynda would like to dedicate this article to Jennifer Inkster

In 1990 when I was visiting the most northern part of Australia, I had a conversation with a lawyer about a challenging case. It raised crucial questions about protection of the vulnerable - specifically young Aboriginal women - and the administration of justice in Australia. One of the most important questions seemed to me to be:

How can ideas and ideals of human rights and citizenship underpin attempts to achieve reconciliation and justice?

Groote Eylandt sits off the far north coast of Australia and is home to a remote Aboriginal community in Warnindilyakwa country. There is traditional jurisdiction over all offences categorised as non-index crimes². This precept is in keeping with Indigenous communities' aspirations for self-determination. In the broader Australian context there appeared to be some understanding of Indigenous administration of 'justice'. However, when a 23-year-old man brutalised and murdered his 16-year-old wife, the mainstream criminal justice system did not accept the community court decision. The perpetrator was found guilty under customary law and, in accordance with this law, took a spearing in the thigh and paid monetary compensation to the victim's family. Murder is an index crime. The young man was retried in a court on the mainland and sentenced to life imprisonment. The official criminal justice system was also attempting to administer justice.

We are left with the question: *Did the justice system also offer protection to vulnerable young women?* The other pertinent question raised is: *Whose 'justice' and 'justice' for whom?*

In the case of Groote Eylandt, the administration of 'justice' meant the Indigenous community lost not one, but two young citizens and also its right to self-determination was seriously undermined.

Citizenship implies rights and responsibilities. It is the right of individuals - including the most vulnerable - to expect dignity, respect and non-violence from others. It is also an Indigenous community's right to govern themselves, including applying the rule of law. There is a responsibility to adhere to protecting such values.

The interconnectedness of human rights and notions of citizenship can influence a flexible administration of justice to allow for both forms of protection - over culture and in terms of personal

¹ This article has also been published in: Lansdowne, H and Dobell, M (eds) *Women, Culture and Development in the Pacific*, Canada: CAPI, 2001.

² Index crimes denote eight classes of offences and include murder, forcible rape, robbery, burglary, aggravated assault, larceny over a specified amount, arson and motor vehicle theft. See Black HC, *Black's Law Dictionary*, 6th edition, West Publishing Co., St Paul, 1990, at p771.

security. Based on this principle, a goal of reconciliation is to seek accommodation of differences, to find expressions of a common citizenship.

This article has two tasks:

1. To conduct dialogue about how ideas and ideals of human rights and citizenship underpin attempts to achieve reconciliation and justice
2. To describe the means of advocating citizenship in conversation with Indigenous women.

Controversies about the meaning of citizenship - including difficulties for vulnerable groups to have their voices heard - will also be addressed.

Citizenship in Australia

Make neighbours, not fringe dwellers:

Make us mates, not poor relations

Citizens, not serfs on stations

'Aboriginal Charter of Rights' - Oodjaroo Noonuccal³

A map of Australia depicts over 360 Indigenous language groups, six states and three territories. Indigenous Australians⁴ comprise 2% of the population – 350 000 people of a total population of almost 18 million – and are the most socio-economically impoverished group in Australian society. Over 50% of Aboriginal and Torres Strait Islander peoples are on government benefits. Less than 25% earn over \$25 000 as a yearly income. Only 5% own their own home. Indigenous children die at three times the rate of non-Indigenous children. Indigenous young people are 27 times more likely to be incarcerated than their non-Indigenous peers. An Aboriginal woman is more than 50 times as likely as a non-Aboriginal woman to be in jail. Indigenous Australians die at six times the rate of non-Indigenous people. The average life expectancy for an Indigenous woman is 20 years less than other female citizens of Australia⁵.

Reconciliation in Australia is about supporting our Indigenous cultures. It's about righting wrongs, yet there are no guaranteed Indigenous rights enshrined in the Constitution and Aboriginal and Torres Strait Islander peoples have never been offered treaties with governments. Citizenship rights and responsibilities – including protection of culture – demand that reconciliation must go beyond governmental rhetoric towards practical responses to overcoming the disadvantage experienced by Indigenous Australians, particularly women. This process involves consultation, negotiation and partnership, and implies dialogue. These conversations about difference cross gender, cultural and national boundaries.

Internally, Australia took the initiative for ten years of reconciliation with the establishment of the Council for Aboriginal Reconciliation in 1991. The Federal Parliament's Act established the Council, with the aim to "promote reconciliation, including the fostering of a continuing national commitment from governments at all levels to address Aboriginal and Islander disadvantage". This Council is comprised of Indigenous and non-Indigenous Australians from diverse backgrounds. Australia had the courage to embark on a number of enquiries that, while they might uncover shameful policies and conduct, would aim to seek truth and with it, remediation and reconciliation.

Australia had seized the initiative. In 1992 Prime Minister Paul Keating acknowledged the dislocation and dispossession of Indigenous Australians and said,

It is time to bring the dispossessed out of the shadows, to recognise that they are part of us... We simply cannot sweep injustice aside...Imagine if ours was the oldest culture in the

³ Noonuccal O, *My People*, Jacaranda Press, Brisbane, 1990.

⁴ Indigenous Australians comprise Aboriginal and Torres Strait Island peoples. There is widespread diversity within these groups and the major differences between these two groups of peoples are characterised by geography, cultural practices and their histories of colonisation.

⁵ ABS, 'Special Article: Aboriginal and Torres Strait Islanders A Statistical Profile', *1996 Census*, (1996) Canberra: Australian Bureau of Statistics (ABS); Rintoul S, *The Wailing: A National Black Oral History*, Reed Books, Melbourne, 1993, pp.13 14; Moreton Robinson A, 'Wrestling Whiteness on the Journey to Truth, Justice and Reconciliation' (1999) May/Issue 135 *Graduate Women* AFUW Inc., Adelaide, pp.11 12.

world and we were told it was worthless...Imagine if we had suffered the injustice and then were blamed for it... Gradually we are learning how to see Australia through Aboriginal eyes, beginning to recognise the wisdom contained in their epic story".⁶

Paul Keating also acknowledged "the report of the Royal Commission into Aboriginal Deaths in Custody showed, with devastating clarity, that the past lived on in inequality, racism and injustice".⁷

In the current atmosphere of political divisiveness on Indigenous issues in Australia, restating ideals of citizenship is crucial. In response to the *Wik*⁸ native title judgement, John Howard's conservative government has taken a less sympathetic approach to the recognition of Indigenous rights than perhaps any Commonwealth Government since the 1967 referendum, which overwhelmingly supported Indigenous representation in census data collection on Australian citizenship.⁹ A non-committal response to implementing the recommendations of the 'Stolen Generations' report¹⁰ - a comprehensive review of the implications for Indigenous people of past unjust government policies involving the forced removal of children from their families - has hindered reconciliation processes. The controversy over mining in, and around, traditional Indigenous heritage sites has attracted international concern. The recent emergence of Pauline Hanson's One Nation Party and the one million voters Australia-wide who supported the Party's policies of racial intolerance, serves as a reminder that convincing Australians of the merits of recognising the doctrine of 'equal and different' in civil society is difficult.

Women 'speak in language' of reconciliation

In her keynote address to the Australian Reconciliation Convention, native Hawaiian attorney and Governor of Ka Lua, Mililani Trask, commented that for many years the international community of Indigenous peoples had looked to Australia as a leading nation in the process of reconciliation between Indigenous and non-Indigenous citizens. With regard to the Native Title Act, she discussed the provision to allow the pastoralists to establish agreements with Indigenous people to give them an opportunity to work out solutions for their mutual economic benefit. This Act extended the reservations contained in pastoral leases (however short lived) in most parts of Australia that were in favour of Indigenous people allowing them to enter leaseholds, erect temporary shelters and obtain food. The Native Title Act encompasses land rights and self-determination for Indigenous Australians and ideals of citizenship that include partnership with non-Indigenous citizens. However in closing, Trask referred to one of the key issues of contention arising from the amendments to the Act, the subordination of Indigenous voices to those of the pastoralists:

I regret to tell you that, in the international arena we now see that Australia returns to the dark days of its racist past. Is there any other way to interpret the proposed amendments to native title? Or the preposterous Ten-Point Plan to *Wik* [which] is a fundamental deprivation of the clauses and provisions of the International Covenant on Civil and Political Rights: in my estimation a clear violation of a covenant that Australia is a signatory to?¹¹

In the context of a discussion of Indigenous women's rights in the Asia-Pacific region, the voice of a leading Indigenous spokesperson from Hawaii provides an interesting framework.

⁶ Paul Keating, quoted in: Rintoul S, *The Wailing: A National Black Oral History*, Reed Books, Melbourne, 1993, at p12.

⁷ Paul Keating, quoted in: Rintoul S, *The Wailing: A National Black Oral History*, Reed Books, Melbourne, 1993, at p13.

⁸ *Wik Peoples and Thayorre People v Queensland* (1997) 141 ALR 129. In its *Wik* (1996) decision the High Court of Australia held that pastoral leases do not necessarily extinguish native title. The judgment supported the two groups of native title claimants, the *Wik* and the Thayorre Peoples who claimed that their native title had not been extinguished by the grant of pastoral leases over their land.

⁹ Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995.

¹⁰ The recent expression of regret by the Australian government over past wrongs to our Indigenous people made no mention of the 'forced removal of children from their families'.

¹¹ Trask M, 'Plenary Session 2: Indigenous Self Determination'. In *Human Rights and Indigenous Australians* Book 3, produced by The Council for Aboriginal Reconciliation, Canberra, 1997, pp.24 29 at p29.

Mililani Trask talks about a conceptual and strategic design for reconciliation informed, in part, by Australia's initial steps towards reconciliation and by her own Knuckamoulie people. Four key elements were identified for a process of reconciliation bolstered by citizenship ideals:

1. repentance,
2. recognition,
3. restoration and
4. restitution.

Initially there needs to be explicit acknowledgment of past wrong, who is responsible, and of present ramifications in terms of personal suffering, deprivation and poverty: 'the purpose of an apology is not to shame anyone, but to establish an environment of equity so that all the parties can come together'. Recognition of Indigenous peoples' diversity of cultural differences – 'each and every clan and language group' – as well as the importance of this contribution to the fabric of the broader diversified society is crucial. Restoration is another signpost in the path to equal citizenship for Indigenous people by restoring social, cultural and political structure; land (as much as possible); the history of Indigenous habitation; and the voice of Indigenous people in policy and political decision-making. Restitution is a final key component – 'making whole that which was lost' – as in providing high standards of service for health, education and housing, programs designed by Indigenous people to meet Indigenous peoples' needs.

Mililani Trask reminds us that the right to self-determination for Indigenous peoples is a means of utilising citizenship potential by virtue of achieving economic, social and political development.

In our culture we say that we are Knuckamoulie [speaks in language], child that is born up from the land. Our culture is matrilineal, we follow to the ways of women, you don't abandon your mother, you don't develop your mother, you don't say –OK I will give you my mother – give me a pay check. We need to have our land ... that is the way we survive.¹²

Negotiating cultural survival and personal security is captured in the poetic vision of the Knuckamoulie peoples. 'Speaks in language' gives us the cue. The language of reconciliation is not confined – like the rule of law – to a written form. Indigenous systems of knowledge, visions of citizenship and notions of rights and responsibilities are based in oral expression. For example, the importance of knowledge to Indigenous cultures is little understood by a non-Indigenous Australian legal system, articulated in terms of openness and accountability, when Aboriginal systems of law knowledge is organised as intellectual property not freely available to all.¹³ Processes of cultural representation must be contextualised to unmask issues about the exercise of power.¹⁴

Confining the language of human rights to legal abstractions and policy documents has also worked to marginalise the participation of women as citizens¹⁵ particularly in the context of socio-economic development.¹⁶ Within the State-based framework of mainstream human rights, Arati Rao sees the exclusion of women as embedded in "a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served".¹⁷

¹² See note 11 at p28.

¹³ Duff C, 'Indigenous women and discrimination: The Hindmarsh Island Bridge Debate'. In *Women and the Law Conference: Proceedings*, edited by Larbalestier J and Russell D, University of Sydney Printing Service, Sydney, 1995, pp.45 54.

¹⁴ Larbalestier J, 'Through their own eyes: An interpretation of Aboriginal women's writing'. In *Intersexions: Gender, Class, Culture and Ethnicity*, edited by Bottomly G, de Lepervanche M and Martin J. Allen & Unwin, Sydney, 1991.

¹⁵ Toro MS, 'Popularizing Women's Human Rights at the Local Level: A Grassroots Methodology for Setting the International Agenda'. In *Women's Rights and Human Rights: International Perspectives*, edited by Peters J and Wolper A. Routledge, New York, 1995, pp.189 194.

¹⁶ See Howard RE, 'Women's Rights and the Right to Development' pp.301 313; and Seif HA, 'Contextualizing Gender and Labor: Class, Ethnicity, and Global Politics in Yemeni Socio Economy'. pp.289 300; and Youssef NH. 'Women's Access to Productive Resources: The Need for Legal Instruments to Protect Women's Development Rights'. All three articles are found in: *Women's Rights and Human Rights: International Perspectives*, edited by Peters J and Wolper A. Routledge, New York, 1995, pp.279 288.

¹⁷ Rao A, 'The Politics of Gender and Culture in International Human Rights Discourse'. In *Women's Rights and Human Rights: International Perspectives*, edited by Peters J and Wolper A. Routledge, New York, 1995, pp.167 175, at p174.

Linking human rights to citizenship responsibilities involves dialogue. In interpersonal association and in international relations the beneficiaries of such dialogue would be those for whom 'citizenship' currently has little meaning – women, Indigenous people, children and other marginalised groups. Listening to others and learning from them is an intrinsic part of developing these links. In conversations with each other, aspirations for citizenship ideals can be given political literacy as the cultural becomes multicultural, the local becomes international, the oral becomes written. In an attempt to highlight this dynamic, verbatim snippets of dialogue between Aboriginal and non-Aboriginal women are transcribed here and interwoven with written critiques of citizenship.

Reconciliation Business: Women and Citizenship

*Jean: Welcome sisters all - although I can see a couple of gentlemen around. Lovely to see such a big gathering of women.
You could almost call it a 'jilimi' which is an Aboriginal word meaning women's space. We can talk in the safety of that.*

One month before the Australian Reconciliation Convention, on 10 April 1997, in a community centre in New South Wales, Australian women were invited to come together in cross-cultural dialogue. Stella Cornelius, the founder of the Conflict Resolution Network, and Councillor for the NSW State Committee for Aboriginal Reconciliation, and her colleagues orchestrated the 'Woman to Woman' forum. 16 women – eight Indigenous and eight non-Indigenous Australians – spoke for about 15 minutes each to an audience of over 100 other women from diverse backgrounds.

The morning's programme was divided into three sections:

1. reconciliation in the community;
2. human rights and Indigenous Australians; and
3. reconciliation, the law and constitutional issues.

Conversation was centred around the common theme of reconciliation defined as a citizen's movement. Or, in the words of the Council for Aboriginal Reconciliation, whose vision statement clearly assumes that a shared responsibility is possible: "A united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all".¹⁸

The 'Woman to Woman' forum created time and space to discuss reconciliation and citizenship. The following selected comments emphasise the importance of learning through listening: "*It's so important that we, as women, get together and explore possibilities and alternatives*". They also express ideals about citizenship: "*We need to find more ways of facilitating communication for people who don't have a voice. People like us can do it, from the grass roots*".

An environment conducive to uninhibited expression for all was an important feature of the process of conversation that allowed us to take risks. Dialogue, debate and conversation are important ways to share and test common language and to connect the personal or individual to the cultural or multicultural. Loosely structured conversation encouraged a community of enquirers to become mutually responsible for creating knowledge: Tapping into this rich motivation to teach and learn – opening up language to create possibility – enables us to find common ground.

Learning the language of citizenship requires us to acknowledge links between what we value, what we think, and how this affects our understanding of the world in which we live and learn. The process becomes socially and politically relevant when we share our ideas and our understanding. Reconciliation, in one sense, is all about talking together: "*We can learn from each others' stories, from sharing life narratives*"; in another it is about advocacy and social justice.

¹⁸ AGPS, 'Walking Together: the First Steps' Report of the Council for Aboriginal Reconciliation 1991 4 (1994) Canberra: Australian Government Printing Service (AGPS) at vii.

Listening to participants – as scripted here – speak about reconciliation in terms of humility and forgiveness, diversity and solidarity, identity and belonging, empowerment and stamina, teaches ideals of citizenship.

Repentance: Humility and Forgiveness

Juliette: *It's wonderful to hear you. And it brought back to my recollection one of the most important things which I don't find in the way Australians talk about reconciliation. In South Africa, in countries of South America and Central America they say that it is a 'Truth and Reconciliation' inquiry or a 'Truth and Reconciliation Commission': this is not the black armband view of history this is truth! As I said, my work here is the craft of words, communication, and if one could see the word 'truth' brought together with 'reconciliation' more often in the public debate Jean's experience and the experience of being Aboriginal would come to surface, would rise and expand and be seen more clearly by those who at the moment have this little veil of static in front of their eyes and their ears. We have to drop the veil, see the experience.*

Jean: *My experience is that of thousands of other Aboriginal people and there is still a massacre of our culture. For example the younger generations are still suffering because they can't speak their language - the kids can't find their country. These things are emerging and young people are really searching now. We want to see Aboriginal languages taught in our schools and communities. We've just got to deal with realities and not go off down this path of supposed reconciliation. Until we really know the guts of this country, the pain that is really here, we will not find a path to true reconciliation. There are ways and means of healing a country and we can come together and work on it.*

In discussions about citizenship it is unhelpful to simply reject the concept of 'selective rights'. This notion is central to contemporary analyses of citizenship in which rights are linked with responsibilities: through emphasising different needs we can realise universal principles. For example, Maurice Roche, in *Rethinking Citizenship*¹⁹ discusses the emergence of a "duties discourse" affected by feminism and ecology. Encouraging ideas about the 'personal as political' and making claims for women's rights, he acknowledges feminist ideas about recognising gender difference in order to promote universal notions of equality. He also refers to the ecological movement's interpretation of citizenship which politicises nature and imposes "a set of unreciprocated duties on the present generation to provide ecological welfare to future generations"²⁰. The recognition of 'selective rights' is crucial to citizenship ideals, for rights and responsibilities to ensure cultural survival.

Recognition: Diversity and Solidarity

Shelley: *There is one thing I do want to say first up. Rasmae is a Merian woman and I would like to take the opportunity to thank Rasmae and the Merian people for giving Australia the Mabo decision²¹. After many years of struggle, I think we're only just beginning to realise what an incredible gift that decision is and although I know there were judges and lawyers involved, it was really the Merian people and their struggle which gave to Australia as a whole the opportunity to heal and to reconcile.*

Rasmae: *Thank you Shelley, I'm very proud to be here especially in the company of women like Coral and Jean. It was a woman, after all who was behind what is known as Mabo. It was said that our law wasn't recognised and we would have to go through the laws of this country and the power brokers and the speakers are male. So one of my aunts who was the instigator of the Mabo case, became the adviser and the men became the plaintiffs. My aunt thought of the cases in the Northern Territory that were overturned because certain relationships to the land weren't met by the people in that area - but this was not a precedent for us because these conditions didn't apply to us. So we had a good case which still took ten years.*

¹⁹ Roche M, *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society*. Polity Press, Cambridge, 1992.

²⁰ See note 19 at p53.

²¹ *Mabo v Queensland* [No 2] (1992) 175 CLR 1. In 1992, the High Court of Australia decided that Torres Strait Islanders had rights to their land before the arrival of the colonisers.

Reshaping citizenship-related ideas to unmask inequality and advocate for others is central to Will Kymlicka's theory of "multicultural citizenship".²² The democratic tradition, he argues, involves a diversity of views which underpin social cohesion. Citizenship implies individual choices and the capacity to engage others. Minority cultural rights or "group specific rights are needed to accommodate our differences".²³ Recognition of specific Indigenous rights can contribute to an all-inclusive vision of equal rights, nationally and internationally.

The paradox of this advocacy of citizenship is that an ambitious national or global view can be achieved by positive discrimination to attain the human rights of specific vulnerable groups. Although respect for different 'versions of freedom' may discredit humanitarian ideals and undermine unifying principles such as social justice²⁴, recognition of difference need not be characterised by an impasse in arguments about differential rights.

Restoration: Identity and Belonging

Carolyn: *He was an Elder and he said to me that one of the great obstacles to reconciliation and communication is belonging. He said every Aboriginal person - no matter what their situation - knows who he or she is, knows where they came from, has a connection. Each person, he said, has been named in this land - going back to the Aboriginal creation stories of how people came out of the land, who are sung out of the land, who are called out of the land. Then, he said, they know their place. But, he said, White people - and he was very anxious about this - had not been named in the same way. He said, if only you could broadcast that - if we could name White people in the same way - that would build an enormous bridge of communication. It seemed to me a most exquisite idea and a most compassionate idea.*

Coral: *Yes, certainly. Reconciliation as I see it is, if you like, a very first step for people to be aware that there is something beyond where we are at this point in time. That their future - not just a future - but as many futures as there are people in this land. As I see it, you can only start with yourself and work there. On this land then, there are thousands and thousands of journeys and each involves their own way of reconciling. As each individual moves and heals and grows then the community as a whole starts to move and heal and grow.*

Visions of citizenship are all-inclusive in their goals. By contrast, citizenship associated with national sovereignty excludes people. The rules of nationality and citizenship in Australia have defined a common identity, with which Aboriginal people – and many migrants – could never comply.²⁵ Although non-violent philosophies and practices are inherent in visions of citizenship, respect for national sovereignty and associated selective entitlements, remain obstacles to the attainment of such visions. Within national boundaries different groups may feel silenced and denied their rights. The contribution of the Aboriginal voice to citizenship theory, according to Alistair Davidson, has been in showing the inadequacies of any notion of citizenship based on a single national identity. The all-inclusive vision espoused by Indigenous Australians in their struggle for citizenship rights meant "alliances with other Indigenous peoples helped undermine the 'national family' notion of citizenship of the past".²⁶

Restitution: Empowerment and Stamina

Penelope: *What I would like to say is I'm looking forward to the time when I have a government in power which says things like - we will all gain from this reconciliation. That reconciliation doesn't*

²² Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995.

²³ See note 22 at p108.

²⁴ Rees S. 'Defining and Attaining Humanity'. In *The Human Costs of Managerialism: Advocating the Recovery of Humanity*, edited by Rees S and Rodley G. Pluto Press, Sydney, 1995, pp.285–300.

²⁵ Davidson A, *From Subject to Citizen: Australian Citizenship in the Twentieth Century*, Cambridge University Press, Melbourne, 1997.

²⁶ See note 25 at p213.

mean giving something away to somebody else. It means we will all grow and our society will gain. Debra, what do you advise governments to do?

Debra: *Oh something - anything half the time. I think Aboriginal employment at the moment is quite problematic and it's time to get outside of our box - which is how we perceive employment generally across the Australian community - and think about it in a completely different way. Especially in the public sector we need to perforate the boundaries so we don't just keep perpetuating clear distinctions between private, public and community sectors. I think over the last few years government policy has focussed very much on big private sector organisations rather than looking at smaller working groups. For example, with not much effort they could find information about existing voluntary organisations of Aboriginal women who do child protection work which is all self-funded. The government has a major role in helping Aboriginal organisations to form agencies to provide services.*

In contemporary Australia Indigenous people – and particularly Indigenous women – do not experience equality as measured by indicators relating to health, education and personal security. Governments may make efforts to moderate this disparity. However when it comes to reshaping citizenship-related ideas and institutions in order to accommodate Indigenous women, and to do this by recognising Indigenous rights, these efforts to reach equitable outcomes are not attained.²⁷

Conclusion

Jeanette: *Getting back to women, do you think that women will play a really crucial role in the whole reconciliation process? I mean I know we are - I'll answer my own question - but I mean what is the special contribution, is it our ability to cope? Is it as simple as that - coping with the unexpected, an ability to adjust to changing circumstances? We're more adaptable citizens, just something we happen do better than the fellas so we're going to have to play a really important role here.*

Lisa: *I don't know if we do it better than the fellas, but I know we do it differently from them. We have different ways. And I think this is very much a woman's way no matter what culture you're coming from - just sitting down and having a bit of a yam just trying to work out where we could go to from here.*

Crucial to a dialogue on citizenship is the fair and equal representation of women. From international social justice systems and notions of humanness to peace education and ideals of civil society, women have much to contribute. Experiences of those who are powerless, but on whom vulnerable others depend for protection²⁸, must be included in any discussion of human rights and citizenship. However, the role of women in facilitating communication and advocating citizen action on development and security concerns has largely been unrecorded.²⁹

Advocating citizenship rights and responsibilities involves the personal and local, the national and international, the oral and the written. Dialogue across discipline boundaries and between cultures and countries is a key mechanism for developing trust, producing evidence about the meaning of citizenship and using networks to turn visions into policies. As Aboriginal leader Lowitja O'Donoghue says:

I am not suggesting that reconciliation is simple - the issues are complex, it will involve hard work, difficult debate, vigorous negotiation and it will sometimes be painful, but I am optimistic about the vision of a reconciled Australia.³⁰

Interdisciplinarity celebrates difference. In seeking ways to open new modes of dialogue, alternative voices are given legitimacy. The language of human rights must not be confined to

²⁷ Peterson N and Sanders W (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge University Press, Melbourne, 1998 at p27.

²⁸ O'Neill, O 'Justice, Gender and International Boundaries'. In *The Quality of Life*, edited by Nussbaum M and Sen A. Clarendon Press, Oxford, 1993, pp. 242-269.

²⁹ Rosario Braid F, 'The Philippine Peace Process: Dynamics of Culture, Communication and the Civil Society' (1997) Unpublished paper, *Asian Institute of Journalism and Communication*, Manila.

³⁰ O'Donoghue L, 'O'Donoghue Optimistic on Reconciliation' *Koori Mail*, Wednesday, June 3, 1998.

legal and political conversations indulged in only by privileged professionals or the written word. Poetic visions voiced by Indigenous peoples are just as valid. The vulnerable need opportunities to champion their view of citizenship and to influence others' perceptions.

The connotation of words in diverse cultures must be explored so that visions of citizenship are expressed in ways that make sense to the least secure as well as to the most powerful. For example, it would be counterproductive if advocacy of universal rights was expressed only in western-oriented ethnocentric terms.

Conversations between Indigenous and non-Indigenous women in Australia highlight issues about identity and belonging, humility and forgiveness, diversity and solidarity, empowerment and stamina.

In these conversations they create time and space to discuss the 'exercise of power' in an unhurried and unthreatening fashion. Finding such space is crucial to the articulation of human rights and hopes for citizenship. As Mililani Trask suggests, this can act as part of a global picture that includes personal narratives, visions of collective solidarity, national histories and aspirations for improved international relations:

Here in Australia, your Indigenous peoples are the keepers of the Dreamtime for all of us in the Pacific basin.
What a great and sacred charge they have.
We cannot allow greed, economic greed, the lust for political power and ambition to drive back the tide of reconciliation.³¹

Advocacy of the interdependence of human rights and citizenship sets the scene for reconciliation. In countries such as Australia, Indigenous women are among the most vulnerable yet they live by citizenship ideals of reciprocity. Learning from these women about their experiences and understanding of community and caring, partnership and interdependence enhances the process of reconciliation and contributes to the attainment of equality and justice.

My learning from Indigenous women presents me with a paradox: Oral traditions have a life of their own yet I want to write them down and relate them to contemporary issues affecting government policies of reconciliation. The burden of this paradox is not dissimilar to the dilemma faced when Indigenous traditions of justice co-exist with official and Anglo-Saxon traditions, as in the example with which this paper began. The co-existence may have to be fostered by separation and respect rather than any decision that one system must always dominate another.

³¹ Trask M, 'Plenary Session 2: Indigenous Self Determination'. In *Human Rights and Indigenous Australians Book 3*, produced by The Council for Aboriginal Reconciliation, Canberra, 1997, pp.24-29 at p29.

Baptism by Fire



Kirstie Marshall MLA was an Olympic and World Cup Champion Skier and has been actively involved in numerous sporting committees, such as the Women in Sports Business Network. She was the Victorian Sportswoman of the Year in 1988 and 1990-1992. Ms Marshall was also a six-time winner of the Australian Skier of the Year Award before being elected as an MLA for Forest Hill, Victoria in November 2002.

"A baptism by fire" was what my entrance into the foray of politics was called by some of the distinguished members of the media. Funny that. My baptism was, as I see it, controlled, manipulated and determined by the media entirely. I can honestly say I am relieved it did not engulf my every being. However, that was due, in no small part, to the support I received from my family, particularly my husband and mother.

I think back to what my expectations were. I knew I felt the focus would be particularly intense, as I had been labeled a celebrity candidate from the very beginning. However, I would have thought that someone who had the credentials of being a hard worker, determined, optimistic, over-achiever, young(ish), trailblazer, etc. was the ideal candidate to represent the people. I had proven myself beyond doubt in an entirely different field. However, the media treated me as a stooge. It was as if someone who had, against my will, been placed in the position that I was in. I felt that overnight I had lost what defined me, and became a "mindless", "voiceless" picture for the media to poke fun at.

Campaigning was the easy part. I based everything I said and did on honesty. Everyone who worked with me did so with the knowledge that we were going to give it everything we had. We shared the desire of winning, not the expectation of success. The result will always be acceptable when you know there is nothing more that you could have done that would have changed the result.

Everything we did as a team in preparing for the election was about looking forward. I used the analogy that to drive a car successfully you have a large windscreen and a small rear-vision mirror. You might occasionally glance into the past but you never focus on it. I did not want to hear what people thought were the failures of previous Governments or individuals for that matter. I wanted people to know what it was that I would do. I wanted them to know what was important. I did not want people to blindly trust me, but get to know me and ask questions. I realised very quickly that no one expected us to win, but that was fine with me. I enjoyed having daily goals. As the final day of judgement was drawing near, it was reminiscent of my old athletic days. It brought me back to life.

I had every reason to commit 100%. There were people who had been involved in twenty-six years of unsuccessful campaigns in Forest Hill, yet they were right behind me from the start (they did later say they thought we would never win in the early days, but could see the momentum building.)

So once I was elected, I thought it would have put the wolves at bay. From the beginning of December, I went about setting up my office, interviewed and employed staff. I also prepared for the birth of my first child. I wasn't doing any of these things because I had to; I did them because I wanted to.

Christmas came and went, the heat wore on and my due date drew close. I was still going into the office and worked up until the day Charlotte was born. On the day my waters broke, I had attended the Geelong Air show in 35-degree heat with my husband, Matty. Charlotte came around lunchtime on the 15th. Whilst campaigning, I was asked if I was taking maternity leave

(following claims in the media that I was taking a year off!) I had always maintained that it was my aim and desire to continue working as soon as I was fit enough but that I would not be taking any leave.

The formal ceremony for the Members of the 55th Victorian Parliament was on the 24th of February, 2003 and my first official day in the chambers was on the 25th of February. That I was able to attend was due to the fact that my mother had unselfishly offered to look after Charlotte to enable me to go into the chambers when required and like every other Member, I would work from my office the rest of the time. On my first day, I was traveling to Parliament from my home in Forest Hill and my mother was coming from Black Rock. I was running late and was afraid I would not get to Parliament in time for the Bells which I had been told meant that I had to be in the Chamber and in my seat. I had never asked what would happen if I wasn't there. But it was made perfectly clear, if the Premier had to be there without fail, we all had to.

With the baby screaming out for food, I called the Government Whip from my car and told him that I had been unsuccessful in contacting my mum. He told me to get to the chambers as soon as I could. He said, "Don't worry. Just get here as soon as you can and come straight to the Chamber". So I parked my car, walked straight there and began feeding as the bells rang. They ring for three minutes and in allowing as much of that time to expire as I could, numerous Members passed me on their way in without saying anything but a friendly hello. I got up with her still suckling away and sat quietly in my seat. The Speaker had not at this point entered the room, but shortly after I sat down, the Sargent at Arms, came over and asked me to leave.

There are a few things I have learnt since I have been working in there. One of them is that the Members may come and go but many of the Parliamentary staff have been there for up to thirty years. They have seen it all. In this case, The Sargent at Arms asked me to leave because he knew the rules: all of them, including the Standing Order that stipulated that anyone who was a stranger, that is somebody who is not an elected Member of Parliament, may not be in the Chamber when the House is sitting. Only on the rarest occasion were exceptions ever made and this was always with a prior arrangement. No one had mentioned this to me. I am unsure of who was aware of the rule, but at least one experienced Member later said they felt responsible for what happened to me (I assured them it was not their fault) and the Sargent at Arms was only doing his job.

The media uproar began when journalists took it upon themselves to make the issue about breast-feeding. It was not ever about that. The reason I was asked to leave was because of a Standing Order or rule put in place to protect all Members from unauthorised people entering the chamber. The rule about strangers in the House had never been used before as there had never been a cause for it to be. Nobody ever considered that a newborn and breast-fed baby might be an exception.

Rules change when there is a need and attention is drawn to the matter. The Standing Order was not aimed at preventing women with young children from holding office. However, what will stop women from balancing work and family, in the instances where this is possible, is the barrage of criticism that is received when we do this. Children can be neglected by parents that are home on a full time basis. Parents can be almost totally removed from interacting with a newborn if they are working long hours, even more so considering the hours a newborn spends sleeping. Regardless of what the issue was originally about, the media created a circus as they thought that it was something interesting to focus on. When I refused to cave in to their, at times, erratic demands for access - it was as if I had struck a sleeping beast. My mother was attacked as if she too was guilty of protecting a wanted criminal. After that, my every move was being scrutinised. It placed an enormous and unwanted pressure on me.

Had it not been for the fact that I love my job, I love my family and nothing was going to stop me from fulfilling my obligation to all of the wonderful people who voted for me and even those who didn't. I don't know how I would have survived. I know I am still taking one day at a time and

have come to terms that I will be known for the rest of my life as the woman who was ejected from Parliament on her first day. Perhaps this is not such a bad starting point. My father said that it couldn't be a bad thing as the rule has since been changed, reflecting a more modern view. This is a good outcome. He is right. I am thrilled the Standing Order has been updated and that the plight of breast-feeding mothers everywhere has had this very important issue raised. "How can we chastise women for feeding in public, when we are not providing any alternatives?" for one and "What do people find so distressing about a baby being fed by a mother in this way?" I have no answer for that but I can tell you that the fiercest and most distressing criticism came from women. I received hate mail, some of it was frightening. They were the scary type where letters have been cut out from newspapers and magazines then pasted together. For a time my mail was scanned for powders and metal objects. I am used to it now - that's to say my mail being scanned. I will never get used to how some people have such venom in their hearts.

The media continue to put any spin they choose on a situation and I have learnt to expect and accept it. I have also learnt to be more accepting and celebratory of the differences between people. I understand that our opinion will always be just that, an opinion, yet at times it can carry a force behind it capable of destroying small countries let alone a person. The media are in the business of selling a story.

Thinking of politics, I did not know how well I could do it; I just knew it was worth trying. I hope the memory of my baptism by fire will eventually be replaced with the thought that I am one person who never gives up on trying, who has faith in who and what I am and is always true to my word.

'Human Rights, Women and HIV/AIDS'



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Of the over 60 million people who have been infected with HIV in the past 20 years, about half became infected between the ages of 15 and 24. Today, nearly 12 million young people are living with HIV/AIDS. Young women are several times more likely than young men to be infected with HIV. In nearly 20 African countries 5% or more of women ages 15 to 24 are infected. Such statistics underscore the urgent need to address HIV/AIDS among youth.

Gender differences in patterns of HIV infection among young people vary substantially around the world. Where heterosexual transmission of HIV dominates, often more young women are infected than young men. In most of Africa infection rates among young women are at least twice the rates among young men.¹

In certain regions adolescent women are as much as six times more likely than adolescent men to be infected. In some parts of Kenya and Zambia, for instance, teenage women have HIV prevalence rates of 25% compared with 4% among teenage men. In Botswana about one –third of women ages 15 to 24 are estimated to be HIV-positive, twice the proportion among men the same age.² A similar gender imbalance occurs in the US.³

Where the HIV epidemic is widespread among injecting drug users, as in Australia, New Zealand, Europe, and Central Asia, most cases occur among young men, because young men are more likely than young women to use drugs.⁴ In China in the mid-1990s infected adolescent men between ages 16 and 19 outnumbered infected adolescent women nine to one.⁵

Among young men in industrialized countries, sexual transmission of HIV is predominantly through men having sex with other men. For example, in the US in 1999 half of the AIDS cases in men ages 13 to 24 were among those who had sex with other men.⁶

The risk of becoming infected with HIV during unprotected sex is two to four times greater for a woman than for a man.⁷ Male – to – female transmission is more likely because during vaginal intercourse a woman has a larger surface area of her genital tract exposed to her partner's sexual secretions than does a man. Also, HIV concentration is generally higher in a man's semen than in a woman's sexual secretions.⁸

Adolescent women are at even greater risk than adult women. The vagina and cervix of young women are less mature and are less resistant to HIV and other STIs, such as chlamydia and gonorrhoea. Changes in the reproductive tract during puberty make the tissue more susceptible to penetration by HIV. Also, hormonal changes associated with the menstrual cycle often are accompanied by a thinning of the mucus plug, the protective sealant covering the cervix. Such thinning can allow HIV to pass more easily. Young women produce only scant vaginal secretions,

¹ Joint United Nations Programme On HIV/AIDS (UNAIDS). Report on the global HIV/AIDS epidemic. Geneva. UNAIDS, Jun. 2000. 135 P. (Available: http://www.unaids.org/epidemic_update/report/index.html accessed Jul. 2000).

² See note 1

³ UNITED STATES. Centers For Disease Control And Prevention (CDC). Young people at risk: HIV/AIDS among America's youth. [Fact Sheet]. Atlanta, Georgia, U.S. CDC. Sep. 2000. 2 P.

⁴ See note 1

⁵ YU, E., QIYI, X., Zhang, K., LU, P., and Chan, L. HIV infections in China: 1985 through 1994. American Journal of Public Health 86(8): 1116-1122. Aug. 1996.

⁶ See note 3

⁷ Ainsworth, M. and Over, M. Confronting AIDS: Public priorities in a global epidemic. World Bank Policy Research Report. Washington, D.C., Oxford University Press, Oct. 1997. 353 P; see note 1

⁸ Laurence, J. Women and AIDS. [Editorial]. AIDS Patient Care and STDs 13(2): 77-79. Feb. 1999.

providing little barrier to HIV transmission.⁹ As more studies of HIV infection include women as well as men, they are finding that, for unknown reasons, women get sicker at a lower viral load than men.¹⁰

Women's right to safe sexuality and to autonomy in all decisions relating to sexuality is respected almost nowhere.

As it is intimately related to economic independence, this right is most violated in those places where women exchange sex for survival as a way of life. And we are not talking about prostitution but rather a basic social and economic arrangement between the sexes which results on the one hand from poverty affecting men and women, and on the other hand, from male control over women's lives in a context of poverty.

By and large, most men, however poor can choose when, with whom and with what protection if any, to have sex. Most women cannot.

As such, our basic premise has to be that unless and until the scope of human rights is fully extended to economic security (ie the right not to live in abject poverty in a world of immense riches), women's right to safe sexuality is not going to be achieved.

A Minister of Health of one of the Southern African countries declared this year that women have a right to sexuality which does not endanger their lives: A guiding principle perhaps for all our work in HIV/AIDS/STI.

The major issues

- Lack of control over own sexuality and sexual relationships
- Poor reproductive and sexual health, leading to serious morbidity and mortality. Rates of infection in young (15-19) women are between 5 and 6 times higher than in young men (recent studies in various African populations)
- Neglect of health needs, nutrition, medical care etc. Women's access to care and support for HIV/AIDS is much delayed (if it arrives at all) and limited. Family resources nearly always devoted to caring for the man. Women, even when infected themselves, are providing all the care.
- Clinical management based on research on men. This year we plan to update guidance and start with module on clinical management of HIV/AIDS in women.
- All forms of coerced sex – from violent rape to cultural/economic obligations to have sex when it is not really wanted, increases risk of microlesions and therefore of STI/HIV infection.
- Harmful cultural practices: from genital mutilation to practices such as “dry” sex.
- Stigma and discrimination in relation to AIDS (and all STIs): much stronger against women who risk violence, abandonment, neglect (of health and material needs), destitution, ostracism from family and community. Furthermore, women, are often blamed for spread of disease, always seen as the “vector” even though the majority have been infected by only partner/husband.
- Adolescents: access to education for prevention, (in and out of school and through media campaigns), condoms, and reproductive health services before and after they are sexually active. Promotion and protection of adolescent reproductive rights (particularly girls). Ostacles in terms of laws and policies, health service provision, cultural attitudes and expectations of girls and boys' sexual behaviour, cultural practices, and educational and employment opportunities.
- Sexual abuse: there is now evidence that this is an underestimated mode of transmission of HIV infection in children (even very small children). Adult men seek ever younger female partners (younger than 15 years of age) in order to avoid HIV infection, or if already infected, in order to be “cured”.

⁹ Berman, S. and Hein, K. Adolescents and STDs. In: Holmes, K., Sparling, P., Mardh, P., Lemon, S., Stamm, W., Piot, P., and Wasserheit, J., eds. Sexually Transmitted Diseases. 3rd ed. New York, McGraw Hill, 1999. P. 129 142; Iversen, A., Fugger, L., Eugen Olsen, L., Balslev, U., Jensen, I., Wahl, S., Gerston, L., Mullins, L. and Skinhøj, P. Cervical human immunodeficiency virus type shedding is associated with genital R chemokine secretion. The Journal of Infectious Diseases 178(5): 1334 1342. Nov. 1998; Moscicki, A., MA, Y., Holland, C., and Vermund, S. Cervical ectopy in adolescent girls with and without human immunodeficiency virus infection. Journal of Infectious Diseases 183(6): 865 870. Mar. 2001.

¹⁰ Farzadegan, H., Hoover, D., Astemborski, J., Lyles, C., Margolick, JI, Markham, R., Quinn, T., and Vlahov, D. Sex differences in HIV 1 viral load and progression to AIDs. Lancet 352(9139): 1510 1514. Nov. 7, 1998. (Available: thelancet. Com, Accessed Jan. 31, 2001).

- Disclosure of status, partner notification, confidentiality. These are all more difficult issues for women than for men for the reasons discussed above- negative consequences; and the fact that women have usually been infected by their only partner / husband.
- Because disclosure is more difficult, women's access to care and support is further decreased. VCT as an entry point for care and prevention is vital. Protection for women when they disclose status must be assured. We have this year worked intensively with UNAIDS on issues of disclosure and confidentiality. HIS produced a question and answer document which will be published shortly.

Human rights issues relating to mother to child transmission (MTCT)

Informed consent:

- To testing during pregnancy,
- To the intervention itself
- To termination / continuing with the pregnancy

- Provision of adequate pre-test counselling, pre-intervention counselling / information; infant feeding counselling; contraceptive advice especially if not breast-feeding.
- Protection of confidentiality, including shared confidentiality in the interests of care and support; and the problem of not breast-feeding when this amounts to "Public disclosure" of positive serostatus. Legal provisions, health service practices and community / NGO support.
- Provision of family planning services, alternative infant feeding/breastmilk substitutes, material support for fuel, water etc. in addition to the intervention itself.
- Involvement of partner / husband at all stages, positive and negative consequences.
- Potential adverse effects of taking antiretrovirals (ARVs) especially in repeat pregnancies of an HIV infected woman.
- Women's access to care and treatment apart from the MTCT intervention, woman as vessel for the baby.
- Generation of orphans. Parents likely to die. On mother's death, baby's survival chances much reduced. Should woman herself be treated, at least for common HIV related illness.
- Selection of women to benefit from MTCT.

HIV and Vulnerability in women

Women are vulnerable to HIV because of sexual subordination, economic subordination, and biological vulnerability.

Sexual Subordination

Around the world a variety of cultural practices and traditions increase young people's risk for HIV/AIDS. For the most part, these practices and traditions affect young people more than adults – and affect young women even more than young men.

In many societies women are expected and taught to subordinate their own interests to those of their partners. With such expectations, young women often feel powerless to protect themselves against HIV infection and unintended pregnancies. Often, adolescent girls endure sexual coercion and abuse. In Kenya 40% of sexually active female secondary school students said that they have been forced or tricked into sex.¹¹ In Cameroon 40% of female adolescents reported that their first intercourse was forced.¹² Young women sometimes give in to having sex for fear that, if they refuse, they will be raped anyway.

Wife abuse is widespread. In some countries more than 40% of women have been assaulted by their partners.¹³ Gender – based violence is closely linked to HIV/AIDS . In Rwanda, for example, HIV- positive women with an HIV- Positive partner were more likely to report sexual coercion in

¹¹ African Medical Research Foundation. Female adolescent health and sexuality in Kenyan secondary schools: A research report. Nairobi, Kenya, 1994.

¹² Rwege, M. Sexual risk behaviors among young people in Bamenda, Cameroon. International Family Planning Perspectives 26(3): 118-123, 130. Sep. 2000.

¹³ Heise, L., Ellsberg, M., and Cottemoeller, M. Ending violence against women. Population Reports. Series L, No. 11. Baltimore, Johns Hopkins School of Public Health, Population Information Program, Sep. 1999. 43 P.

their relationship than were women without HIV.¹⁴ In Tanzania partner violence was 10 times higher among young HIV-positive women than HIV-negative women.¹⁵ Many women do not dare even to bring up the topic of condoms for protection against HIV infection for fear that they will be physically abused.¹⁶

Societal forces and gender-based power inequalities create the sexual subordination that puts women at risk. Socialized concepts of masculinity and femininity as well as gender and power relations limit the capacity of young women to negotiate the boundaries of sexual encounters so as to ensure both their safety and their satisfaction. This is true to a greater or lesser extent in all societies. But in developing countries, poverty further interacts with gender imbalances to prevent women from protecting themselves from HIV.

Coerced sex can include rape and other sexual abuse, in and outside the family, as well as forced sex work. Any non-consensual penetrative sex carries an increased risk of transmission of HIV and other STDs, due to the absence of lubrication and because men who rape are not likely to use condoms. The problems associated with rape and other forms of violence against women are often intensified in war situations, in which occupying or invading armies systematically rape women as part of a strategy to intimidate the local population.

Economic Subordination

AIDS is now largely a disease of deprivation.¹⁷ A World Bank analysis of 72 countries shows that at the national level both low per capita income and unequal distribution of income are associated with high rates of HIV infection. Among urban adults in the typical developing country, a US\$2,000 increase in per capita income is associated with an HIV infection rate 4 percentage points lower.¹⁸ In a climate of deprivation young people, and especially young women, are at particular risk. In Kenya, for example, adolescent women from poor and unstable family environments were more likely than women from better family environments to have had sexual experience.¹⁹ In Ecuador sexual risk – taking by adolescents was more common among families with only one income earner than in those with two or more.²⁰

In virtually every society, women face discrimination in employment and social status, which results in economic vulnerability to HIV. This includes occupational segregation of women into low-paying clerical and service jobs, unequal pay and fewer promotions compared to men, fewer workplace benefits and concentration of women in the informal sector. For example, in agricultural sector development, women lack access to technical assistance, training and credit, with funds and technical training typically going to men involved in cash crop farming rather than to women who are more likely to be engaged in subsistence farming.

In many countries young women, lacking opportunities, seek support from men, trading sex – and thus the risk of contracting HIV infection – for security. The risks are greater when the men are older. In Tanzania, for example, where growing poverty has made traditional marriages more difficult to arrange, young women compete for the attention of older men, who are better established than young men and thus more attractive as potential husbands. Often, this practice is driven by parental expectation of financial support from their have caused many young women to prefer older men who can take better care of them.²¹

¹⁴ VAN DER Straten, A., King, R., Grinstead, O., Vitting Hoff, E., Serufilira, A., and Allen, S. Sexual coercion, physical violence and HIV infection among women in steady relationships in Kigali, Rwanda. *AIDS and Behavior* 2(1): 61-73. 1998.

¹⁵ NNKO, S. and POOL, R. Sexual discourse in the context of AIDS: Dominant themes on adolescent sexuality among primary school pupils in Magu district, Tanzania. *Health Transition Review* 7(Suppl.3): 85-90. 1997.

¹⁶ See note 14

¹⁷ Wolfenson, J. Free from poverty, free from AIDS. Presented at the United Nations Security Council meeting on HIV/AIDS in Africa, New York, Jan. 10, 2000. (Available: <http://www.worldbank.org/html/extdr/extme/jdwsp011000.html>, Accessed Jan. 2000); World Health Organization (WHO). *World health report 1995: Bridging the gaps*. Geneva, WHO, 1995. (Available: <http://www.who.int/whr/1995/evolution.html>, Accessed Sep. 2000).

¹⁸ See note 7

¹⁹ Kiragu, K. and Zabin, L. The correlates of premarital sexual activity among school age adolescents in Kenya. *International Family Planning Perspectives* 19(3): 92-109. Sep. 1993.

²⁰ Guijarro, S., Naranjo, J., Padilla, M., Gutierrez, R., Lammers, C., and Blum, R. Family risk factors associated with adolescent pregnancy: Study of a group of adolescents and their families in Ecuador. *Journal of Adolescent Health* 25(2): 166-172. Aug. 1999.

²¹ Zelaya, E., Marín, F., García, J., Berglund, S., Liljestrand, J., and Persson, L. Gender and social differences in adolescent sexuality and reproduction in Nicaragua. *Journal of Adolescent Health* 21(1): 29-46. Jul. 1997.

Although the motivations for this are complex²², young women sometimes enter into relationships with older men – called “sugar daddies” in sub-Saharan Africa – who pay their school fees, buy them gifts, and offer other inducements.²³ Other young women establish similar relationships with young men.²⁴ In South Africa many young women have sexual relationships in exchange for favors, gifts, and cash.²⁵ A few studies report similar arrangements between young men and older women, as in Cameroon and South Africa, where some young men have “sugar mummies”.²⁶ Migration as a result of economic necessity, war, famine, or political oppression increases the risk of HIV transmission to women by disrupting the normal mechanisms controlling male sexuality and by constraining women to engage in sexual barter for survival. Sexual bartering to obtain entry or residence permits, in exchange for transport, or to obtain or hold onto jobs has been reported in many situations, and is particularly likely when women are isolated from their own community structures and when they do not speak or read the local language. Cross-border trafficking of young girls in Southeast Asia is a rather flagrant example of the interaction between migration and violation of the rights of girls and women.

Biological Vulnerability

The risk of becoming infected with HIV during unprotected sex is two to four times greater for a woman than a man. Male – to – female transmission is more likely because during vaginal intercourse a woman has a larger surface area of her genital tract exposed to her partner's sexual secretions than does a man. Also, HIV concentration is generally higher in a man's semen than a woman's sexual secretions.

Adolescent women are at even greater risk than adult women. The vagina and cervix of young women are less mature and less resistant to HIV and other STIs, such as chlamydia and gonorrhoea. Changes in the reproductive tract during puberty make the tissue more susceptible to penetration by HIV. Also, hormonal changes associated with the menstrual cycle often are accompanied by a thinning of penetration by HIV. Also, hormonal changes associated with the menstrual cycle often are accompanied by a thinning of the mucus plug, the protective sealant covering the cervix. Such thinning can allow HIV to pass more easily. Young women produce only scant vaginal secretions, providing little barrier to HIV transmission. As more studies of HIV infection include women as men, they are finding that, for unknown reasons, women get sicker at a lower viral load than men.

As more studies of HIV infection include woman's as men, they are finding that, for unknown reasons, women get sicker at a lower viral load than men.

Finally, with respect to biological vulnerability, women are disproportionately the recipients of blood transfusions and other blood products for complications at childbirth or preventable conditions such as anaemia.

Solutions

Increasingly it is being argued that short – term solutions to women's vulnerability to HIV infection and other sexually transmitted diseases lie in the development of clandestine, woman-controlled methods of HIV prevention that do not require male complicity or agreement; and that long-term solutions lie in the empowerment of women to achieve economic autonomy. It is also evident that reducing the impact of the HIV epidemic for women and girls in developing countries will also involve strategies that focus on educational opportunities, on careful review of women's changing role as caregivers, and vigilant analysis of the impact the HIV epidemic is having on the status of women.

²² Luke, N. Cross generational and transactional sexual relations in sub Saharan Africa: A review of the evidence on prevalence and implications for negotiation of safe sexual practices for adolescent girls. Philadelphia, International Center for Research on Women, Sep. 26, 2001. 61P.

²³ See note 22: Meekers, D. and Calves, A. Main girlfriends, girlfriends, marriage, and money: The social context of HIV risk behavior in sub Saharan Africa. Washington, D.C., Population Services International, 1997. (Working Paper No.5) 23 P.

²⁴ Huoton, L., Cullen, R., and Khalokho, S. Perceptions of the risks of sexual activity and their consequence among Ugandan adolescents. *Studies in Family Planning* 31(1): 35 46. Mar 2000; see note 15

²⁵ Macphail, C. and Campbell, C. 'I think condoms are good but, aai, I hate those things': Condom use among adolescents and young people in a Southern African township. *Social Science and Medicine* 52(11): 1613 1627. Jun. 2001.

²⁶ Caldwell, J. The impact of the African AIDS epidemic. *Health Transition Review* 7(Suppl. 2): 169 188. 1997.

Lack of Information

Many adolescents are at risk because no one – including parents, educators, counsellors, health care workers, or the media – has taught them about HIV/AIDS or about how to protect themselves and others. Despite over 15 years of international recognition of the need for education and communication to prevent HIV/AIDS, young people today still have only limited opportunities to learn about the virus and the disease.

Some adults still think that sex education encourages sexual experimentation. Consequently, programs and campaigns often are limited in what they can discuss. For example, educators at the University of Cairo in Egypt had to alter their program “so as not to be accused of immoral propaganda”.²⁷

Despite such worries, reviews of program evaluations find that HIV/AIDS education programs do not hasten the start of sexual activity, do not increase the frequency of sex, and do not increase the number of sex partners among adolescents. In fact, some programs that included discussion of contraception delayed the onset of sexual activity and increased the likelihood of condom use.²⁸

While the importance of education about HIV/AIDS is widely recognized, 44 of 107 countries studied recently did not include AIDS education in their school curricula. In interviews with 277 secondary school principals in South Africa, 60% acknowledged that their students were at moderate or high risk of HIV/AIDS, but only 18% of the schools offered a full sex education curriculum.²⁹

At the same time, traditional ways of educating the young about sex have diminished or disappeared altogether. For example, in many sub-Saharan countries Christian missionaries discouraged initiation rites that defined the passage from youth to adulthood. As a result, opportunities for telling young people about sex, traditionally a part of those rites, were lost. The social bonds and traditions that used to shape young people’s behavior and help them make the transition to adulthood have weakened in the face of urbanization, new attitudes toward sexuality, and the breakdown of the extended family.

As a result, more young people are sexually active but without adequate information to protect themselves. In Cameroon, Cote d’Ivoire, Kenya, Tanzania, and Zambia – countries where HIV/AIDS is now epidemic among adolescent women – the Demographic and Health Surveys (DHS) in the mid – 1990s found that 20% to 50% of young women did not know any way to protect themselves. In Mozambique, where an estimated 15% of young women have HIV,³⁰ 74% of young women and 62% of young men could not name a single way of protecting themselves.

Young women are far less knowledgeable about HIV than are young men. For instance, in five countries surveyed the percentage of young women who know a way to protect themselves against HIV is only half that of young men. Moreover, young women often hesitate to challenge misinformation from their partners lest they appear too knowledgeable about sex.

When young people do know something about HIV/AIDS, their knowledge is often shallow. For example, when students in Papua New Guinea were asked how to protect against HIV, 27% said that it was enough to get to know a partner first or to make sure that their partner had not had sex in the previous six months.³¹ Similarly, many young people do not know that a healthy – looking person can have HIV. In some countries where AIDS is widespread, such as Lesotho and South Africa, 50% to 75% of women ages 15 to 19 do not know that a person with HIV may look healthy.³²

²⁷ El Gawhary, K. Breaking a social taboo: AIDS hotline in Cairo. Middle East Report 28(1): 1–5. Spring 1998. (Available: <http://www.merip.org/mer/mer206/mer206.htm>)

²⁸ Grunseit, A. Impact of HIV and sexual health education on the sexual behaviour of young people: A review update. Geneva, Joint United Nations Programme on HIV/AIDS, 1997. 63 P; Kirby, D. Emerging answers: Research findings on programs to reduce teen pregnancy. Washington, D.C., National Campaign to Prevent teen Pregnancy, May 2001. 187 P.

²⁹ Population Council, International Center For Research on Women (ICRW), International HIV/AIDS Alliance, Program For Appropriate Technology In Health (PATH), University of Alabama, and Tulane University. Youth and HIV/AIDS. Horizons Research Update, Washington, D.C. Population Council, Jul. 2000.

³⁰ Attaran, A. and Sachs, J. Defining and refining international donor support for combating the AIDS pandemic. Lancet 357(9249): 57–61. Jan. 6, 2001.

³¹ Friesen, H., Danaya, R., Doonar, P., Kemiki, A., Lagani, W., Mataio, G., Rongap, T., and Vince, J. Assessment of HIV/AIDS knowledge, attitudes and behavior of high school students in Papua New Guinea. Papua New Guinea Medical Journal 93(3): 208–213. Sep. 1996.

³² Carr, D. Youth in Sub-Saharan Africa: A chartbook on sexual experience and reproductive health. Washington, D.C., Population Reference Bureau, Apr. 2001. 44 P.

AIDS Education

In June 2001 member states at the United Nations General Assembly Special Session on AIDS agreed to “ensure that by 2005, at least 90% of young men and women aged 15 to 24 have access to the information and education necessary to develop the life skills required to reduce their vulnerability to HIV infection”.³³ One way to achieve this goal, at least in theory, is through a country’s education system – especially if programs reach students at an early age, before some begin to drop out of school. At the International AIDS Conference in Durban in 2000, the “Prevention works” Symposium recommended that HIV/AIDS education begin early, focusing on children as young as five year.³⁴

Nevertheless, there is considerable disagreement over HIV/AIDS education – including what to teach, at what age, in what setting, by whom, and to what end. Political pressures often keep sex education – and thus HIV/AIDS education – out of the classroom. Sensitivities about sexuality and young people’s behavior often obstruct AIDS education even where there is a strong national commitment to address the AIDS crisis. In spite of such obstacles, some school programs appear to have made gains, although evidence from program evaluation is sparse.

Comprehensive evaluations have examined the impact of HIV education programs worldwide. In Canada and the US researchers found that one – third of the 28 programs they reviewed delayed the age at sexual initiation among students participating.³⁵ A more recent analysis that reviewed school-based education programs in Namibia, Nigeria, South Africa, and Zimbabwe found that some of the programs helped delay sexual initiation, decreased number of partners, and increased contraceptive use. For example, in Namibia a curriculum that emphasized abstinence and safer sex practices helped some female students delay the start of sexual activity but did not increase abstinence or condom use overall. In Brazil students participating in a school-based AIDS education program reported having fewer sex partners than students in schools without the AIDS program.³⁶

Important comparison of AIDS education programs for youth include addressing pressure and norms that an age risky behavior.³⁷ Changing young people taking behavior requires going beyond providing infection to helping young people acquire the ability to refuse sex and to negotiate with sex partners.

In Thailand a comprehensive education program for young people included problem – Solving exercises, role playing, and analysis of “triggers” for unsafe sexual behavior (such as alcohol use). This program helped to achieve a 50% decline in new HIV cases, and the incidence of STIs among young men in the program was one-seventh of that among a control group without AIDS education.³⁸ (8).

Researchers have identified key elements of HIV/AIDS education programs, largely from US – based studies. Programs are more likely to be successful by:

- Focusing on reducing specific risky, sexual transmission
- Using theoretical approaches to behavior change that have proved successful as a basis for program development;
- Having a clear message about sexual activity and condom use and continuously reinforcing this message;
- Providing accurate basic information about the risks of adolescent sexual activity and about methods of avoiding intercourse or using condoms against HIV infection;
- Dealing with peer pressure than other social pressures on young people to be sexually active;
- Providing modelling and practice of communication, negotiation and refusal skills;

³³ United Nations General Assembly. Declaration of commitment on HIV/AIDS. Aug. 2, 2001. (Resolution adopted by the General Assembly)(Available: <http://www.un.org/ga/aids/docs/aress262.pdf>, Accessed Jun. 28, 2001).

³⁴ Fee, N. and Youssef, M. Young people, AIDS, and STIs: Peer approaches in developing countries. In: MANN, J. and Tarantola, D., eds. AIDS in the World II: Global Dimensions, Social Roots and Responses. New York, Oxford University Press, 1996. P. 247-248.

³⁵ See note 28

³⁶ DAS Gracias RUA, M. and Abramovay, M. Evaluation of preventive actions against STDs/AIDS and drug abuse in elementary and high schools in Brazilian capitals. Geneva. United Nations, Jun. 2001. 118 P.

³⁷ Agha, S. Consumer intentions to use the female condom after one year of mass marketing (Lusaka, Zambia). Washington, D.C., Population Services International, 1999. (PSI Research Division, Working Paper No.26) 16.

³⁸ Celentano, D., Bond, K., Lyles, C., Eiumtrakul, S., Go, V., Beyrer, C., NA Chiangmai, C., Nelson, K., Kham Boonruang, C., and Vaddhanaphuti, C. Preventive interventions to reduce sexually transmitted infections: A field trial in the Royal Thai Army. Archives of Internal Medicine 160(4): 535-540. Feb. 28, 2000. (Available: <http://archinte.ama-assn.org/issues/v160n4/rpdf/iai90112.pdf>, Accessed Aug. 6, 2001).

- Using a variety of teaching methods that involve the participants and help personalize information;
- Using teaching methods and materials appropriate to students' age, sexual experience, and culture;
- Selecting as teachers people who believe in the program and then training them to be effective.

More evaluation is needed of developing – country AIDS education for youth in school and out of school.

HIV/AIDS education programs should be age-appropriate – that is, programs for younger adolescents should focus on avoiding or delaying sex, while those for older adolescents should include discussion of condoms and other contraceptives in addition to urging abstinence.³⁹ Of course, education cannot help young people who cannot avoid or delay sex, even if they want to – for example, young women trafficked into prostitution or raped in refugee camps.

Peer education. Many strategies for youth now make peer education a key approach.⁴⁰ Perhaps the most important goal of peer education is to establish standards for acceptable behavior. When youth play a role in developing social and group norms that protect against HIV infection, they serve as positive role models for behavior change.⁴¹

Most young people find trained peer educators credible because they communicate well with other youth and set believable examples of behavior. Peers also can help other young people acquire such skills as sexual negotiation and assertiveness.⁴²

For peer education programs to be effective, training of the peer educators is essential – including follow-up sessions that reinforce knowledge beliefs, and skill.

Training not only should ensure that peer educators know how to teach about HIV/AIDS but also that they are able to see things from the perspective of the young people they are trying to reach . A wide variety of peer AIDS-education programs in developing countries reach young people, including in Indonesia⁴³, Kenya⁴⁴, Peru⁴⁵, Thailand⁴⁶ and Zambia.⁴⁷ While evidence from evaluation is slight, peer education programs have been found to reduce the incidence of STIs including HIV, change risky behavior, and improve health, including among the peer educators themselves.⁴⁸ In a US peer education program among youth, for example, condom use increased from 45% to 55% among participants surveyed.⁴⁹ In Peru, in the absence of the Es Salud peer project, youth condom use in the project area would have been 39% less.⁵⁰

Peer education is sometimes assumed to be inexpensive, since it relies on volunteers. Costs can run high, however, to train, support, equip, and supervise peer educators. High turnover among peer educators requires continuous recruitment and training of replacements. Also, peer programs usually need professionals to provide guidance and support. While a growing consensus holds that peer educators should be compensated in some way, experience cautions against overcompensation to avoid distancing peer educators from their audience.⁵¹

³⁹ See note 7; Collins, C. Dangerous inhibitions: How America is letting AIDS become an epidemic of the young. San Francisco, Center for AIDS Prevention Studies, Harvard AIDS Institute, Feb. 1997. 44 P.

⁴⁰ See note 34

⁴¹ O'Hara, P., Messick, B., Fichtner, R., and Parris. D.A peer led AIDS prevention program for students in an alternative school. Journal of School Health 66(5): 176-82. May 1996.

⁴² Family Health International AIDS Control Prevention Project (FHI AIDSCAP). How to create an effective peer education project: Guidelines for AIDS prevention projects. Arlington, Virginia, FHI, 1996, p33; see note 34

⁴³ International Planned Parenthood Federation (IPPF). Annual report 1995-1996. London, IPPF, 1996. 34 P.

⁴⁴ See note 1

⁴⁵ Frost, J., Jones, R., Woog, V., Darroch, J., and Singh, S. Adolescent sexual and reproductive behavior: A developed country comparison. Contry report for the United States. New York, Alan Guttmacher Institute, 2001. (Occasional Report).

⁴⁶ See note 38; Fongkaew, W. and Bond, K. Promoting social action networks for youth health. Washington, D.C., Pathfinder International, Focus on Young Adults, 1999. 2 P. (Available: <http://www.pathfinder.org/project%20Highlights/lifenet5.html>, Accessed Jun. 12, 2001).

⁴⁷ Serlemitsos, E. (Johns Hopkins University Center for Communication Programs, Zambia Field Office) [Circulation of Trend setters] Personal communication, May 9, 2001.

⁴⁸ Norman, J. Programs at a glance: Evaluated peer health education programs. Washington, D.C., Advocates for Youth, Nov. 1999. 6 P. (Available: <http://www.advocatesforyouth.org/publications/pag/evaluated.htm>, Accessed Sep. 10, 2001).

⁴⁹ See note 41

⁵⁰ See note 45

⁵¹ Field, M., Weis, E., and Smith, S. Lessons Learned: programming for adolescent and young adult. Washington, D.C., United States Agency for International Development (USAID), Feb. 1998. 35 P.

Status of Women

What is the impact to HIV on the status of women in developing countries? It is broadly recognized that the pandemic has catastrophic cost consequences since it mainly affects people in the economically productive adult years. The heavy macroeconomic impact of AIDS comes partly from the high cost of treatment which diverts resources from productive investments, and partly from direct effects on productivity due to illness and the loss of skilled adults. These macroeconomic effects are superimposed on a deepening crisis associated both with the effects of structural adjustment policies and with employment structures inherited from colonial times which have contributed to the weakening of the extended family and to the feminisation of poverty. With declining real income, women have had to compensate by working longer hours, competing with men in a labour market which severely undervalues women's work. Women currently account for half of the world's income and have one hundredth of the world's property registered in their name. The potential of the HIV epidemic to worsen gender imbalance is high.

As the HIV/AIDS epidemic intensifies, we are seeing increased stigmatization of women, and a change in women's social and political position. Women are frequently identified as the reservoirs of infection or as vectors of transmission to their male partners and to their offspring. In fact many countries appear more prepared to invest in programs to prevent mother-to – child transmission than in programs to prevent transmission to women in the first place. This perspective is harmful in that it fails to focus on men's equal responsibility to prevent HIV, it prevents programs from developing services that meet the needs of women, and it underlies research and intervention strategies that have been designed more to protect men from women than to enable women to protect themselves.

In many countries, the law does not allow women to inherit land. This means that women lack collateral for financial services; combined with low levels of education, this constitutes a clear gender – based constraint to economic activity. Inheritance laws also mean that widows are vulnerable to making sexual decisions influenced by economics: it may mean accepting the levirate or traditional marriage to a brother – in – law, a social safety net with a distinct risk of encouraging HIV transmission; or becoming involved in some form of prostitution to support themselves and their children. Attempts thus far to change the legal status of women in the face of the HIV epidemic have met with social resistance even when the actual laws themselves are changed.

Conclusion

In order to address economic and biological vulnerability of women, educational inequities, increasing health burdens being placed on women, and impediments of the current status of women, a multi-pronged strategy will be required. At all levels of the strategy, women, both infected and affected, must be involved if this is to be effective. Solutions are not simple but the seeds of those solutions are found in the conventional wisdom of communities themselves. They are also found in systems-level analysis which should inform the creation of gender – sensitive HIV and development policies. We must engage decision makers at local, national and international levels to address these imbalances and these issues if we are to mitigate the devastating psychosocial and economic impact of HIV on women in developing countries. Strategies should be aimed at enhancing the responses of families and communities to the HIV epidemic in such a way that they enhance women's status. Only by doing so will women's vulnerability to HIV transmission be reduced and the possibility that women will play full roles in society enhanced.

Strategic interventions to promote gender equity deserve a central focus in national AIDS plans. Governments can help eliminate the financial inducements to multiple partnerships by revising laws and labour codes to guarantee women the right to own and inherit property, to earn salaries on a par with men, and to have equal access to credit and training. They can improve women's ability to protect themselves by expanding female education, educating women about their rights, fighting the cultural beliefs that denigrate women and value boy children over girls, and helping women to organize on their own behalf. Until women become part of the dialogue that establishes policy and distributes resources, women's issues will remain vastly underattended. And until women share power more equally with men – in both the public and the private sphere – they will remain at heightened risk both for HIV and for the discriminatory practices and stigmatization associated with AIDS.

The Silenced Few – Non-English Speaking Women in Prison



Debbie Kilroy is an employee and advocate of Sisters Inside.

Sisters Inside is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system, and to address gaps in the services available to them. We will work alongside women in prison in determining the best way to fulfil these roles. To get involved with Sisters Inside contact... (07) 38445055

Anna was caught carrying drugs through Brisbane Airport and was remanded to the women's maximum security prison. She spoke limited English. A faceless interpreter explained the induction process. Anna was terrified and was refused access to written information in her language to explain the prison processes or to explain her legal rights whilst in prison. Anna's children were sent to an orphanage after she was sentenced. A year later Anna received a fax informing her that her youngest child had been sold. She was hysterical and could not explain to anyone what was happening to her or to her child. No interpreter was contacted so the prison had no idea why she was in deep depression.

Imprisonment is one of the most isolating, horrifying and depriving experience for any woman. For women from non-English speaking backgrounds (NESB) the prison experience is one of "desperate isolation".¹ There are approximately 300 women incarcerated in Southeast Queensland prisons at any one time, 9 – 12% of this population are NESB women. NESB women experience fear, racism and persecution due to overwhelming communication barriers and systematic mistreatment from Department of Corrective Services (DCS) processes.

Non-English speaking women are a significant minority within the Queensland prison system. In 2000, DCS released a needs analysis that stated 11% of women in prison are from a NES background.² This figure has increased to 14.2% in 2003.

The Department of Corrective Services only attempts to provide linguistically and culturally appropriate information during the process of induction on first arrival at prison. After this no further attempts are made to ensure that NESB women have information regarding their legal rights, privileges, punishments or regulations. This information is only available in English. NESB women endure absolute deprivation and isolation in the prison system. They are in a "state of defacto solitary confinement."³

Sisters Inside, at West End, provided NESB women in Southeast Queensland prisons with a questionnaire and interviewed them for approximately 90 minutes. Additionally, NESB women who have recently been released were also interviewed. NESB women are so small in number they might be easily identified by others, so paramount in our considerations were issues of confidentiality. When interviewing NESB women who have been released we noticed they shared their experience with more freedom and less fear of reprisals.

NESB women in prison have often experienced extensive violence in their lives before imprisonment. Findings for the research questionnaire confirm that 76.8% of NESB women in prison have been sexually assaulted, usually multiple assaults, throughout their lives. This sexual abuse is usually by family members and was first perpetrated against them at a very young age. 76.9% of NESB women in prison have experienced domestic violence and 61.5% have used drugs and/or alcohol. 84.6% stated that they will return to violent homes, as they have no resources available to ensure their own safety and their children's safety. 84.6% are mothers with an

¹ Easteal, P, *The Forgotten Few: Overseas Born Women in Australian Prisons*, AGPS, Canberra, 1992

² Women's Policy Unit, *Profile of Female Offenders*, Department of Corrective Services, 2000.

³ See note 1

average of 1.6 children each. Language and cultural differences prevent these women from accessing mainstream services. These are barriers that the women perceive and therefore believe that there is no alternative but to return to violent environments once released.

The questionnaire asked women to volunteer their worst experiences in prison. Women volunteered language and cultural barriers (84.6%), not understanding their sentence or prison processes (61.5%), isolation from children (76.9%), being scared (23%), lack of culturally appropriate food (23%), access to religious and cultural services (30.7%), one woman's child being sold (7.6%), and one woman's child dying whilst she was in prison (7.6%) as their worst experiences.

NESB women also face the day to day cruel and unusual abuse that exists in prison life, *"The terror is not what other women experience in here (prison) I just shake all the time and am so lonely."*⁴

When Mee arrived in Brisbane, airport customs searched her luggage and found two kilos of heroin. She was arrested and taken into custody. She was taken to the maximum security women's prison. She spoke little English and couldn't understand what the prison officers were telling her. They eventually rang the telephone interpreter service to assist with the induction process. This phone call was the last time Mee had access to an interpreter. Prison staff believed that because she had some words of English she could understand everything they were telling her.

Mee grew more fearful. She had no one to speak with and she was pregnant. She would be taken to the medical centre to see a doctor and could not understand what they were saying. She didn't know if her baby was all right or not. The medical staff would administer drugs to her and she didn't know why. She was too scared to say no to them.

She would pray at night in her cell. This was the only access she had to her religious practices. At no time was a Monk or Nun from the Buddhist community available for Mee. This terrified her even more, for the first time in her life she had no religious contact.

This reception/induction process is arduous for NESB women with no English because of the minimal contact with interpreters. As the reception/induction process can be quite lengthy and complicated, prison management never use face-to-face interpreters. Instead, they rely on the telephone interpreting service. It is an alienating means of communication, particularly in a situation where women are feeling at their most vulnerable. Further, the admission process into prison is completed within 24 hours and all the women interviewed stated that they never again had access to an interpreter after the phone was hung up.

NESB women frequently rely on information from other women in prison. The NESB women claim they prefer to observe the custom of the prison and to watch before they act, as a means of gathering information. If they have to ask someone, they would choose another NESB person. As there are only a small number of NESB women at each prison, care was needed to ensure that NESB women had ready access to each other.

NESB women found that, in general, contact with prison program staff was not easy. The difficulties were most apparent in the early stages of prison life. First, and in common with many other inmates, the women felt afraid to ask for help, particularly at the Brisbane Women's Correctional Centre. They were unaware of the procedures for seeing a counsellor or accessing educational programs.

Prison management attempt to overcome language problems through the use of other women prisoners as interpreters, but there are problems attached to this strategy. When fellow prisoners are used as interpreters, NESB women may be placed at a disadvantage, as the prisoner's ability

⁴ Statement from Interviewee, October 2002, V.02, p1

at interpretation may not be sufficiently advanced. Further this contravenes Queensland Government Policy which states that:

*"...as far as practicable, friends and family members should not be used in the same role as professional interpreters. Children and relatives are not appropriate interpreters in any context."*⁵

NESB women are placed at greater risk to their physical safety. All signs warning of danger (eg indicating an electric fence) are in English only. It is possible that such an action is a breach of the Queensland *Workplace Health and Safety Act 1995*. As DCS has determined that certain signs are needed for the health and safety of the prisoners, they are under an obligation to provide them in a form accessible by all.

Mee's baby was born, a little girl, immediately after Mee was sentenced. The prison system gave permission for Mee to keep her baby with her in the prison. Whilst she was glad to keep her baby, the circumstances were very difficult for her because she could not communicate well with anyone and did not have any money to provide essentials for the baby. Mee was not eligible for Centrelink payments as she was not a citizen of Australia. Therefore the prison manager decided to give Mee \$40 a week to buy the baby's essentials; this was not nearly enough. To make the situation worse the prison staff decided what Mee could buy for her baby. She was not allowed to feed her baby the food that was culturally appropriate. She was made to feed the baby western food.

Food in prison is based on western cuisine. Despite the existence of some freedom in selecting menus, NESB women find it very difficult to cook their own food. Yet for most of their prison life NESB women must cook and eat from the standard Western menu. It is very different from what they are used to eating. Even when NESB women are allowed to vary the menu they are faced with problems. The prison provides some basic ingredients for the women's use and the women then "buy in" any special items which they wish to use. NESB women find that the basic ingredients are western so they have to buy almost all ingredients for any meal they choose to cook. This presents a financial burden because the women only receive approximately \$1.50 - \$4.00 per day in pay.

The religious needs of prisoners are met through the Chaplaincy Board. The Chaplaincy Board currently includes four denominations (Anglican, Catholic, Uniting Church and the Salvation Army). Prisoners whose religions are not included in any of the groups must make special arrangements for services or visits by contacting their caseworkers / welfare workers.

61.6% of NESB women stated that no information was provided about access to religious services for their faith. 23% stated that they have to pray in their cell and are sometimes disturbed by prison officers. 15.4% were given a Christian Bible even though they were not Christians. There is a potential problem in relation to religious observance. Some NESB women did not perceive a problem in the existing arrangements. They saw religion as a "private" matter and hence they were not concerned. Yet the present organisation makes it difficult for NESB women. They are likely to be non-Christians and so are excluded from easy access to religious support. Moreover, the process of arranging for contact is itself more difficult because of their language problems.

The Vietnamese are a significant minority within prison and they have very distinct days of special significance. Yet their festivals and days of special religious observance are not celebrated within prison. The Vietnamese women identified two days of special significance: *Tet* and the Moon Festival.

Furthermore, close living with shared accommodation presents some particular problems for NESB women. Women routinely spend 12 - 13 hours per day locked in their cells or units. The small number of NESB women means that it is likely that they will be placed in a cell with non-NESB women. NESB women report social and emotional isolation due to cultural and language

⁵ Multicultural Affairs Queensland, *Language Services Policy*, Queensland Government, Department of Premiers and Cabinet, 2001 at p11

difference. The situation is particularly unfortunate when it is remembered that NESB women often have to rely on a trusted other to help them gather information and to fill in forms.

The NESB women stressed the importance of family. Only one woman presently in prison had support from family or friends on the outside. Some NESB women have chosen not to tell their family of their imprisonment and the majority do not have any friends in Queensland or Australia.

All prisoners suffer difficulties in maintaining ties with families and friends. Visiting times and the number of visitors are restricted, as are times for telephone calls. The cost of telephone calls is also prohibitive for those whose families are interstate or overseas. The women have to pay for all telephone calls.

The NESB women are sceptical of seeking support from any ethnic organisations. They feel "shame" in front of their communities and feel that some of the organisations are "as judgemental as the prison system". They did state that having someone to speak to in their own language would be wonderful. Certainly, ethnic communities could provide valuable support to those in prison and to their families. Many of the ethnic organisations in the greater Brisbane area have shown an interest in supporting NESB women in prison.

NESB women experience difficulties accessing the educational programs provided by DCS. All women are expected to do some core educational program as a means of moving through the system if they are sentenced to over 12 month's imprisonment. NESB women found severe problems in accessing programs. Their difficulty is attributable to their lower levels of English ability.

Section 9 of the *Racial Discrimination Act 1975* (Commonwealth), which states that racial discrimination be unlawful, is relevant to the NESB women in prison. However, being Commonwealth legislation, the author has decided to direct a focus to State legislation. All of the NESB women interviewed reported they had never heard of the Anti-Discrimination Commission and that there were laws against discrimination. Further, 76.9% stated that they felt very uncomfortable lodging a complaint because of fear of retribution from the prison system.

Section 11 of the *Corrective Services Act 2000* (Queensland) (CSA) provides for prisoners to be informed of entitlements and duties. Section 11(2) provides that if a prisoner does not understand English, the person in charge⁶, being the General Manager of the prison employed by the DCS, must take reasonable steps to ensure the prisoners understand s11(1) CSA, being entitlements and duties under the Act, and administrative policies and procedures relevant to the prisoners entitlements and duties. Section 11(3)(a) of the CSA provides that the General Manager, being the person in charge, must by law ensure a copy of the relevant legislation be available to all prisoners. All prisoners must reasonably therefore include NESB women.

International instruments are not binding in International law and have not been legislated into Australian domestic law. The well known international instrument concerning treatment of prisoners is the UN *Standard Minimum Rules for the Treatment of Prisoners (UNSMR)*. Rule 6 in the *UNSMR* prohibits any discriminatory treatment of prisoners which is based on the grounds of race, colour, religion, gender, national or social origin, political or other opinion, property, birth or other status. This is relevant to NESB women in prison. The Standard Guidelines for Corrections in Australia which are modelled on the *UNSMR* do not have the force of the law. The *Racial Discrimination Act 1975* (Commonwealth) is relevant and was identified in this paper. However, the NESB women are imprisoned under Queensland law. The *Q Anti-Discrimination Act 1991* seemed appropriate to analyse to discover whether a complaint could be lodged.

The Queensland Government does have a Language Services Policy that reflects a whole of government commitment to the development of communication strategies to inform clients of services and the policy states that they will:

⁶ *Corrective Services Act 2002* (Queensland) s 5

*Plan for language services in the agency, incorporating interpreting and multilingual information needs into the budgeting, human resource and client service program management”.*⁷

Therefore, in relation to reasonableness and financial circumstances it is already Government policy to ensure language services are available. We at Sisters Inside appreciate however that stories like Anna’s and Mee’s are not exceptional, and their failure to receive justice, or even basic necessities, should be abhorred by the entire legal community.

⁷ Queensland Government *Language Services Policy* 2001 at p7

Indonesian Marriage Law on Polygamy: Reasons behind the Opposition toward the abolition of polygamy



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Introduction

Before the enactment of the 1974 Marriage Law, the Indonesian Women's Congress (KOWANI), whose members were mainly middle class educated women, argued for abolishing polygamy to improve women's position in marriage. However, their stand was opposed by many Muslims. This paper will analyze the reasons for Muslim opposition to a full prohibition of polygamy. I will argue that there are two main reasons for their opposition.

First, many Indonesian Muslims believe that polygamy is (literally) allowed by the Qur'an, so they cannot prohibit something that is allowed by the Qur'an, Muslims' Holy Book. *Second*, Indonesian Muslims' continuing conflict with the Dutch during colonisation and with the secular nationalists in the post-independence period prevented Muslims from adopting monogamous marriage imposed by the Dutch and the secular nationalists. The Indonesian Marriage Law no.1/1974 states that marriage is basically monogamous. However, it allows a husband to practise polygamy under certain circumstances and conditions. The 1974 Marriage Law states the following provision in relation to polygamy:

Article 3:

- (1) In principle in a marriage a man shall be allowed to have one wife only. A woman shall be allowed to have one husband only.
- (2) A Court of Law shall be capable of granting permission to a husband to have more than one wife, if all parties concerned so wish.

Article 4:

- (1) If a husband desires to have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he shall be required to submit a request to the Court of Law in the region in which he resides.
- (2) The Court of Law referred to in paragraph (1) of this article shall grant permission to the husband wishing to have more than one wife if:
 - a. his wife is unable to perform her duties as wife;
 - b. his wife suffers from physical defects or an incurable disease;
 - c. his wife is incapable of having descendants.

Article 5:

- (1) In order for a request to be submitted to the Court of Law as referred to in Article 4 paragraph (1) of this Law, the following requirements shall be obtained:
 - a. the approval of the wife or wives;
 - b. the assurance that the husband will guarantee the necessities of life for his wives and their children;
 - c. the guarantee that the husband shall act justly in regard to his wives and their children.
- (2) The approval referred to in paragraph (1) under the letter a of this article shall not be required of a husband if it is impossible to obtain the approval of his wife or wives and if she or they are incapable of becoming partner or partners to the contract, or if no information is available with respect to his wife or wives for the duration of at least 2 (two) years, or on account of other reasons requiring the judgment of a Judge on the Court of Law (Department of Information, 1979, p. 10-11).

First, I will outline the Qur'anic verse 4: 3, which has often been used to justify the permission for polygamy and its background of revelation. I will discuss the Muslim literal and contextual interpretation of the verse. I believe that the contextual and comprehensive interpretation of Qur'anic verses supports the full prohibition of polygamy. Second, I will describe the Indonesian context prior to the 1974 Marriage Law. The 1974 Marriage Law was enacted in the context of conflict between Muslim nationalists and secular nationalists, which prevented Muslims from adopting a secular marriage law draft, including monogamy.

Muslim Interpretations of Polygamy

In this part of the paper, I will present various Muslim interpretations of polygamy. Muslims can be categorised into three groups in their interpretations of polygamy. First, some Muslims believe that Islam allows polygamy. Second, some of them believe that Islam restricts polygamy. Third, other Muslims believe that Islam prohibits polygamy. The source of these different interpretations is their different approach in reading Qur'anic verses An-Nisa' (IV): 2-3& 129:

To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own (verse 2). For this is indeed a great sin. If ye fear that ye shall not be able to deal justly with the orphans, **marry women of your choice, two, or three, or four;** but if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice (verse 3)¹.

Ye are never able to do justice between wives even if it is your ardent desire (verse 129)².

The first group who believes that Islam allows polygamy approaches the Qur'anic verse literally and only refers to the underlined part of the verse: **marry women of your choice, two, or three, or four.** The second group who believes that Islam restricts polygamy also approaches the Qur'anic verse literally and only refer to the bold part of the verse: **marry women of your choice, two, or three, or four;** but if ye fear that ye shall not be able to deal justly (with them), then only one. Based on their literal reading, this group restricts the number of wives a man can have to four. The group also restricts the man with the requirement that he must deal with his wives justly. Otherwise, he can only have one wife. Most Muslim family laws throughout the Muslim world are in accord with the second-group's interpretation³. Indonesia's 1974 Marriage Law, which was mostly derived from Muslim family law, is one of the examples of this second-group's interpretation in relation to polygamy.

The third group believes Islam prohibits polygamy approaches Qur'anic verses *comprehensively* and *contextually*. This group not only refers to the underlined and bold parts of the verse but also to the whole verses of An-Nisa' (IV): 2-3 and 129. In addition, this group points to the need to consider the context of the verse's revelation. The verse was revealed in the seventh century of Saudi Arabia, after Muslims were defeated in the *Uhud* war. Many Muslim men were killed in the battle, leaving their wives, children and their property. At that time, many women were not accustomed to run a business, therefore other Muslim men were appointed to be guardians to manage the widows' and orphans' wealth⁴. Some male guardians, however, wanted to have the orphans' wealth for themselves. They tried to appropriate the orphans' money by mingling their own small accumulations of money with the orphans' inheritance or by marrying them when the orphans reached puberty. They assumed that if they married the orphans, they would not need to pay the dowry and could treat their orphaned wives as they wished because the orphans did not have someone to protect them⁵. In this context, the following verses were revealed to guide and prevent male guardians from being unjust towards the orphans:

¹ Ali, Abdullah Yusuf, *The Meaning of the Holy Qur'an*, Amana Publications, Beltsville, 1989, 184 5

² See note 1, at p227

³ Mahmood, Tahir, *Family Law Reform in the Muslim World*, New Delhi: The Indian Law Institute, 1972.

⁴ Doi, Abdur Rahman I, *The Qur'an, Women and Modern Society*. India: Sterling Publisher Private Limited, 1999.

⁵ Mawardi, Ahmad Imam, 'The Political Backdrop of the Enactment of the Completion of Islamic Laws in Indonesia' in Arskal Salim and Azyumardi Azra (eds.) *Shari'a and Politics in Modern Indonesia*. Singapore: Institute of Southeast Asian Studies, 2003.

To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin. If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice⁶.

Based on the context of revelation and the wording of verse 4: 2-3 and 129, the third group interprets these verses, as being *not* about the permission for polygamy, but rather about the importance of being *just* toward the powerless orphans. If male guardians fear for being unfair toward the orphans, they are allowed to marry two, three or four women, a practice which was common in seventh-century Arabia. However, if they fear for being unjust to more than one wife, they can only marry one wife. Being just toward multiple wives, the primary requirement for polygamy, is stated in verse 4: 129 to be impossible for men to achieve. Therefore it is understood that polygamy is prohibited⁷. Abduh (1849-1905), an Egyptian scholar, was the leading proponent of this group. His interpretation of polygamy, written by his student, Rida, influenced many Muslim scholars and reformers to work for legislating polygamy. His influence was especially marked among Tunisian scholars and religious authorities who decided to ban polygamy in 1956⁸. However, even though many Muslim feminists support this third interpretation, some of them seem to be reluctant to state clearly that Islam prohibits polygamy. Those who are reluctant to say that Islam prohibits polygamy mostly prefer to say that "the Qur'anic ideal is monogamy" or "the Qur'an opposes polygamy",

Indonesian Context Prior to the 1974 Marriage Law

In this part of the paper, I will briefly describe the Indonesian context prior to the enactment of the 1974 Marriage Law. Even though the 1974 Marriage Law is intended for all Indonesians regardless of religion, the content of the law was mainly derived from Muslim law. Therefore, I will *firstly* describe the position of Muslim law in Indonesia since the Dutch colonial era. *Secondly*, I will describe the women's organisations' continuing struggle to put pressure on the government to reform the marriage law. *Thirdly*, I will highlight the continuing conflict between Muslim nationalists and the secular nationalists in the post-independence era, which caused Muslims to resist the secular idea of monogamous marriage.

During the early stages of Dutch colonization in the Netherlands Indies (now Indonesia), the Dutch did not interfere with native laws. They also did not differentiate between *adat* and Muslim laws. They allowed Muslims to use their law in settling disputes-for example, in relation to marriage and inheritance. This Dutch policy was written in the Resoluties der Indische Regeering March 25, 1760 and later, it was also registered in the Regeerings Reglemen (RR) in 1885. The policy, which was developed by van den Berg (1845-1927), is known as *Receptio in Complexu*. It allowed the colony's judges to settle cases based on their religious laws. For Muslims, *Receptio in Complexu* means that Muslim judges could refer to Muslim law⁹. At a later stage of colonization, however, the Dutch recognized the difference between *adat* and Muslim laws. During the conflict between the proponents of *adat* law and the proponents of Muslim law, such as during the Paderi war

⁶ See note 2, at p184 5.

⁷ Rida, Muhammad Rashid, *Tafsir Al Manar* vol. 4., Beirut: Darul Ma'rifah, 1973.

Jawad, Haifaa A, *The Rights of Women in Islam : An Authentic Approach*, New York, St. Martin's Press, 1998.

Wadud, Amina, *Qur'an and Woman : Rereading the Sacred Text from a Woman's Perspective*, New York : Oxford University Press, 1999.

Barlas, Asma, *'Believing women in Islam : unreading patriarchal interpretations of the Quran'*, Austin, University of Texas Press, 2002.

⁸ See note 7, per Jawad.

⁹ Suny, Ismail, 'Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia' in Juhaya S Praja (ed.) *Hukum Islam d Indonesia. Perkembangan dan Pembentukan* (second edition), Bandung, Remaja Rosdakarya, 1994, at p73.

Ichtiyanto, 'Pengembangan Teori Berlakunya Hukum Islam di Indonesia' in Juhaya S Praja (ed.) *Hukum Islam di Indonesia. Perkembangan dan Pembentukan* (second edition), Bandung: Remaja Rosdakarya, 1994, at p117.

Azra, Azyumardi, 'The Indonesian Marriage of 1974. An Institutionalization of the Shari'a for Social Changes' in Arskal Salim and Azyumardi Azra (eds.) *Shari'a and Politics in Modern Indonesia*. Singapore, Institute of Southeast Asian Studies, 2003, at p79.

(1821-1837) in West Sumatra, the Dutch took the side of the proponents of *adat* law and supported the development of *adat* law to curb the progress of Muslim law¹⁰.

In 1929, at the suggestion of Snouck Hurgronje (1857-1936), an advisor of the Dutch government on indigenous and Arab affairs, the Dutch changed the policy in relation to the Muslim laws from *Receptio in Complexu* into *Receptie*. *Receptie* (reception theory) meant that indigenous people were subject to *adat* laws. Muslim laws could only be applied if they did not contradict *adat* laws¹¹.

In 1937, the Dutch government further reduced the influence of Muslim law by removing the Religious Courts' authority to settle Muslim disputes on inheritance, giving the authority to the Civil Courts. The reason given for its action was that the Muslim law of inheritance was regarded as contradicting the *adat* laws¹². As a result, Muslims of the Netherlands Indies were unhappy with the Dutch interference on the implementation of their law, especially with the Dutch discriminatory policy of positioning Muslim law subordinate to the *adat* law.

Prior to the enactment of the 1974 Marriage Law, the people in the Netherlands Indies acted within four different marriage laws:

1. Muslims acted within the Muslim marriage law which was un-codified
2. Christians acted within the Ordinance of 1933
3. Europeans and Chinese acted within the Civil Code (*Burgerlijk Wetboek*) which regulated marriage among the people subject to the Western law
4. Non-Christian and non-Muslims acted within *adat* law¹³.

At that time, the position of the Netherlands Indies women in marriage was vulnerable. This vulnerable position of women in marriage is partly recorded in letters of Kartini (1879-1904) to her Dutch friends. Kartini, one of the pioneers of women's emancipation in the Netherlands Indies, expressed her opposition to the local Javanese aristocratic traditions of women's seclusion, parentally arranged marriage and polygamy. In her opinion, marriage served to fulfil male interests, and offered nothing to women. In her socially segregated aristocratic family, she said, there was no place for love. She also criticized the discriminatory treatment of girls and boys in term of education. She proposed education for girls to the government in order for women to be economically independent and for them to avoid relying on marriage. In her time, education could only be accessed by the male elite. Because of her aristocratic father, she was allowed to study in Dutch primary school, a most unusual practice, even though she finally ended up being secluded when she reached the age of twelve¹⁴.

In her letters, Kartini regarded polygamy as a sinful act because it hurts women's feelings. In her opinion, anything that hurts others, even animals, is a sinful act. She herself was raised in a polygamous family, which were common among elite families at that time. Kartini could see directly the misery of women who had a co-wife living under the same roof. They needed to compete with each other to gain the attention of their husband. Despite her rebellion against marriage, because of her love of her father, she finally ended up being married to a man who already had three wives and six children. She felt powerless for not being able to resist polygamy because she said that polygamy had been legitimized by religion¹⁵.

In my opinion, what Kartini regarded as "religion" is actually the male biased interpretation of religion. Many Muslims confuse the "Qur'an" and "its interpretation" (*tafsir*), assuming that *tafsir* is the same as the Qur'an itself and therefore both are regarded as infallible.¹⁶ For Muslim, the Qur'an is God's revelation and therefore is infallible, while *tafsir* is a human production and

¹⁰ Maarif, Ahmad Syafi, *Studi tentang Percaturan dalam Konstituante. Islam dan Masalah Kenegaraan*. Jakarta, LP3ES, 1985.

See note 10, per Azra, at p78 79.

¹¹ See note 10, per Suny, at p74.

¹² See note 10, per Suny, at p74.

¹³ See note 10, per Azra, at p79.

¹⁴ Kartini, Raden Adjeng, *Letters from Kartini : an Indonesian feminist, 1900 1904* (translated by Joost Coté), Clayton, Monash Asia Institute, Monash University in association with Hyland House, 1992.

¹⁵ See note 15.

¹⁶ For further information regarding Muslims' confusion between Qur'an and its interpretation, see Barlas, Asma, *Believing women in Islam : unreading patriarchal interpretations of the Quran*. Austin, University of Texas Press, 2002.

therefore is fallible and can be challenged. As a human product, *tafsir* is also not free from bias and interest.

A similar objection to the Muslim marriage law, which Kartini called “religion”, was also expressed by members of Indonesian women’s organizations in the early 1900s. As noted previously, Muslim marriage law was un-codified, which resulted in uncertainty for Muslim women regarding their rights and how to protect them. The Muslim interpretation of *shari`a* at that time allowed men to marry and repudiate women as well as practise polygamy against the women’s will. As a result, there were many cases of divorce, under-age and forced marriage and polygamy without adhering to Islamic regulation¹⁷. The women’s organizations held their first congress on 22-25 December 1928 in Yogyakarta. 30 organizations participated in the Congress¹⁸. During the women’s organization congresses of 1928, 1935, 1938 and 1941, women continued to put pressure on the government to reform the marriage law¹⁹.

In response to the women’s organisations’ pressure to reform marriage law as well as to protect European women from becoming the victim of polygamous marriage, in 1937, the Dutch government issued the Marriage Registration Ordinance. The Ordinance stipulated that marriage is basically monogamous, and that non-monogamous marriage is invalid. It also stated that marriage might be dissolved by the death of a spouse or after a spouse has been absent for two years without trace. In any other cases, divorce needed to take place in the court. The Ordinance also stipulated the obligation of the husband to support his ex-wife and how to deal with the custody of children after divorce. This Ordinance was intended for those who referred to the unwritten law such as Muslims, Hinduists and animists who voluntarily wished to register their marriage. The draft of the Ordinance was discussed by the government with various organizations of men and women. Muslim organizations mostly opposed the Ordinance. Women’s organizations who agreed with the Ordinance did not have enough voices to vote. As a result, this Ordinance failed to be discussed in the parliament²⁰.

Muslim opposition to the Ordinance can be understood as arising from at least two directions. *First*, as already discussed, most Netherlands Indies Muslims at that time mostly believed that polygamy is (literally) allowed by the Qur’an, so they would not prohibit something that is allowed by Qur’an. *Second*, many Muslims religious leaders and politicians were disappointed about the Dutch interference in the implementation of the Muslim law and did not want further interference. Their stand against colonisation also prevented them from adopting the Western (Dutch) viewpoint of monogamy imposed in the Marriage Ordinance.

After independence, during Soekarno’s presidency, Muslim nationalists were in conflict with secular nationalists. On the one hand, Muslim nationalists wanted to formally include the implementation of *shari`a* in the Indonesian Constitution. On the other hand, secular nationalists wanted the state to remain neutral in relation to religion. In later year, similar conflict between Muslims and the New Order secular government occurred. The New Order government was suspicious of the Muslim wish of establishing an Islamic state. Therefore, the government developed policy to suppress and weaken Muslim political power. As a result, Muslims reacted negatively to this government suppression (Mawardi, 2003). It was in this context of conflict that the 1974 Marriage Law was enacted.

After the failure of the 1937 Marriage Ordinance, women’s organisations continued to put pressure on the state for marriage law reform. Their continuing long struggle only bore fruit during the New Order government when the nationalists supported marriage law reform with different interests. On the one hand, women’s organisations wanted to reform marriage law to improve women’s position in marriage. On the other hand, nationalists of the New Order wanted to unify the law throughout Indonesia and eliminate the influence of the Dutch colonial law. They thought that the colonial law was divisive and discriminatory because the people of the Netherlands Indies were subject to a

¹⁷ Katz, June S & Katz, Ronald S, ‘The New Indonesian Marriage Law: A Mirror of Indonesia’s Political, Cultural, and Legal Systems’ (1975) 23(4) American Journal of Comparative Law, at p653 681.

¹⁸ Soewondo Soerasno, Nani, *Kedudukan Wanita Indonesia dalam Hukum dan Masyarakat*, Jakarta, Timun Mas, 1955, at p128.

¹⁹ See note 18, at p657.

²⁰ See note 19, at p150 154.

number of different marriage laws²¹. Despite their differing motives, as a result of the nationalists' support, in July 1973, forty-five years after the first women's congress, Soeharto's government agreed to reform the marriage law²². Without the nationalists' interest in unifying the marriage law, women's voices urging marriage law reform might have been left unheard.

However, the process of reforming the marriage law took a long time. There were several causes which prolonged this process. *Firstly*, it was not easy to reconcile the conflicting interests of several groups of Muslims, secularists, Christians and Chinese. Muslims were afraid of the "veiled Christianization" in the Marriage Bill draft proposed by the government. Christians and Chinese were afraid of the increased influence of Islam in Indonesia if the marriage law derived from Muslim law²³. *Secondly*, some Indonesians were in favour of diversity of law, in which different religious groups refer to different marriage laws. However, others preferred a unification of the law in which different religious groups acted within one marriage law. *Thirdly*, the issue of polygamy was also hotly debated. The women's organizations and many nationalists opposed polygamy. However, Muslims did not want to abolish it²⁴. The details of the debate were as follows.

On July 31, 1973 the government submitted the new marriage draft to the House of Representatives. There was no information on who composed the draft. However, it was clear that the Ministry of Religion and Muslim leaders were not consulted in the process of drafting the law. As a result, Muslims felt that they had been pushed aside and objected to several articles of the law which they considered contradictory to their religion. For instance, article 2 (1) of the draft stipulated that registration was necessary for a valid marriage. This was considered contradictory to the Muslim law which only required the contract between the bride's father/guardian and the groom with the presence of two witnesses. In addition, articles 3 and 40 required Muslims to ask the permission of the Civil Court before obtaining divorce and practicing polygamy. These provisions took away the authority of the Religious Court in handling Muslim family cases and regarded as threat to the Muslim religious affairs in Indonesia. For Indonesian Muslims, the Religious Court was regarded as a symbol of Muslim's authority and a guarantor of the implementation of Muslim law.

Furthermore, article 11 (2) allowed marriage between different religions (mixed marriage). This article was rejected by Muslims because it was considered to be against their religion and only would benefit the process of Christianisation. Articles 8 (c) and 62 were also opposed by Muslims for regarding an adopted child as the same as a natural child and therefore marriage between an adopted child and his/her parent was prohibited. For Muslims, the status of an adopted child is different from that of a natural child and adoption could not change the relationship between the adopted child and his/her parents. Articles 13 and 49 which gave legal status to the engagement and obliged the man to marry his girlfriend if she is pregnant during the engagement were also rejected by Muslims. Muslims did not recognize the status of engagement and thought these articles legitimated sexual relation before marriage²⁵.

Among the four parliamentary groups, only the United Development Faction (*Fraksi Persatuan Pembangunan*) opposed the law draft, while the Armed Forces Faction, the government party (*Golkar*) and the Democratic party (*PDI*) principally supported the draft. With the voting process, the United Development Faction would be lost. However, the United Development Faction threatened to walk out in the case of a vote. In addition, outside the parliament building, there were a large number of demonstrators, mainly young Muslims, opposing the law. Due to the continuing controversies and demonstrations, to create political stability, the government compromised to accommodate Muslim political interests. Working committee was formed to revise the draft, consisted of 10 representatives from all parties. The amended draft deleted articles which were considered to be contradictory to Muslim law. For instance, civil registration was no longer necessary for the valid marriage, marriage between adopted child and his/her parent was

²¹ See note 10, per Azra, at p81 2.

²² See note 18, at p657 and 660.

²³ See note 10, at p82.

²⁴ Salam, Solichin, *Meninjau Masalah Polygami*, Djakarta, Tintamas, 1959.

²⁵ See note 18, at p660 2.

prohibited. Mixed marriage and the status of adopted children were completely deleted. The article on the legal status of the child born outside marriage was left subject to future government regulation. To reduce the incidence of divorce and polygamy, permission was required from the Religious Court, not the Civil Court²⁶.

Finally, the new marriage law was passed by the parliament on Dec 22, 1973 and signed by President Soeharto on Jan 2, 1974. To implement this new marriage law, the government issued its Implementing Regulation, Government Regulation No. 9/1975 on April 1975²⁷. The 1974 Marriage Law aims at reducing the number of divorces, polygamous marriages and child marriages. It also aims at unifying Indonesian marriage law²⁸.

Muslims were generally happy with the new marriage law. The government achieved its aim to unify the marriage law. However, Protestants and Catholics were unhappy for the requirement of the application of religious law in marriage. They prefer secular law rather than religious law. They would be happy if the original draft was left unchanged. However, the provision on divorce, polygamy and the position of women at least were closer to their expectations. The women's groups who had been pressing for so long for the marriage law reform preferred the original draft rather than the revised law²⁹. The enacted Law failed to eradicate discrimination against women in marriage, leaving women subject to the religious codes, which for instance, oblige them to accept polygamy and make divorce easier to initiate by the husbands rather than by the wives³⁰ (Blackburn, 1999, p. 190).

Conclusion

Prior to the mid 1980s, the majority of Muslims, including Muslims of Indonesia, tended to approach the Qur'an *literally*. The partial and literal understanding of Qur'anic verses in relation to polygamy holds that Islam restricts, even allows polygamy. However, the comprehensive and thematic (*maudhu'i*) approach to the Qur'an discourages, even implicitly prohibits polygamy.

The provision of polygamy in the 1974 Marriage Law of Indonesia was the product of the literal approach to the Qur'an. It was also produced in the context of continuing conflict between Muslims and the Dutch during the colonisation era as well as between Muslim nationalists and secular nationalists after independence. Thus, the provision of polygamy in the 1974 Marriage Law can also be regarded as one of the ways for Muslims to show their resistance to the Dutch Marriage Ordinance which tried to abolish polygamy during the colonisation era and to show Muslim resistance to the secular draft of the marriage law prior to the enactment of the 1974 Marriage Law.

The current Indonesian situation is different from the context prior to the enactment of the 1974 Marriage Law. Many Muslim political leaders currently hold important positions in the Indonesian government. In addition, there has been increasing number of Indonesian Muslims who approach the Qur'an comprehensively and thematically, especially liberal Muslim scholars. However, they are still the minority among the large number of Indonesian Muslim population. Furthermore, it appears that the literal interpretation of Qur'an in relation to polygamy still has major influence among the majority of Indonesian Muslims. Therefore, the reform toward the full prohibition of polygamy in the Indonesian marriage law is unlikely to succeed unless the comprehensive approach to the Qur'an in relation to polygamy is continually promoted in Indonesia.

²⁶ See note 18, at p662 5.

²⁷ See note 10, at p84.

²⁸ Cammack, Mark, 'Islamic Law in Indonesia's New Order' (1989) 38(1) *International and Comparative Law Quarterly* 38 (1), 53 73.

²⁹ See note19, at p665 6.

³⁰ Blackburn, Susan. 'Women and Citizenship in Indonesia' (1999) 34 *Australian Journal of Political Science* 190



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‘Speech Delivered at the Activating Human Rights and Diversity Conference, Tuesday 1 July 2003’



Senator Natasha Stott Despoja has been a South Australian Senator for the Australian Democrats since 1995 and is the youngest woman ever to enter the Australian Federal Parliament. Senator Stott Despoja was elected Leader of the Australian Democrats in April 2001 and again in January 2002. She resigned this position in August 2002. Her current portfolio responsibilities include privacy, science and biotechnology, foreign affairs, the status of women, higher education, work and family, republic and territories and local government.

I acknowledge the traditional owners of the land.

Thank you for the opportunity to be a part of this very timely and important conference.

It is a crucial time for human rights, not just in Australia but throughout the world.

Recently, I attended a lecture presented by Cherie Booth QC, who began her presentation on the premise that: “we in the West live in a world where the argument in favour of human rights has, for the most part, been won.”

If the argument has been won, then we have a long way to go before we see the full realisation of what we were arguing for in the first place.

We live in a country that greets those fleeing from persecution – not with open arms of compassion – but by locking them up in the desert, or by bribing poor nations to remove them from our shores and our consciences.

Their claims for asylum are treated with cynicism by a heartless Government and – even when they have proven their genuine need for protection – they are left in an uncertain state of limbo for three years, unable to be reunited with their family.

We live in a country where our intelligence agency has just been given the power to lock up any Australian over the age of 16 for seven days in order to interrogate them. They will have no right to silence and the burden of proof will be reversed, requiring them to prove that they do not have the information ASIO is looking for or face five years in prison.

This Government also allows its own citizens to be detained indefinitely by the United States, without charge, in a bizarre legal vacuum between international and domestic law, leaving them with no protection under either.

And of course, a permanent stain on Australia’s human rights record is our continuing failure to ensure justice for our indigenous community, or say sorry for the injustices of in the past.

And we live in a country that is still prepared to compromises on women’s rights.

Just over a month ago, the Government once again reiterated its refusal to support the Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women.

Not only do we see these express compromises on women’s rights, but as we delve deeper, we find some more insidious examples of Government policies that entrench gender inequalities.

In Australia, many low-income women are forced to return to work soon after having a baby – sometimes just two weeks after giving birth by caesarean section – in order to provide for their families.

Australia is now just one of two OECD countries without a national system of paid maternity leave to support of women's reproductive rights. The other country is the United States. And as Naomi Wolf said recently, the US exists just to make us look good!

The Government has also pursued policies that perpetuate the disproportionate effects of violence on women.

We know that it is women and children who are the most severely affected by war, and yet our Government provides unswerving support to the United States in its unilateral military campaigns – even when there is little, or perhaps no evidence to back up the reasons for military action.

The Government's domestic agenda also compromises the safety of women in the community. The expenditure of \$10.1 million on so-called terrorism awareness fridge magnets was bad enough, but what was even more disturbing was the recent discovery that this money was taken directly out of domestic violence prevention projects.

What about the women who are alert and alarmed every day of their lives due to male violence?

Even the ridiculous handgun reforms that were enacted by Commonwealth and State Parliaments in recent weeks will have a disproportionate effect on women.

We now have a system where such a vast array of guns remain legal that gun-owners will simply be able to hand in the few models that have been banned and use taxpayer's money to go out and buy new guns.

The Government bowed to the demands of sporting shooters at the expense of community safety – particularly the safety of women. These reforms will do little to change Australia's status as one of two key centres for illicit trade in firearms in the Asia Pacific Region. Since the beginning of this year alone, more than 245,000 people have been killed by small arms – 80% of these victims are women and children.

While the proliferation of these types of policies continues, it is more important than ever for women to maintain our efforts to achieve increased participation in decision-making processes at every level.

We still have a long way to go, but there are encouraging reports from different parts of the world. Just this week, more than 600 female leaders from around the world have converged on the Moroccan city of Marrakesh for the Global Summit of Women.

It was also very exciting to hear about the recent Welsh election, which saw – for the first time – equal representation of women and men.

In our own region, we know that New Zealand has had its first female Prime Minister, first female Governor-General and first female Chief Justice. Shame on Australia for standing back and complacently watching our smaller neighbour achieve these important milestones before us. But, of course, Australia still has the opportunity to appoint or elect our first female President!

The equality of every human being is the foundation principle of human rights. When we view each other as equals – regardless of our race, colour or creed, or indeed our gender – we will experience a sense of injustice and empathy when others are not treated with compassion and respect.

There would be no need to fight for human rights if we lived in a world where we treated each other equally, with compassion, understanding and respect for human dignity.

At the most basic level, that is what human rights are all about – they are about how we relate to each other as human beings – individually, corporately, through our governance structures and when we engage in commerce with each other.

They are based on the principle that we should treat others how we would like to be treated ourselves – we want to be able to live our lives without the fear of death or imprisonment or torture; we want to be free to learn about the world, to express our thoughts and to practice our faith; we want to make choices about our partners in life, our reproduction, our vocation, and who we want to lead us.

If we are in financial hardship, we want someone to help us; if we are sick, we want access to medical care; we want food to eat, water to drink, clean air to breathe and a home to live in.

Human rights law simply codifies the basic needs, aspirations and freedoms of every human being. It enables us to resort to the law when these rights are violated or threatened.

But we must also work hard to foster a greater level of empathy and compassion within the community so that we can create a mainstream culture in which human rights are respected, and there is less need to resort to the law when they are threatened.

“Lawyers talk in big words”¹: Understanding legal justice within the context of an Indigenous Australian women’s studies classroom



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In 1988 Robyn Kina, an Aboriginal woman, was convicted and received a life sentence for the murder of her non-Aboriginal de facto husband, Tony Black². The initial trial lasted only half a day. In the trial, Kina neither gave nor called any evidence in her defence, a decision made by her defence team based on their assessment of her credibility in the stand and what they said was her total “unwillingness to give evidence before a jury, or to be subjected to cross-examination”³.

This process silenced Kina’s history of sexual, physical, emotional and psychological abuse at the hands of Black. For example, on the day of the killing, Black threatened to unlawfully assault both Kina and her 14-year-old niece⁴. Kina pleaded not guilty on the grounds of provocation and a lack of intent, however there was initially no evidence to establish these defences due to the absence of direct evidence of what had occurred prior to the stabbing⁵. Williams J held that there was no proper basis for the establishment of provocation and held Kina guilty of murder and sentenced her to imprisonment for life with hard labour⁶.

An appeal was lodged and heard in the Court of Criminal Appeal on 23 November 1988, on the grounds that the trial judge erred in failing to permit the jury to consider the defence of provocation. The appeal was dismissed; as there was still no evidence of what occurred in the room prior to the stabbing hence no conclusion could be drawn as to the existence of provocation. A petition for pardon was presented to the Governor on behalf of Kina on 24 May 1993.

Under section 672A of the *Criminal Code*, the Attorney-General has the power to refer the case to the Court of Appeal for determination. In Kina’s case the Attorney-General referred the case to the Court of Appeal on the grounds that Kina had not received a fair trial and a miscarriage of justice occurred through problems, difficulties, misunderstandings and mishaps with communicating instructions to her lawyers. It was argued that this had led to errors so fundamental that Kina did not submit evidence, which, if placed before a jury, would have had a significant possibility of acquitting Kina of the offence of murder. In the alternative, the Attorney-General submitted that if the evidence was not considered fresh evidence then it was of such a nature that a refusal by the Court to receive it would lead to a miscarriage of justice because the evidence would demonstrate that it was unsafe to allow the conviction to stand⁷.

The Court of Appeal considered that Kina’s evidence raised issues of provocation, self-defence and lack of necessary intent.

¹ Kina in Robson F, “The Terrible Trials of Robyn Kina”, *Good Weekend, The Australian*, 26 March 1994, at p 41.

² *R v Robyn Bella Kina* (Unreported, Qld CCA) (23 November 1988); *R v Robyn Bella Kina* (Unreported, Qld CA, BC9303391) (29 November 1993). See also Westwood M, “Killer goes free after conviction set aside,” *The Australian*, 30 November 1993, at p1.

³ Note 1.

⁴ Ghent C (producer), *Excuse for Murder. 4 Corners* [Video recording]. Sydney, Australian Broadcasting Corporation, May, 1993.

⁵ Note 1 at p43.

⁶ Per Williams J, Supreme Court of Queensland, 5 September 1988.

⁷ Pringle K, ‘Casenotes: R v Robyn Bella Kina’, *Aboriginal Law Bulletin* (1994) 67(3) 14 15.

The court heard that Kina's life had been filled with abuse, trauma and hardship and she was a victim of violence and sexual assault. Kina's refusal to have intercourse with Black on the morning of his death led to the killing. Black had also threatened to physically and sexually abuse her niece, and it was while Kina was acting under this provocation that she picked up the knife from the kitchen and stabbed him. Evidence was heard to corroborate Kina's relationship with Black and the Court was given the overwhelming impression that he had repeatedly and violently assaulted her. The Court of Appeal agreed – the legal system had failed Kina in not allowing evidence of her brutal treatment at the hands of the deceased to be presented in her defence. A new trial was ordered, at the discretion of the Department of Public Prosecution.

After five years in a maximum security prison, the Court of Appeal eventually freed Kina by recognising some of the factors that had contributed to Kina's silence, such as her Aboriginality, the nature of battered women's syndrome and shame⁸.

In this paper we will discuss the understandings made possible of social and legal justice for Aboriginal women through a 'problem-based learning' (hereafter PBL) analysis of *Kina v R*⁹ in an Indigenous Australian Studies classroom at the University of Queensland. These are framed within our reflections on what Kina's case can teach us about definitions of justice, the marginalised position of Indigenous women within the Australian legal system, the dominance of Western constructions of justice and Indigeneity, and the continued silencing and exclusion of Indigenous Australian voices from processes of legal and social justice for themselves and their communities.

The educational context

The educational context is a course called *ABTS2010 Aboriginal Women* that is taught through the Aboriginal and Torres Strait Islander Studies Unit at the University of Queensland. Developed in 1995, the aim of this subject is to promote, through academic research and discussion, recognition and understanding of the social, political and cultural roles of Aboriginal women in contemporary Aboriginal and mainstream societies. The course is offered through the Bachelor of Arts program; can be credited towards majors in Aboriginal and Torres Strait Islander Studies, Anthropology and Women's Studies; and taken as an elective course by students enrolled in other degree programs.

This course actively addresses the literal absence of Aboriginal women from much mainstream teaching, research and discourse and aims to provide a space to allow a diversity of Indigenous women's voices to make the journey into, within, and at times against the academy. Through lectures and tutorials both students and lecturers explore historical and contemporary issues identified as relevant by Aboriginal women. Where possible and appropriate, guest lectures are presented by Aboriginal women and compared and contrasted with knowledge constructed by mainstream disciplines. Hence the learning objectives of this course are to recognise and understand the social, historical, political and cultural roles of Aboriginal women in contemporary Aboriginal and mainstream societies; to understand the similarities and differences between the perspectives and life experiences of Indigenous women and others; and, to reflect, interpret and critically analyse the works of and about Indigenous women with reference to the social, historical, political and cultural issues which directly impact upon them.

A large component of the course content is facilitated through the use of PBL. Although not widely employed in Arts or Social Science pedagogy, the PBL approach has grown out of research that demonstrates that adult learners understand material better and retain it for longer if they engage with it actively. Active engagement usually entails the student taking on the responsibility to work through some real-life or near to real-life situation.

⁸ Note 7 at 15.

⁹ *R v Robyn Bella Kina* (Unreported, Qld CCA) (23 November 1988); *R v Robyn Bella Kina* (Unreported, Qld CA, BC9303391) (29 November 1993).

The student has to decide what the situation is, what they need to know to understand and work through this situation to the stated goal, and then take on the responsibility of doing what is necessary to reach that goal. In practical terms, what this means for students is a way of working that they may not have encountered at University before.

During PBL sessions students work in small groups, undertake independent research and share the results of that research with peers who are dependent on each other for a satisfactory understanding of the situation at hand. Students are expected to actively partake in these small group discussions and the lecturer's role is to facilitate the group's work. There are occasions where students generate questions that she may not be able answer and the lecturer is there to help students to find an answer through suggesting routes of research, arranging for visits from experts and sometimes providing resources.

Kina v R

PBL is one of the major ways through which discussion of law and justice issues for Aboriginal women is facilitated in this course and we will now focus on one of the PBL packages completed in semester one 2003 titled 'The State v Kina'. This PBL package examines a murder charge against Robyn Kina, an Aboriginal woman who was accused of murdering her de facto. Issues of white law and justice as they include/exclude Aboriginal women are examined to consider the differences between Aboriginal and non-Aboriginal systems of justice, the way in which these two systems of Law confront each other in the court-room, and the multi-layered nature of the disadvantage faced by Aboriginal women under Western law.

In this PBL package students were expected to:

1. Describe the Kina case;
2. Examine processes of white and Aboriginal law relevant to this case;
3. Identify the similarities and differences between Aboriginal and non-Aboriginal approaches and perspectives on justice;
4. Examine the discourses of family violence, violence against Aboriginal women and women in general and their relevancy to this case;
5. Consider the relationship, tensions and conflict between gender and race and the impact of these on the delivery of justice to Robyn Kina;
6. Examine the relationship that Aboriginal women have with the criminal justice system and thereby consider the way that Western law works for and against Aboriginal women.

To begin addressing these tasks, students were given a range of learning stimulus material, including:

1. The following quote from Kina:
*"He said you're a gutless slut you wouldn't use that on me. That's when I just sort thrust the knife into his stomach"*¹⁰;
2. This description:
"This is Robyn Kina's recollection of the events that took place the night she ended a violent relationship with her de facto husband. Her case was heard, she was convicted of murder, and subsequently jailed for life";
3. A short video excerpt from the ABC 4 Corners documentary program *Excuse for Murder* in which the reporter asks: *"Why couldn't Robbie testify?"*¹¹; and
4. Various newspaper and journal articles which refer directly to Kina's case¹².

¹⁰ Note 4.

¹¹ Note 4.

¹² Westwood M, "Killer goes free after conviction set aside," *The Australian*, 30 November 1993, at 1

Subsequent to watching the video excerpt, students formed small groups to begin to explore the learning issues raised by the learning stimulus material and asked questions about why it might be that Kina was unable to give evidence at her own trial. The following list of research questions was generated:

1. What is "shame" and how does it relate to Kina's case?
2. What other options did Robbie have?
3. What relationship did Robbie have with her lawyers? Did Robbie have any options for communication with her lawyers?
4. Would the results have been different if Robbie had been a white woman, white man or black man?
5. What was her relationship with her Indigenous family?
6. How does the Australian legal system work?
7. What was Black's history? Was it mentioned in the hearing?
8. What was Robbie's state of mind towards Black? Did she kill him out of revenge or self-defence?
9. What other support services (eg counselling) was Robbie given?
10. Did Robbie's lawyers have access to her personal life history as well as her criminal record? Is this why she was unable to testify?
11. What was the racial and gender make up of the jury?
12. Why is there more family violence within Indigenous families and against Indigenous people? What is battered women's syndrome?
13. What are the cultural contexts behind giving evidence, speaking up?
14. What are the historical views and treatment of black women by white men? What relationship do these attitudes have to justice for Aboriginal women?
15. What difference did Robbie's case make in terms of law and justice for women, Aboriginal women who are both victims and offenders of violence?
16. What impact did the media have on Robbie's case and her chances to be set free?

Although not always answered, each group was assigned a research question and asked to bring the results of their research the following week to share with the remainder of the class. We now turn to explore the types of understandings generated by students about the facts of Kina's case and how these relate to the provision of legal justice for Indigenous Australian women.

The marginalised position of Indigenous Australian women with the Western legal system

One of the issues arising from the PBL case is that the Western legal system has been complicit in the marginalisation of Aboriginal women. The Kina case has shown that this subordination occurs through alienating court practices, intimidating interview and examination techniques, cultural insensitivity and language barriers.

The hostilities that Indigenous Australian women face in seeking justice have further 'flow-on' effects, whereby the material facts (which might provide an adequate defence) remain hidden. Coupled with a misreading of what the absence of such facts may mean, as well as a misinterpretation of her words and actions, an Aboriginal woman charged with an offence may therefore be unable to present a sufficiently strong case that might otherwise be put forward.

This might explain the high incarceration rates¹³ of Aboriginal women. Prison statistics for 1998 reveal that they are significantly over-represented in prison, with for example 200 per 100 000 of the adult Indigenous women's population being imprisoned, compared to 15.3 per 100 000 in the non-Indigenous community¹⁴.

¹³ See Pickering S & Alder C, "Challenging reforms for feminists and the criminal justice system," in D Chappel & P Wilson (eds), *Crime and the criminal justice system in Australia: 2000 and beyond*, Butterworths, Sydney, 2000; Payne S, "Aboriginal Women and the Criminal Justice System," *Aboriginal Law Bulletin* (1990) 46 (9) 9 11; MacKay M & Smallacombe S, "Aboriginal women as offenders and victims: The case of Victoria," *Aboriginal Law Bulletin* (1996) 80(3) 17 23; Behrendt L, "Aboriginal women and crime, Australia," In *Encyclopaedia of women and crime*, Nicole Rafter Oryx Press, Arizona, 2000.

¹⁴ Baldry in Pickering S & Alder C, note 13 at 229.

Furthermore, the prison rate for Aboriginal women since 1993 has increased by 97%¹⁵. This was also Kina's experience, who, whilst in jail, discovered that her story was unfortunately all too common¹⁶. Indeed, Carrington remarks:

There is hardly an Aboriginal woman in Australia untouched by the operation of criminal justice in her life, whether directly or through the repeated criminalisation of her children, her kin, her men, or through her own victimisation of various crimes.¹⁷

The disproportionate rates of incarceration indicate that the criminal justice system has been an "external assault on [Aboriginal] society"¹⁸ which continues to damage Aboriginal peoples and cultures, particularly Aboriginal women who are continually being defined legally, socially and culturally by people and institutions outside Aboriginal communities, such as the legal system.

These constructed, if not imagined, identities and realities of Aboriginal women not only occur within the core legal structure of the courtroom but also within its associated bureaucracies and jurisprudences. Behrendt explains, "There are so few Aboriginal people graduated in law that the voices of our people in a legal theory context have yet to be articulated"¹⁹. Standing on the margins of these legal constructions means that Aboriginal women are often excluded from and silenced within the dominant structures and are often without autonomy to determine what is best for their lives²⁰.

The historical legacy of colonialism, racism and sexism

In this analysis of Kina's case, history provided an important vehicle for students to understand the contemporary positioning of Indigenous Australian women in relation to issues of law and justice. When asked why Indigenous women's views are not considered in relation to customary law, Maurice J replied, "It's just because historically no one ever asks them"²¹. This comment points to the historical ignorance, trivialisation and misreading of Aboriginal women's distinct and separate social, religious and legal role in Aboriginal society by largely white male observers²².

Pre-Invasion Indigenous societies were egalitarian with women enjoying equal status with men because of their "separate but equally vital roles"²³. As one Aboriginal woman described it, "Men never used to boss over the women. We are bosses ourselves, women ourselves"²⁴.

One of the side effects of colonisation was the imposition of Western gender inequalities onto Aboriginal societies²⁵. Under the white male eyes of the law, women were viewed as the property of men, and a woman's evidence was not accepted without corroboration²⁶. In this Eurocentric and patriarchal framework Aboriginal women were then viewed in the following way: Aboriginals = animals; women = domestic property of men; therefore Aboriginal women = domestic property of men who can be treated like animals. Aboriginal women thus served a double purpose for the colonisers as a source of sex and labour²⁷ and found themselves dually disadvantaged.

¹⁵ Behrendt L cited in Pickering S & Alder C, note 13 at 229.

¹⁶ Note 1 at 41.

¹⁷ Note 13 at 229.

¹⁸ Upton J, "By violence, by silence, by control: The marginalisation of Aboriginal women under white and 'black' law", *Melbourne University Law Review*, (1992) 18 867 873 at 871.

¹⁹ Behrendt L, "Aboriginal Women and the White Lies of the Feminist Movement: implications for Aboriginal women in rights discourse", *Australian feminist Law Journal*, (1993) 1 27 44 at 43.

²⁰ Note 18 at 867.

²¹ Maurice J cited in Upton J, note 18 at 873.

²² Note 18 at 867.

²³ Whitney K. "Dually disadvantaged: the impact of Anglo European law on Indigenous Australian women", *James Cook University Law Review*, (1997) 4 13 38 at 17.

²⁴ McDinny E, "Borroloola Women Speak. Man and Woman Dance Now," In F Gale (ed), *We are bosses ourselves: The status and role of Aboriginal women today*, Australian Institute of Aboriginal Studies, Canberra, 1983 at 70

²⁵ Note 19 at 28.

²⁶ Note 18 at 868.

²⁷ Note 23 at 26.

The colonial objectification of Indigenous Australian women is evident in a purported memo sent by Kina's own defence lawyers, which reads, "nothing could be finer than Robyn Bella Kina in the mor-or-or-ning"²⁸. The shockingly direct reference to Kina as sexually available and willing is an example of the perpetuation of the colonial notion of Aboriginal women as inferior and suggests that although, ostensibly, barriers to equality before the law have been removed, it is this lack of status that contributes to Aboriginal women's continual disadvantage in the legal system.²⁹

The law itself further perpetuates this white male bias, albeit under the guise of objectivity. Stubbs criticises the defence of provocation for failing to recognise experiences of "women who do not conform to a white middle-class standard"³⁰. Western law requires the application of an objective test, that is, how an "ordinary" person would have acted in the face of the gravity of provocation³¹. This ordinary person does not share the sex, race, culture or any other personal characteristic of the accused except for their age³². This approach has been criticised by McHugh J, who suggests,

"Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities".³³

Indeed, evidence of "battered women's syndrome" has only recently been recognised in the defence of provocation, despite it being a well-established excuse for males who murder their spouses for merely leaving the relationship³⁴. Thus the law itself prevents substantive equality for Indigenous women by failing to consider issues of race and gender. However, recent criminal cases, specifically in the Northern Territory³⁵, have made allowances for gender and culture in applying objective standards. Perhaps then the law is changing so that substantive justice may actually be starting to be achieved.

The exclusion and silencing of Indigenous Australian women

Another issue discussed at length by students was the dominance of Western male ideology in the legal system and the walls it constructs to effectively exclude and silence Indigenous Australian women from processes of legal justice. One of the major barriers relates to the differing concepts of gender and gender relations. This is particularly evident in the Court's disregard for and inadequacy in coping with the traditional division between men and women's business in Aboriginal societies, which often prevents discussion of sensitive issues with members of the opposite sex³⁶.

The inappropriateness of the prevalence of male police, judges and lawyers in Kina's case has subsequently been acknowledged by the public defender who admitted, "it was probably not a good idea to send a young white male to obtain such instructions . . . given the necessary references to their sex life, sexual abuse and related matters"³⁷.

Kina remarks that she felt she "couldn't talk about [Black's abuse]"³⁸ because she was embarrassed, which is understandable from any cultural perspective but particularly reflects the Indigenous concept of "shame"³⁹. Shame is a central term in Aboriginal Australia and difficult to translate into non-Aboriginal English. Despite the ravages of colonisation, the centrality of kinship and family to Aboriginal peoples and cultures has continued, a value system of mutual aid and cooperation has been preserved – shame is the linchpin that keeps these altogether and perpetuates them.

²⁸ Cited in Robson F, note 1 at 45.

²⁹ Note 23 at 26.

³⁰ Stubbs cited in Criminal Justice Commission *Aboriginal Witnesses in Queensland's Criminal Courts* [Report], CJC, Qld, 1996 at 102.

³¹ Per McHugh J *Masciantonio v R* (1994) 183 CLR 59 at 73.

³² See note 31, at 70.

³³ See note 31, at 74.

³⁴ Note 4.

³⁵ *Mungatopi v R* (1991) 57 A Crim R 341; (1991) 2 NTLR 1.

³⁶ Note 30 at 97.

³⁷ Cited in Criminal Justice Commission [Report], note 30 at 97.

³⁸ Olle A (presenter), *4 Corners* [Video recording]. Sydney, Australian Broadcasting Corporation, June 1993.

³⁹ Arthur J, *Aboriginal English: A cultural study*, Oxford University Press, Melbourne, 1996.

Kina was "shamed" about being a victim of repeated anal rape and sexual assault; her personal history of violence and prostitution; and of 'shaming' her family by talking about these issues, especially as they related to her niece. However, sociolinguist Eades⁴⁰ argues that her lawyers interpreted Kina's silence according to their Western worldview where, if you are innocent, you are expected to be able to speak about it freely⁴¹ and silence is viewed as a breakdown in communication⁴². This ideology is reflected in the Crown questioning the validity of Kina's evidence, "which has become more favourable to her cause as time progresses"⁴³. Fortunately for Kina, the Court of Appeal finally recognised the cultural, psychological and personal obstacles that made it impossible for her to initially talk about the "provocation"⁴⁴. As Eades remarks, "the manner in which information has emerged in Kina's story is totally consistent with her Aboriginality"⁴⁵. Questions can still be asked, however, about why it took five years to recognise these seemingly obvious barriers to meaningful communication.

In their analysis of this case, students concluded that differences in language emerged as one of the major barriers, and reasons for miscommunication. Eades' research highlights the differences between Standard English and Aboriginal English that impede cross-cultural communication⁴⁶. She found that the interview technique of lawyers with use of direct questions and lack of understanding of silences was more alienating to Indigenous clients⁴⁷. As Dave Berry, a counsellor who was able to communicate with Kina remarks, "[Hearing Robbie's evidence] required no particular skills; I just sat there and listened"⁴⁸. Miscommunication with lawyers is further complicated by the lack of time devoted to building lawyer-client relationships and the technical legalese spoken by lawyers that most people who have Standard English as their *first* language find difficult to comprehend⁴⁹. Kina identifies this problem when she states, "Lawyers talk in big words. You think: 'I wish they would use ordinary words', and then you think, 'maybe they don't know them!' . . . there are a lot of people in jail who don't understand lawyers"⁵⁰. Despite being employed by Aboriginal Legal Services, none of Kina's legal practitioners had received any cultural training on how to communicate with Indigenous people⁵¹. This highlights the necessity to continue the education of legal professionals to facilitate appropriate communication with Indigenous people thereby ensuring that the system provides justice and equality for *all* Australians.

Conclusion

Upon completion of this PBL package, the class found that Kina's case raised more questions than it answered in relation to the provision of legal justice for Indigenous Australian women. First and foremost, students were left wondering:

"What is 'justice'?"

*Is it 'fairness', the appearance of 'fairness', and the proper procedure of the law?
Is it the result, the process, or both?"*

Students surmised that perhaps an answer to these questions could be found by critiquing and positioning what the legal system views as 'justice' in relation to what those dealt this 'justice' believe it should mean. It is arguable that in Kina's case justice was served – she was finally acquitted. However this conclusion places emphasis on the outcome as the determinant of justice.

⁴⁰ Eades D, "Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina", *Language and Communication*, (1996) 16(3) 215-227 at 221.

⁴¹ Note 30 at 96.

⁴² Note 30 at 221.

⁴³ Note 7 at 14.

⁴⁴ Note 7 at 15.

⁴⁵ Note 7 at 14.

⁴⁶ Note 40 at 215.

⁴⁷ Note 40 at 217.

⁴⁸ Cited in Robson F, note 1 at 42.

⁴⁹ Note 30 at 21.

⁵⁰ Cited in Robson F, note 1 at 41.

⁵¹ Note 7 at 14.

In contrast, by looking at the process that Kina endured – from police questioning, through to her relationship with her lawyers, her initial trial, and appeal – her case hardly appears ‘fair’, and was it even the proper procedure of the law?

Fitzgerald and Davies J note that:

“The legal system for the most part works well, but we must not shut our minds to the reality that sometimes matters go awry and produce a miscarriage of justice”.⁵²

Indeed, Themis, the Ancient Greek goddess of justice, is often depicted blindfolded. However, from the understandings gained from this PBL, we do not believe the legal system should be ‘blind’, that it should veil its inherent biases with the shroud of objectivity.

The information presented in Kina’s case highlights that the law functions in a colonial context, as a discourse which officially defines and sanctions political, economic, social and cultural realities for Aboriginal women.

While we recognise that the law does not always appear to be blindly oppressive - Aboriginal women do not always lose their cases – the law operates in a subtler manner to silence and exclude Indigenous Australian women. The PBL analysis of Kina’s case revealed that for justice to be achieved, we need to look outside the application of the law *per se* to the discourses that inform its application – to think and act ‘outside the (legal) square’. This will necessarily involve recognition that Aboriginal people know the problems that they as individuals, and as communities, face. They alone, and at times in conversation with others, have an understanding of how to best solve them and should be included in any discussion about law reform for Indigenous Australian people, particularly women.

It is not impossible to include the voices and perspectives of Aboriginal women in the criminal justice system. A dialogic process whereby the Western legal system recognizes the inherently white and patriarchal nature of its legal practice and underpinning framework, and Aboriginal women are provided with an important opportunity to voice their social, cultural and political ideals, within a very powerful institution of Australian society,⁵³ holds much promise.

⁵² Fitzgerald J and Davies J in Robson F, note 1 at 45.

⁵³ Note 12 at 231.

“Don’t Forget Your Own Backyard” - Human Rights Lawyering in Brisbane



Carla Klease is employed at Blake Dawson Waldron and in early July 2003 ended year-long secondment at QPILCH. At QPILCH, Carla was responsible for the establishment and coordination of the Homeless Persons’ Legal Clinic in Brisbane.

Kirsten Hagon is employed at Mallesons Stephen Jacques and in August 2003 ended a five-month secondment to QPILCH. At QPILCH, Kirsten was responsible for establishing and coordinating the Refugee and Immigration Legal Support Project.

“When I first arrived in Brisbane and talked to many young women lawyers in particular about my experiences with providing legal assistance to asylum seekers the response was always ‘that sounds amazing!’, or ‘I have always wanted to work in human rights!’ This was generally followed by ‘but how can I do this in Brisbane?’ Human Rights are an issue in Brisbane and there are opportunities for lawyers to make an enormous difference to some extremely disadvantaged groups, right here in our own backyard.” – Kirsten Hagon

Women studying law often do so because they have a strong interest in the protection of international human rights. Many students feel that the domestic legal profession does not offer them opportunities to use their legal knowledge to assist in the promotion and protection of international human rights.

However, two projects running out the Queensland Public Interest Law Clearing House Incorporated (“QPILCH”)¹ demonstrate that there are opportunities abound both in corporate law firms and community organisations in Queensland for lawyers to make valuable contributions to their community and the protection of human rights.

The Homeless Persons Legal Clinics

The Homeless Persons’ Legal Clinic (the “Clinic”) was launched in December 2002 by the Honourable Rod Welford MP, Attorney-General and Minister for Justice, to provide free legal assistance to, and advocacy on behalf of, one of society’s most disenfranchised groups – homeless people.

The fundamental precept underpinning the Clinic is the international human right of every person to an adequate standard of living, including adequate housing, clothing and food as set out in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*. Australia is a signatory to the Covenant which imposes an obligation on Australia to respect and recognise this right and to take steps to ensure the realisation of this right.

Unfortunately, as at the time of the 1996 Census, this right was not being enjoyed by at least 105,300 people in Australia with almost a quarter of that number living in Queensland.² At the time of the 2001 Census, Queensland had the highest number of homeless young people in Australia.³ The Homeless Persons’ Legal Clinic is the first legal service in Queensland which is specifically designed to address the legal needs of homeless people. Legal issues are often a contributing factor which prevent homeless people from leaving the cycle of homelessness or which cause people to become homeless. Because of the range of pressures and issues confronting many homeless people (including financial, social, psychological, medical and health issues), legal

¹ For more information on QPILCH go to www.qpilch.org.au

² Australian Bureau of Statistics, *Counting the Homeless: Implications for Policy Development*, Occasional Paper 1999

³ Chamberlain C & MacKenzie D, *Youth Homelessness 2001*, Sydney: RMIT University, 2002

problems often go unaddressed unless legal services are provided at places where homeless people already frequent.

The Clinic provides an innovative outreach service where civil legal services are delivered at crisis accommodation centres and welfare agencies. Rather than clients being required to travel to a legal centre or a corporate law firm for advice and assistance, lawyers from the participating private law firms provide their assistance at locations already frequented by homeless people.

By providing legal representation to a group who otherwise does not, or cannot, access legal assistance, the Clinic:

- reduces inequality before the law for homeless people;
- removes legal barriers that can ordinarily prevent homeless people from exiting the cycle of homelessness, thereby creating a pathway out of homelessness; and
- prevents people at risk of homelessness from becoming homeless because of legal issues.

Ultimately, the Clinic, through its 100 volunteer lawyers from Queensland private law firms, assists many Queenslanders to realise their international human right to an adequate standard of living.

The Refugee and Immigration Legal Support (RAILS) Project

It is a basic human right, articulated in Article 14 of the *Universal Declaration of Human Rights* that “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Under the 1951 *United Nations Convention Relating to the Status Refugees*, Australia has a non-refoulement obligation, meaning Australia must not return refugees to territories where their life or freedom would be threatened.

Australia accepts approximately 12,000 “humanitarian entrants” (which include refugees) each year. Asylum seekers who arrive in Australia in an authorised manner, for example with a valid aeroplane ticket and visa, become community-based asylum seekers. They are immigration cleared before they lodge their protection visa application. They are permitted to reside in the community (so are not detained) on a bridging visa while they await a decision on their asylum application. Many community-based asylum seekers are not permitted to work. Many also have no entitlements to social security, medical benefits or schooling.

Unauthorised arrivals and those who arrive on false documents are detained in Immigration Detention Centres (IDCs). If found to be refugees, they are granted Temporary Protection Visas (TPVs). These visas only last for 3 years, and another application for protection must be made at 30 months. TPV holders have work rights and receive a limited amount of financial support. They do not have right to family reunion, housing settlement or language support.

In Brisbane there are between 250 and 450 TPV holders⁴ and more than 200 community-based asylum seekers.⁵ These groups have extremely limited access to legal support. They are generally not entitled to Legal Aid and Legal Aid Queensland undertakes no immigration work. Paying for legal advice is difficult as asylum seekers and refugees often have limited working rights, or, due to their uncertain status and poor English language skills, may have trouble obtaining steady employment.

A decision not to grant asylum to an asylum seeker or to remove them from Australia will have grave ramifications. An asylum seeker may be returned to a country where they were persecuted

⁴ Centrelink estimated that 5% of the total TPV population live in Queensland, while DIMIA records show approximately 260 TPV holders gave Queensland as their last known address. Brisbane City Council estimates around 350 TPV holders live in Brisbane. Other support agencies estimate more. South Brisbane Immigration and Community Legal Service have assisted over 600 TPV holders over the last three years.

⁵ Brisbane City Council (BCC) estimates 150–200 people, while the Refugee Claimants Support Centre (RCSC) has had contact with approximately 200 people on bridging visas.

and face further persecution, imprisonment or death. The severity of the possible outcomes make provision of legal assistance crucial in ensuring refugees' rights are protected.

The objective of the QPILCH Refugee and Immigration Legal Support (RAILS) Project is to assist a greater number of refugees, asylum seekers and detainees in Queensland to access legal information and representation.

QPILCH has undertaken research to ascertain the extent of the unmet legal needs of this particularly disadvantaged group, focussing on those residing in Queensland. The QPILCH RAILS Project is based on a partnership with the South Brisbane Immigration and Community Legal Service (SBICLS), law firms, volunteer lawyers and the refugee and asylum seeker support community.

We aim to:

- increase knowledge in the refugee and asylum seeker community (and amongst their supporters) of their rights, entitlements and obligations in relation to the asylum seeker process;
- provide additional support to SBICLS endeavours to meet the legal needs of refugees and asylum seekers;
- provide a coordination and referral service for pro bono immigration law assistance; and
- build capacity in the legal community to address the legal needs of refugees and asylum seekers in the long term.

Through legal assistance, refugees have a far greater chance of success in claiming asylum and being accorded their fundamental human right not be returned to places of persecution.

Want to get involved?

If you would like to get involved with either project email contact@qpilch.org.au

Domestic Violence in Hong Kong



Robyn Lamsam graduated from the University of Queensland with a dual degree in Journalism and Asian Studies in 2001. She was awarded First Class Honours in Asian Studies in 2002. She also represented Hong Kong at the 1994 Asian Games and won a Bronze medal in the 50m Freestyle and a Silver in the 4X100m Freestyle Relay.

Introduction

Violence against women has long been an area of great social concern. Although the term encompasses a broad range of issues including infanticide, wife abuse and genital mutilation, this essay will focus on wife abuse. In comparison to most western societies where the issue has received increasing prominence, the controversy of wife abuse is relatively new to Hong Kong society. Despite the fact that women's groups had begun to identify abused women as early as 1981, there was no official data on the issue prior to 1980. It was not until 1984 that the category of "battered wife" was added to the official statistics of the government social welfare department.⁶ Although Hong Kong is generally perceived to be a Chinese society that has maintained its traditional cultural roots, several factors in the territory's history are comparatively unique, and prevent it from being classified as a solely "Chinese" city. As a British colony for more than one and a half centuries, western culture has had a significant impact upon Hong Kong society, much more so than in mainland China. Under the extended influence of the colonial government, the territory transformed into an increasingly westernised and modern society.

As an active member of the international economy, Hong Kong maintained regular contact with global communities which facilitated the influx of foreign concepts, including human rights and rule of law. As economic and social characteristics come to resemble those of the western scene, there has been a significant expansion of Hong Kong society's awareness of social problems such as domestic violence.⁷ Yet although processes of modernisation and industrialisation, coupled with extensive western influences, have led to changing values and institutions in the territory that stress human rights and sexual equality, patriarchal thought and practices remain deeply rooted in Society.⁸

Remnants of traditional Chinese conceptions of womanhood continue to exert an influence on the behaviour and attitudes of Hong Kong people, whereupon efforts to promote women's status in Hong Kong are still met with relative scepticism and hostility from both men and women.⁹ Despite the new rhetoric that modern women are supposed to be strong, independent of spirit and not reliant on the expectations of men, many women in Hong Kong are still by their own admission, influenced by male desires and preferences. Moreover, archaic ideas such as "woman is one of man's ribs" and "if a woman does not have a husband, her body does not have an owner" continue to influence men and women in Hong Kong.¹⁰

By and large, domestic violence derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices that legitimise and therefore perpetuate wife

⁶ Lau, Siu Kai (ed), *Social Development and Political Change in Hong Kong*, Hong Kong, Chinese University Press, 2000.

⁷ Cheung, Fanny M, et al (eds), *Breaking the Silence: Violence against Women in Asia*, Hong Kong, Equal Opportunities Commission, 2000.

⁸ Tang, Catherine S. K., et al. "Breaking the Patriarchal Paradigm: Chinese Women in Hong Kong." In Edwards L & Roces M (eds) *Women in Asia: Tradition, Modernity and Globalisation*, Sydney, Allen and Unwin, 2000 at p188 207.

⁹ Bui, T. and Monash J, 'Domestic Violence in a Vietnamese Community' (1999) 13 (3) *Journal of Interpersonal Violence*, 769 795 at p769.

¹⁰ Croll, Elisabeth, *Changing Identities of Chinese Women: Rhetoric, Experience and Self Perception in Twentieth Century China*, Hong Kong: Hong Kong University Press, 1995 at p156.

abuse.¹¹ The use of physical violence against wives is a manifestation of the historically unequal power relations between men and women, and is not only the means by which women are controlled and oppressed, but is also one of the most brutal and explicit expressions of patriarchal domination through which men possess and control women.¹² The general degradation of women remains grounded in contemporary society and is supported by the most prominent political, legal and religious institutions. The problem is exacerbated by social pressures, notably the lack of access to legal information, aid and protection; the failure to reform or uphold laws that prohibit violence as well as the absence of educational means to address the causes and consequences of domestic violence.¹³

In this sense, women are not only forced to struggle against cultural ideals that require them to submit to almost any form of treatment their husbands consider appropriate, but also against the policies and responses of social agencies which often demonstrate direct or indirect support for male authority and use of violence.¹⁴

Effects of Chinese Culture

Chinese culture has been heavily influenced by the Confucian philosophy in which patriarchal beliefs and values have placed women in submissive and vulnerable positions within society and the family. For more than one thousand years, Confucianism has served as one of the core religious and philosophical foundations that underlies virtually all aspects of Chinese civilisation - the dominant cosmology, political philosophy and doctrine of proper ethics entrenched into the Chinese people.¹⁵ The set of structural principles, ethical precepts and behavioural norms proposed by Confucianism is accepted as a well articulated ingrained ideology for ruling class hegemony and for family relationships and organization.¹⁶ The root of the domestic violence problem lies in the relationship between husband and wife.

The inferior position traditionally ascribed to women places them in a vulnerable position both in the family and in society.¹⁷ Historically the Neo-Confucian "Three Bonds" principle dictated levels of authority in relationships whereby rulers had authority over ministers, fathers over sons and most importantly, husbands over wives. This degrading and oppressive attitude towards women was thus translated into oppressive practices in reality. Patriarchal brutality was legitimised whereby husbands were permitted to abuse their wives, regularly highlighted in popular proverbs such as "women are like wheelbarrows, if not beaten for three days they cannot be used".¹⁸

In addition, influential Confucian doctrines such as the "Nu er Jing" (Classic for Girls) catalogued the ideal qualities for women such as the "Three Obediences" and "Four Virtues". Under the "Three Obediences", women were to obey their fathers as daughters, husbands when married and sons when widowed. By the same token, the "Four Virtues" instructed women to know their place in the universe and behave in total compliance with timehonoured ethical codes; that they should be reticent in words, clean of person and habits, adorn themselves to be pleasing to men and not to shirk household duties.¹⁹

Although Confucianism did not directly provoke wife abuse, it did provide a cultural and legal foundation for the institutionalisation of wife abuse in Chinese society. Despite the existence of elements protecting women against violence such as the importance of interpersonal harmony and respect, rigid gender norms and values have resulted in the continued exploitation and degradation of women. In addition to the "three obediences" and "four virtues" was a patriarchal, patrilineal and

¹¹ Xu, Xiaohu, 'The Prevalence and Determination of Wife Abuse in Urban China' (1997) 28(3) *Journal of Comparative Family Studies* at p283.

¹² Dobash, Emerson R., and Russell P. Dobash. *Violence against Wives: A Case against the Patriarchy*, London, Open Books, 1980 at p21.

¹³ See note 7, at p283.

¹⁴ Heyzer, Noeline. "Women and Violence." WIN News 38.4 (2002) at p42 50.

¹⁵ Jackson, Nicky A. and Gisele C. Oates. *Violence in Intimate Relationships: Examining Sociological and Psychological Issues*. Woburn: Butterworth Heinemann Books, 1998 at 234.

¹⁶ Stacey, Judith. *Patriarchy and Socialist Revolution in China*. Berkeley: University of California Press, 1985.

¹⁷ See note 3, at p39.

¹⁸ See note 2, at p40.

¹⁹ See note 5, at p18.

patrilocal family system that ensures the subordination of women to men, which in turn justifies a cultural and moral legitimacy for men to abuse women.²⁰

Despite the growing movement to identify and challenge notions that have a detrimental effect on the perception and treatment of battered wives, damaging elements of Chinese culture remain evident in a wide variety of social institutions which have a substantial impact on the lives of abuse victims.

Legal Acceptance of Domestic Violence

Violence against wives is rooted not only in the patriarchal attitudes of the past and present, but also in a set of historical government policies that sometimes inadvertently permitted unequal gender relationships to be continuously reproduced.²¹ Traditionally, Confucian doctrines were incorporated into the Chinese Law which served to codify and reinforce the basic authority principles of patriarchy. Under this system, husbands were not responsible for intentionally beating their wives for disobedience.²²

Similarly, traditional English Common Law gave husbands the unabashed right to use physical force to control their wives and maintain the family unit. Under such provisions, a husband was empowered to beat his wife, as "the law thought it reasonable to entrust him with the power of restraining her by domestic chastisement." The only restraint placed upon the extent of "chastisement" was that it be done in a "moderate manner".²³

Effectiveness of the Law in Hong Kong

In Hong Kong today, the Domestic Violence Ordinance (DVO) offers official protection to members of violent families. Under this Ordinance, battered women may apply to the District Court for an injunction or temporary restraining order to prevent continued abuse or to exclude the batterer from the marital home.

Nevertheless the true effectiveness of the DVO is challenged by aforementioned ingrained cultural notions and values that permeate society and affect the public perception of the problem of domestic abuse.²⁴ Although most of the formal laws supporting a husband's right to physical discipline his wife have been abolished, the traditions of male entitlement and hierarchy linger.

They are ceremoniously embedded in the promise to "honour and obey", and are concretely rooted in the economic and gender structures that diminish and marginalise women.²⁵ In Hong Kong, although wife abuse is no longer legally condoned, the issue is all but ignored as a social problem. The legacy of patriarchy remains evident through legal, political and ideological support for male authority, and continues to generate the conditions and relationships that lead to domestic violence.²⁶

The Police Response

Victims of domestic violence often seek assistance from formal social and legal agencies such as doctors, social workers and the police. Although outwardly condemning wife abuse, these agencies often unconsciously uphold traditional attitudes that normalize domestic violence and contribute to the isolation and subordination of wives. The inadvertent support and acknowledgement of the

²⁰ See note 6, at p281.

²¹ Honig, Emily and Gail Hershatter(eds), *Personal Voices: Chinese Women in the 1980s*, California, Stanford University Press, 1988 at 273

²² See note 1, at p264.

²³ Edwards, Susan S. M. *Policing Domestic Violence: Women, the Law and the State*, London, Sage Publications, 1989 at p51.

²⁴ Yeung, Caroline, *Changing Traditional Family Values, Wife Abuse and Legal Mediation*, Hong Kong: City Polytechnic of Hong Kong, 1994 at p5.

²⁵ Tifft, Larry, *Battering of Women: The Failure of Intervention and the Case for Prevention*, Boulder: Westview Press, 1993 at p20.

²⁶ Tang, Catherine S. K. 'Prevalence of Spouse Abuse in Hong Kong' (1994) 9(4) *Journal of Family Violence* at p347 56.

dominant position of husbands sometimes makes it physically and morally difficult for women to seek external assistance.²⁷

A considerable body of literature on domestic violence has concentrated on police responses to the problem as they are undoubtedly the most visible, and arguably the most accountable part of the criminal justice system. In addition to performing the pivotal role of gatekeepers to the criminal justice system, the police also provide access by means of referral to other specialised agencies such as medical, legal and social work that may assist with the many problems associated with domestic violence.²⁸

As one of the only public services available to battered women 24 hours a day, and perhaps the most accessible on a comprehensive, geographical basis, the police are front-line agents of social control in domestic disturbances, and are usually the first formal agency victims of wife abuse turn to for assistance.²⁹ It is therefore essential to examine their policies and practices for a more comprehensive understanding of the status of the problem, treatment of victims, as well as greater awareness of general community attitudes regarding the acceptance or rejection of wife beating.³⁰

In recent years, the Hong Kong criminal justice response to domestic violence cases has been repeatedly criticised for neglecting opportunities to deter future acts of violence, and a general failure to respond to urgent requests for assistance from abuse victims.³¹ The police have also come under a great deal of criticism for insufficient and inappropriate policing in domestic violence situations. Although wife abuse is considered a crime, arrest and judicial proceedings for domestic violence cases are comparatively infrequent because police often avoid arrest or prosecution for offences that are seen as unimportant and unworthy of attention.³²

Additionally, many abuse victims have had negative experiences with the police, who were found to be unhelpful and dismissive. In some cases, not only were they unsympathetic, but by siding with the violent man and engaging in friendly banter, the women were made to feel like the criminals.³³ This form of police behaviour not only fails to afford the victims the right to personal protection, but may also leave the women vulnerable to further attacks as police inaction may signal to the aggressor that there is a licence to continue domestic violence.³⁴

Based on the perception that dealing with “domestics” is not real police work, the common practice of categorising domestic violence under the broad heading of “domestic disturbances” conceals the fact that violence has occurred and trivialises the offence.³⁵ Cynicism towards domestic disputes also provides the police with a rationale for ignoring domestic violence calls until actual physical violence is imminent or has already occurred.³⁶ When demand for police assistance is high, dispatchers often adhere to the policy of “screening out” domestic violence calls, especially when it appears as though excessive violence is unlikely. Similarly, police operate under an unofficial “stitch” policy where officers are unlikely to take action unless urgent medical attention is required.³⁷

Despite the fact that most officers formally accept intervention in domestic violence cases as part of police duties, their privately-held attitudes reflect feelings of reluctance, frustration, ambiguity and disdain for “service work”.³⁸ Officers generally regard domestic violence cases as “rubbish

²⁷ See note 7, at p179.

²⁸ Buzawa, Eve S. and Carl G. Buzawa. *Domestic Violence: The Criminal Justice Response*, London, Sage Publications, 1990 at p10.

²⁹ Smith, Lorna J. F., *Domestic Violence: An Overview of the Literature*. A Home Office Research and Planning Unit Report, London: Her Majesty's Stationery Office, 1989 at p39.

³⁰ Hester, Marianne, Liz Kelly, and Jill Radford (eds), *Women, Violence and Male Power: Feminist Activism, Research and Practice*, Buckingham, Open University Press, 1996 at p131.

³¹ See note 23, at p11.

³² See note 7, at p207.

³³ Grace, Sharon, *Policing Domestic Violence in the 1990s*, London, Home Office Research and Planning Unit, 1995 at p48.

³⁴ See note 24, at p45.

³⁵ Kingston, Paul and Bridget Penhale (eds), *Family Violence and the Caring Professions*, London: Macmillan Press Ltd., 1995 at p118.

³⁶ Davies, Miranda(ed), *Women and Violence*, London, Zed Books, 1994 at p244.

³⁷ See note 24, at p45.

³⁸ See note 19, at p100.

calls" and believe they should not be involved in what is essentially a "waste of time". Furthermore, domestic violence is often "down-crime", as the criminal courts are considered inappropriate locations for resolution of essentially "private" matters. These perceptions stem from the fact that wife abuse is deemed a social, rather than criminal problem.³⁹

Contrary to police claims that they are governed by the rule of law, they are, more often than not, governed by popular morality, which is saturated by particular views regarding gender and constructs of moral "blameworthiness". In addition to formal departmental policies and training, individual officers' attitudes towards domestic violence incidents are influenced by personal views as to the "appropriate" form of marital relationships and indeed, of women and what roles women should hold in society.⁴⁰ In the same way as police officers subscribe to stereotypes about "real" crime and "real criminals", conventional police wisdom similarly accommodates its stereotypes of real and legitimate, or false and illegitimate victims. Assaults or threats of assault seem to invoke sympathy from the police when the victim is thought to be weak or defenceless, but not if she is thought to be strong or not entirely blameless.⁴¹ If there is evidence of bad housekeeping or if the children are not being well looked after, these factors have negative effects on the officers' perception of the victim, who is thus seen as having failed in her wifely responsibilities.⁴²

Moreover, under the prevailing cultural assumption that nagging provokes violence, officers' reluctance to arrest can also be attributed to the belief that men's attacks are sometimes justified by their wives' provocations.⁴³

The application of the law thus becomes selective and inconsistent, depending on the predilections of individual police officers and judicial organizations.⁴⁴

Generally speaking, these assumptions are sustained and perpetuated in wider social attitudes, police and legal culture, attributing blame to some victims whilst exonerating others. Individual officers' analyses of the seriousness, culpability, motivation and intent vary in accordance with the prevailing conceptions of likely suspects and credible victims.

Consequently, any protection offered is conditional upon women meeting police notions of "deservedness" and the circumstances of the attack meeting their definition of "crime".⁴⁵ When police dichotomise incidents into "good" or "bad" cases, based not on the legal features of the case but in accordance with the character of the complainant, men are frequently exonerated and women blamed because moral rather than legal perspectives intervene.⁴⁶

By and large, one of the main problems with the criminal justice system is the extent and pervasiveness of sexist attitudes that influence the exercise of police discretion to investigate, record and prosecute. Patriarchal attitudes go unchallenged, and are not only perpetuated by individual male perceptions, but by official institutions themselves, through informal rules and the formalised structure of internal procedures and regulations.⁴⁷ Generally speaking, the police force as an organisation, is seen as a bastion of male authority and male interest, and it is precisely this profile of male dominance that determines, to a large extent, what is policed and who is protected.⁴⁸

The rationale for the lack of effective police action lies in the widespread belief that domestic violence is almost an exclusively "private family affair". Under the perception that "a man's home is his castle", and as the integrity and solidarity of the family unit is seen as paramount, police are extremely hesitant to interfere with what goes on behind closed doors. Many officers hold that state

³⁹ See note 30, at p118.

⁴⁰ See note 24, at p46.

⁴¹ See note 19, at p94.

⁴² See note 24, at p46.

⁴³ Hanmer, Jalna, and Mary Maynard (eds), *Women, Violence and Social Control*, Hampshire, Macmillan, 1991 at p158.

⁴⁴ See note 19, at p92.

⁴⁵ See note 38, at p98.

⁴⁶ See note 19, at p94.

⁴⁷ See note 40, at p98.

⁴⁸ See note 19, at p31.

intervention would constitute an intrusion into a private relationship, and an erosion of individual liberties.⁴⁹

In addition to the fact that very few officers receive sufficient training in the policing of domestic violence, younger officers frequently feel unable to relate to the circumstances in which domestic violence occur, and find it difficult to tell people, often many years their senior, how to “run their lives”.⁵⁰

Due to the importance accorded to the family, officers tend to display a preference for reconciliation rather than prosecution, whereby intervention is seen as fitting only when designed to help families stay intact. Although most officers are aware that arrest should be a priority in abuse cases, the majority put it below considerations including children’s safety or the reconciliation of the family unit.⁵¹

Generally, police see their role in domestic violence cases as mediators and peacekeepers, rather than enforcers of the law. Under this premise, the common police response is intervention.⁵²

Another significant reason for the reluctance of police to get involved in domestic violence cases is the widespread belief that the majority of victims will eventually decline to prosecute or withdraw their allegations after proceedings have been instigated.⁵³ Police consider this a waste of the department’s time, whilst adding to their workload without any tangible benefits for anyone. Little action is taken aside from attempting to defuse the volatile situation by reasoning with both parties, threatening the suspect with future arrest, or removing one of the parties from the scene. Police often encourage a “cooling off” period for the husband and wife to “think things over” in the belief that this will allow them to make an unemotional decision. In reality however, this may have an adverse effect on the victim who may interpret it as a lack of police support, or place the woman in greater danger.⁵⁴

Conclusion

All in all, throughout history, the concepts of tradition and culture have often served to justify oppression, exploitation and cruelty against women. In 1998, during the debate over changing Chinese Customary Law in the New Territories, traditional culture and custom were presented as something fixed and unchangeable, and were used in an attempt to undermine the general principles of equality.

Ultimately, Customary Law did not survive because its oppressive customs against women offended the principle of formal sexual equality that has been largely absorbed into modern Hong Kong society. This is not to deny the basic patriarchal nature of Hong Kong society, but to underscore the fact that in this instance, laws that were blatantly detrimental to women were unacceptable and could not be justified under the grounds of culture.⁵⁵

Although appeals to “tradition” no longer carry the same force they once had, such appeals can never be totally eradicated. Despite the growing movement to identify and challenge the oppression of women, patriarchy continues to permeate Hong Kong society, and can be found in numerous societal institutions. As such, society must make a conscious effort to evaluate these appeals in terms of their basic justice, overall benefits and detrimental impact.⁵⁶

In spite of tremendous improvements in the status of women world-wide, and growing awareness of the problem of wife abuse, traditional Chinese culture has continued to have a negative impact

⁴⁹ Martin, Del, *Battered Wives*, San Francisco, Glide Publications, 1976.

Pryke, Julie and Martin Thomas, *Domestic Violence and Social Work*, Aldershot, Ashgate Publishing Limited, 1998 at 87.

⁵⁰ Grace, Sharon, *Policing Domestic Violence in the 1990s*, London: Home Office Research and Planning Unit, 1995 at 48.

⁵¹ See above, note 45 at p88.

⁵² Thorne Finch, Ron, *Ending the Silence: The Origins and Treatment of Male Violence against Women*, Toronto, University of Toronto Press, 1992 at p11.

⁵³ See note 38, at 167.

⁵⁴ See note 24 at p57.

⁵⁵ Samuels, Harriet, ‘Hong Kong on Women, Asian Values and the Law’ (1999) 21(3) *Human Rights Quarterly* 707 at 718.

⁵⁶ See note 4, at p207.

on the perception of women in contemporary Hong Kong society. Historically ingrained notions of gender hierarchy and male dominance that have to a certain extent, normalised the inferior position of women and the existence of wife abuse have been perpetuated through deeply entrenched cultural beliefs, social institutions and most detrimentally, within the minds of the women themselves. The true extent of domestic violence remains largely unknown, and has been described as the biggest blind spot in official statistics.⁵⁷

By its intrinsic nature, domestic violence is an elusive research topic - it takes place behind closed doors, is concealed from the public eye. It is often unknown to anyone outside the immediate family. Furthermore, it is not solely the victims and aggressors who wish to keep domestic violence "in the family". The extent of wife abuse remains obscure because of society's perception of domestic violence as a private, family affair and therefore something not to be interfered with by the public sector.

⁵⁷ See note 2, at p11.

“As a woman I want no country”: Citizenship, Nationality and International law¹



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This year is the first year since the inception of this memorial lecture, that we no longer have a woman on the High Court of Australia. Moreover, those of you who attended the inaugural Dame Roma lecture in 2000 will remember this quote Hilary Charlesworth shared, of Dame Roma's views on discrimination. Dame Roma said:

"I always thought that if you quietly infiltrated the system then gradually women would just be there and discrimination would go away. It became clear to me that this quiet method ... was not going to be very effective. You can't just let things go along. You've got to do it by affirmative action". She concluded "When people go on against affirmative action it usually takes the wind out of their sails when I say "I might have thought that fifteen years ago, but I've moved on"².

The Australian High Court hasn't moved on, in fact, it has moved backwards regarding women. It is truly an injustice to the Australian public, and those many women eminently qualified to appointment to the High Court of Australia, that there is no female High Court Justice.

Dame Roma's views need to be preached as far as possible in not letting things just go along – and the Victorian Women Lawyers Association and the Australian Women Lawyers Association have committed themselves to the spirit of Dame Roma in many ways, including the holding of this event on an annual basis.

In stark contrast to the Australian High Court, the newly created International Criminal Court in its ninth round of voting on 7 February 2003 elected its 7th woman judge: Anita Usacka, from Latvia. One only has to look to the Rome Statute to understand how seven women judges out of the 18 positions have so far been elected. In the election process, a procedure was used to meet minimum requirements for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. Representatives were required to vote for at least three candidates from the Group of African States, two candidates from the Group of Asian States, two candidates from the Group of Eastern European States, three candidates from the Group of Latin American and Caribbean States; and three candidates from the Group of Western European and Other States. Representatives were also required to vote for at least six male and at least six female candidates. A system that takes into account geographic regions and gender would certainly improve the composition of the current Australian High Court and this is something certainly worth moving on.

The international legal system is taking on board gender issues in the practice and substantive content of law and it is to the international framework that I will now turn. As many of you know, my primary research interest over the years has been in constitutional law, administrative law and more recently citizenship law. Over the past 6 months in Washington DC I had the opportunity to develop my thinking on citizenship in the international law framework. Having not taught international law myself or even formally studied it, this has been a new area of research for me!

¹ This article is extracted from Kim Rubenstein's *Dame Roma Mitchell Memorial Lecture* given at the Law Institute of Victoria, 6 March 2003.

² Susan Mitchell, *Matriarchs* (1987) pp36, 43 as cited in Hilary Charlesworth's *Inaugural Dame Roma Mitchell Lecture*, 8 June 2000.

When thinking about citizenship issues in the international framework, the discussion is technically about nationality – the country one is formally said to belong. ‘Citizenship’ – one’s legal connection to the state and ‘Nationality’ are terms that are often used interchangeably to describe the relationship between the individual and the State. As we all know, international law is primarily about States. Traditionally, international law has not been interested in the individual. For instance, individuals do not have standing before the International Court of Justice – States do. So if an individual seeks to raise a matter before the Court, he or she requires a State to do so on his or her behalf. This is just one instance where the legal status of nationality is fundamentally important. The International Law Association’s Committee on Feminism, has stated that nationality is in fact one of the most important rights a state can assign to an individual³. This is because there are many areas of international law where an individual’s legal status is defined by their nationality.

My work, entitled ‘Shifting membership – Rethinking Nationality in International law’ is seeking to move beyond nationality when identifying the legal status of individuals in the resolution of disputes. Nationality, in my view, is far too confining and conceptually imprisons individuals in their States cut off, often, from their race, religion, gender, employment, and the many other defining characteristics that far better represent human complexity and experience. Human rights law represents some steps in the direction away from the narrowing notion of nationality, but there are many other areas of international law that could be encouraged in that direction also.

Historically, in domestic law and international law, women have been discriminated against when it comes to nationality. This discrimination is reflected in Virginia Woolf’s often quoted statement from her book *The Three Guineas*:

“As a woman, I have no country. As a woman I want no country. As a woman my country is the whole world”⁴.

To give you a flavour of the work I have been doing, I will look at each of these statements in light of the domestic Australian experience and international law.

“As a woman, I have no country”

The first reference to having no country reflects the legal position of those women who had lost their citizenship by virtue of marriage to a non-national. Virginia Woolf experienced this in her marriage and this was the historical position in many countries, including Australia.

Section 18 of *The Nationality Act* (Cth) 1920 provided for the loss of British subject status for women who married aliens. This was then amended in 1936 and again in 1946 before the *Australian Citizenship Act* 1948 (Cth) was enacted. The 1936 amendment only entitled women to regain their British subject status, having lost it on their marriage to an alien, if their husband naturalised and the women then had the opportunity to make a declaration of naturalisation once her husband was naturalised⁵. The more progressive change came with the 1946 *Amendment Act*. This reinstated British subject status to women who had lost their British subject status by virtue of marriage to an alien before the commencement of the section⁶. This was also provided for in the *Australian Citizenship Act* 1948 (Cth).

The current international position regarding nationality has certainly improved but it is by no means perfect.

Article 9 of the *Convention on the Elimination of All Forms of Discrimination Against Women* recognizes that women should have equal rights with men to change, acquire or retain their

³ International Law Association, Committee on Feminism and International Law, Final Report on Women’s Equality and Nationality in International Law, (2000) page 10. See <http://www.ila-hq.org/pdf/Feminism.pdf>

⁴ Woolf V, *Three Guineas*, Hogarth Press: London, 1938.

⁵ See s 18(5) of the *Nationality Act* 1920 (Cth) as amended.

⁶ Parry cites the commencement as 7 November 1946.

nationality. Article 9 also recognizes that gender discrimination in nationality and citizenship should not be visited upon children. The fact that a significant number of states have made reservations to Article 9, however, attests to the work that remains to be done if women are to achieve equality in this context⁷.

“As a woman I want no country”

This second part of Woolf's quote reflects her rejection of nationalism, yet her writing shows her immediate ambivalence with the statement because of her sense of connection to England⁸. Many people empathise with Woolf's statement as they are unsympathetic to nationalism, particularly when it becomes the motivator for war. At a minimum, feminist writers highlight the multiple stories of nationalism depending on gender, class, race and ethnicity⁹.

Helen Durham's Dame Roma Mitchell presentation last year looked at international humanitarian law. My current research on the role of nationality in international law also looks at humanitarian law and the way it has developed around the concept of nationality, and I argue that a focus on the nation in international armed conflict is outdated, and that nationality should not be the focus for the development of humanitarian principles.

The situation in the former Yugoslavia is one context in which I develop that research, and the place of women in the peace framework in the former Yugoslavia has been the subject of an excellent project by Christine Chinkin and Kate Paradine in their article 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords'¹⁰. They examine the gendered meanings of the concepts of democracy, citizenship and human rights in the context of the General Framework Agreement for Peace in Bosnia and Herzegovina negotiated in 1995. They comment in their section looking at Human Rights and the GFA:

“Women in Bosnia and Herzegovina are trapped in a concept of citizenship that is defined along nationalist lines, demarcated by legally drawn borders and enforced by the international community in a way that leaves little room for negotiation. The collusion of nationalism with religious affiliation that was furthered by war means that women's experience of citizenship is also constrained by religious stipulations. The West simply failed to investigate the reality of nationalism as inevitably sexist and antithetical to women's experience of choice. The internal borders are legally constructed as porous, in that freedom of movements of persons, goods and capital is guaranteed throughout Bosnia and Herzegovina. The GFA also recognizes the possibility of ethnic association across external borders but it does not explicitly mention other forms of external association. However, the free movement of persons across the Entities is an illusion when other identities – family, gender, neighbors – have been destroyed by the violence perceived primarily in ethnic terms”¹¹.

The inherent nationalism in 'nationality' as a legal concept does not sit well with women's experience of identity and membership. It is that concept that is well expressed in Woolf's statement, “as a woman I want no country”. In my view there is great potential in international law to move beyond nationalism as the defining concept and to look for more fundamental links between individuals and communities when resolving legal disputes.

“As a woman my country is the whole world”

⁷ See International Law Association, Committee on Feminism and International Law, Final Report on Women's Equality and Nationality in International Law 2000, p8. See <http://www.ila-hq.org/pdf/Feminism.pdf>

⁸ Hall C, 'Gender, Nations and Nationalisms' in People, Nation and State: the meaning of ethnicity and nationalism edited by Mortimer E and Fine R.I.B. Tauris: London, 1999, at p45.

⁹ This is explained in the context of the former Yugoslavia in: Chinkin C and Paradine K, 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords'. (2001) 26(1) *The Yale Journal of International Law* 103 178, as discussed further below.

¹⁰ See note 9.

¹¹ See note 9.

This aspect of Virginia Woolf's quote speaks to a cosmopolitan world where an individual's nationality is less significant than her humanity. Cosmopolitanism is a contested term, varying from the universal citizen to citizens who have a "wide variety of affiliations"¹² ranging from the local to the global¹³. There is a cosmopolitan view of international law that sees people enjoying multiple memberships, and individuals being citizens of their immediate political communities as well as wider regional and global networks¹⁴.

Feminist scholarship has long recognized that individuals have multiple and often shifting memberships. My current work, in rethinking the centrality of nationality in international law, involves a more nuanced and holistic approach to international law.

There will be instances where aspects of the territorial nation-state will still be relevant and, in others, ethnicity or gender may be relevant. In other contexts still, memberships of community groups, such as Greenpeace, or a particular religious group is significant. This research advocates a contextual approach in determining membership in international law.

It is this sort of approach that is reflected in the composition of the new International Criminal Court – it aims to draw upon a range of experience relevant to the institution – and nationality is not the only significant factor; legal systems and gender issues have also been deemed relevant to that framework.

Conclusion

Australia is a proud member of the international legal system and as women lawyers we have a responsibility to our fellow Australians and fellow humans to work towards a strong international legal system. This means we need to work on both the domestic and international fronts.

As Angela King, Assistant Secretary General and Special Adviser on Gender Issues and Advancement of Women in the UN said (before the elections began to the ICC):

"... we must emphasize that the choice of judges for the ICC is up to Member States, first to nominate, then to elect. This means, of course, that they should also appoint women judges at the national level. They need encouragement and pressure from groups such as the Women's Caucus for Gender Justice, national NGOs, and groups of professional lawyers and jurists"¹⁵.

May Dame Roma's fine example inspire us all to keep up that fight, of ensuring that woman's voices are heard at all levels of public life, so that the entire community benefits from our collective and diverse experiences. In international law it means opening up the confining dialogue of nationalism to encompass the multiplicity of voices that make up the human experience, the deeply nuanced quality of women's voices being a vital ingredient. Locally, it means swelling the chorus of the many and diverse women's voices, so as to make it unthinkable for a government of laws to be administered solely by men – whether as Governor-General, Prime Minister, or as High Court Justice.

¹² See Dannereuther R and Hutchings K (eds) *Cosmopolitan Citizenship*, St. Martin's Press: New York, 1999. See also: Hutchings K, 'Political Theory and Cosmopolitan Citizenship', in Hutchings K (ed) *Cosmopolitan Theory* St. Martin's Press: New York, 1999.

¹³ See Berman P, 'The Globalization of Jurisdiction' publication forthcoming in 2003.

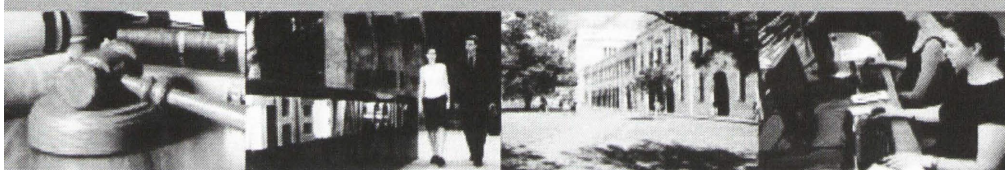
¹⁴ David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8(1) *Legal Theory* at p33.

¹⁵ Opening remarks by Angela E.V. King Assistant Secretary General and Special Adviser on Gender Issues and Advancement of Women at the Panel Discussion on "Fair Representation: the ICC Elections and Women" United Nations Church Centre 29 January 2003, at <http://www.un.org/womenwatch/feature/icc/st29jan2003.html>



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2004

Women's Political Participation and Political Development (with an emphasis on Islamic Societies)¹



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Women constitute half of the population in different societies; therefore their important role in the society should be taken into consideration. One of the important roles of women in various societies is the role they play in political development. Political participation of both the men and women in a society can provide an environment for women's political development. Preparing this environment requires introducing democratic processes in the society including: political and social education of women, economic power for women, and making some serious changes to legal codes.

A woman's role in Islamic societies suffers from some confusion. On the one hand women must maintain Islamic traditions and values, and on the other hand they are faced with the infiltration of western criterion for womanhood. There are several verses in the Koran that refer to the social and political role of women in the society². When the Koran talks about mutual consultation³, it does not exclude women from the ideal way in which people should conduct their affairs. Modern representative governments apply this principle of consultation in State affairs.

Islamic history has also several examples of women's political participation in different areas. Women's political participation should take a variety of forms. Voting in the local and national elections is just one form of participation. Holding important positions, such as legislator, lawyer, minister, or premier, should be available forms of political participation for women. We should not limit women's participation simply to voting, as in some countries, because women are entitled to hold a variety social, political and economic posts. We should consider women's competence for various kinds of incumbency and encourage participation on the basis of merit.

In this paper we first discuss the forming of Civil Society in Islamic societies, thereby promoting women's political participation. Then the necessity of women's participation in decision-making processes is examined. Thirdly, the role of cultural issues in gender discrimination, and women's rights in Islam are discussed. Finally, some guidelines for increasing women's political participation in Islamic societies are presented.

Civil Society and Women

When speaking about civil society and its institutions in Islamic societies, we should consider the fact that people require political development, along with social and economic development, to remove gender discriminations and provide equal rights for men and women.

¹ This paper was presented at the *(Other) Feminisms Conference* at The University of Queensland, July 12 2003.

² Such as Sura 9:71

³ Sura 42:38

Let us first explain the concept of civil society. Obviously, scholars do not adhere to one standard definition of the concept, but by looking at different definitions we can describe the characteristics of civil society as follows:

- Civil Society is more characterized by horizontal and equal, as opposed to hierarchical and strict, relationships that are more democratic in nature.
- The language of Civil Society leans towards needs, hopes, and entreaties, instead of the language of order and rules.
- The logic of 'survival of the fittest', which produces a society of roughness, toughness and cruelty, is excluded from Civil Society. Civil Society instead requires the logic of dialogue; compromise, discussion, sharing opinions, and decisions by group councils.
- The strengths of Civil Society are politeness, flexibility and diplomacy, rather than bravery and rigidity.

After this explanation, we should not need to explain that women are present completely in a Civil Society. As half of the population, and half of the available social, intellectual, artistic, spiritual and cultural life in any nation, women play an important role in Civil Society. Women have an energy that is, unfortunately, still raw in general and in our countries, in particular. Women's energies have been restricted in the Islamic world, so that only a small part of their abilities, creativity and potential, has been expressed. Therefore, women's participation is still needed in creating a full Civil Society. At the same time, women have made great progress in some societies, and have taken their place in building even the military society in some countries⁴.

In exploring the notion of Civil Society it is important to consider its distinction from the Political Society - the State and its political authorities. The term Civil Society points here to anything that is not bound to the State, or the authority, in any existing society. The State, in its simplest meaning, is the centre of power and authority. Its institutions, tools and personages are the means by which the State exercises its power and authority, regardless of the form of control or government. The life of Civil Society can be considered in isolation from the State and its institutions, activities and functions. Civil Society can be seen as a live entity, that is not only separate, but actively faces and opposes, exerts pressure on, and supervises, the State at all times.

The characteristics of political society are those of strength and power in decision-making, and are different to the relationships that govern Civil Society. Civil Society involves relationships of acceptance, tolerance, mutual benefits, contracts, understanding, disagreement, problems, rights and freedoms, responsibility and duties, and all of that we know of society through the practical experiences in our daily lives. In this sense, Civil Society is dynamic and changing.

After considering this comparison of Political Society and Civil Society, it does not take much to understand that the role of women in Political Societies is, at best, still weak, and at worst, completely absent. In other words, Muslim women now must open larger sectors of Civil Society for their power, authority, influence, and activities, to grow without any further hindrance or withdrawal. Thus, they may work their way into the Political Society itself, infiltrate it, and open the relationships of power, state, governance and decision-making. It is worth mentioning here that states like India, Pakistan, Bangladesh, Sri Lanka, Turkey, Britain and Ireland have had the experience of women leading the political life of the nation, without those states losing any of their strengths, reputation, resources or independence.

The third matter that comes to mind when explaining the meaning of Civil Society in Islamic countries is the traditional society from which Civil Society was born. I am not saying anything new when I emphasise that new societies are still being created and formed in Islamic states. Islamic states are widely different in the degree of progress in building contemporary Civil Society that is mature and comprehensive. Hence, we find the characteristics and relationships controlling traditional societies to be: family relationships and relatives; tribes; denominations; and kinship.

⁴ Galal Al Azm S 'Women and Civil Society' (2000) *Civil Society: Democratisation in the Middle East*, website: <http://www.ibnkhaldun.org/newsletter>

In contrast, in Civil Society we find that power relationships and issues of citizenship dominate. These relationships of citizenship mean that the issue is that equality is needed for all, men and women, in all their rights and duties⁵. Given that the relationships of traditional society are the roots of Civil Society, Muslim women should have a real interest in nurturing relationships of equality and cultivating them, in private and in public spheres, especially if they involve creating better circumstances for women to fulfil their needs, abilities and ambitions as human beings.

In other words, the future for Muslim women lies in the development of Civil Society and its progress towards a dynamic Islamic Civil Society, that is alive and active, and that is open to the values of productivity, skills, creativity, abilities, and allows success and progress for everyone. I say this because the old traditional society does not in fact allow women to have any active, leading, or prominent roles in its economic, political, social, military, intellectual, or cultural arenas. Experience has shown that it is only contemporary Civil Society that is capable of providing true opportunities for women to achieve their identities, probe their inner powers and carry true responsibility, which leads to true independence.

Civil Society considers women, as a matter of principle at least, a citizen like all others, therefore women must find a solid foundation in Civil Society from which they may move towards their liberation, away from the continuous guardianship characterising traditional societies. Women must also find a way to break the traditional, and enforced, division of labour to find a new realm based on civil, humane and refined considerations, which focuses on women's abilities, choices, achievements and scientific or academic input.

Let us also note that in a traditional society, social relationships take on relations of collectivism, accumulation and hierarchy that are considered natural. There are divisions based on: the free and the slave, the man and the woman, the general and the private, and the Muslim and the non-Muslim - meaning the state religion or the religion of the majority on one hand, and all other religions on the other. These four divisions control the old traditional society and are evident in the differences in rights and benefits enjoyed by individuals in the society. Therefore, the rights and duties, responsibilities and employment of any person, or their lack thereof, are based on the person's belonging either to: the public or private realm; the free or the enslaved in society; the male or the female sex; Islam or other religions. In opposition to all these traditional divisions we find that relationships in Civil Societies are based on the citizenship principle, and are therefore emphasise participation, obligations, rights, verticality and equality. That is why the model of Civil Society obliterates the divisions of traditional Islamic society⁶. Traditional divisions must end in order to form a true Civil Society.

In Civil Society there is something called public opinion, in place of the national unanimity that is often adopted by traditional societies. Citizenship in Civil Society replaces the first identity in the traditional societies, such as the religious or the tribal identity. The ideas of human rights, citizenship and the citizen, replace the rights of the master over the slave, or the nobility against the people. At the same time, terms such as 'the people', 'free will' and 'national sovereignty', which redefine the concept of nation and discard its older traditional definitions, become prominent. Surpassing outdated relationships to create more refined ones is the key that opens the door of progress to women, so that finally everything depends on women's will to struggle to achieve their desired goals. It is so because liberation, freedom, equality, and self-governance are taken, not freely given.

When a Civil Society in countries like ours is still being formed and developed, one finds oneself, and women in particular, involved in a struggle, a 'push-and-pull', between contradictory forces. Some of these forces pull women back to the past and try to force them into the service of the older traditional society. Other forces push them towards a contemporary society that is progressing and developing.

⁵ Galal Al Azm S 'Women and Civil Society' (2000) Civil Society: *Democratisation in the Middle East*, website: <http://www.ibnkhaldun.org/newsletter>

⁶ Kar M, *Women's Participation in Politics: Obstacles and Possibilities*, Women's Studies Press, Tehran Iran, 2001.

It is a force that tries to gather all of woman's powers and strengths to contribute to society's institutions and values, and to increase the gains and achievements women have fought for themselves and for a truly Civil Society.

While a Civil Society in many countries, including Islamic societies, is in its preliminary stages of formation, women are still forced into, and limited by their traditional duties. Also, most of the men in such societies do not really believe women should enter into political aspects of life, which is a major obstacle for women's political participation. However, generally speaking, Civil Society can revive women's political rights, helping them to look beyond family life and establish feminist movements, to enter parliaments, and to play a real role in all different spheres⁷.

Necessity of Women's Participation in the Process of Decision-making and Leadership

The platform of the *Fourth World Conference on Women* in Beijing 1995 strongly requested that governments around the world guarantee women's full participation in power structures and decision-making, as well as empower women to fulfil these goals⁸. Two kinds of argument may be advanced in support of this agenda, a human rights argument and a more pragmatic, efficiency-based argument. It should be noted that there is considerable overlap between the two types of argument.

In democratic countries, rights-based arguments are difficult to deny (although the Beijing Platform noted that even in democratic countries women's participation in decision-making is needed in order to "strengthen democracy and promote its regular functioning"⁹). It is a basic principle of democracy that adult citizens from all walks of life should have equal access to participation in decision-making and leadership roles. Ideally, representatives from groups with specific interests and perspectives should participate directly in decision-making processes and leadership roles to ensure that both the agenda of issues to be considered, and the decisions made, incorporate their views. It is untenable that any specific interest group, for example a particular ethnic or religious group, could be systematically excluded from direct participation in decision-making on the grounds that others can speak 'for' them. Since women and men play different roles in society and therefore have different needs, interests and priorities, it follows that women cannot be adequately represented in decision-making processes conducted exclusively by men.

The pragmatic, efficiency-based argument for women's participation in decision-making and leadership also starts from the recognition that women and men have different needs, interests and priorities arising from their specific roles and situations. Even when men are aware of, and seek to represent this difference, they lack the necessary information, in the same way that mainstream decision-makers are unable to capture the perspectives and needs of minority cultures. This failure to incorporate women's concerns in decision-making represents a major loss for society as a whole. Women's needs, interests and concerns are not just those of women themselves, but also reflect their roles as mothers, wives and caregivers. Therefore, incorporating women's perspectives in decision-making should result in better decisions that more adequately reflect the needs and interests of children and families - including male members of families¹⁰.

Finally, the Beijing Platform recognises that women's participation in decision-making and political life is vital for the advancement of women. Women's position of inequality with men exists partly because their needs and concerns are not considered in current decision-making: their views do not reach the mainstream agenda. Much of the discussion at the NGO Forum focussed on the need for women to be involved in 'setting the agenda'. The advancement of women demands that women participate actively in setting the agenda and determining issues on which decisions are to be made.

⁷ Kar M, *Women's Participation in Politics: Obstacles and Possibilities*, Women's Studies Press, Tehran Iran, 2001.

⁸ 'Platform for Action' (1995) *Fourth World Conference on Women*, website: <http://www.un.org/womenwatch/confer/>

⁹ See note 8.

¹⁰ Corner L. 'Women's Participation in Decision Making and Leadership: A Global Perspective' (2002) *UNIFEM East and South East Asia*, website: <http://www.unifem-eseasia.org/TechPapers/wleaders.html>

An Australian woman politician recently pointed out that it was only when women entered the Australian parliament in significant numbers that issues such as childcare, violence against women, and the value of unpaid labour were even considered by policy makers. As a result of these issues entering the agenda, Australia now promotes family-friendly employment policies, including work-based childcare. Australia also recently experienced a nationally representative survey of violence against women. An initiative within Australia to collect time allocation data and to use that data to try to incorporate the value of unpaid work in national policy-making was also recently introduced in Australia.

Why are women marginalised in leadership?

Women are marginalised in decision-making and leadership by a variety of processes that begin in infancy. In most societies, women lack experience of decision-making and leadership in the public arena because girls, in contrast to boys, are socialised to play passive roles and given little opportunity to make decisions or develop leadership skills outside the family context. In most traditional societies girls are kept largely within the confines of the household and family where they are protected and taught to accept the decisions that others – parents, teachers, brothers – make on their behalf. As a result of this lack of experience in a public context, girls tend to the lack self-confidence and skills needed to function effectively in positions of formal leadership.

An added handicap for many is their lack of capacity, due to discrimination in access to education and training: in most countries, women have higher levels of illiteracy and fewer years of schooling than men¹¹. Even when women succeed in gaining education and enter the decision-making mainstream, they are often marginalised by institutional settings that reflect men's needs and situations and ignore women's differing needs and experience. Modern work patterns and practices are designed for men who have a supportive wife to take care of their essential domestic needs and family responsibilities at home, hence the saying that 'every career-man needs a good wife', because institutions are designed to fit the needs and expectations of men. The hours and inflexibility of the working day, overtime, the location of work, and commuting times make it difficult for working women to meet the dual expectations of their family and work roles, giving rise to role conflict.

Most men do not face such role conflict because society regards their family and personal roles as discretionary, meaning that they are subsidiary to, and have to be fitted in with, the primary work role. Thus, although men play important roles as husbands and fathers, these generally do not interfere with their primary work role as family breadwinner. For example, if a man's wife or child falls ill or is otherwise in need of his assistance, he is not expected (nor, in most cases, permitted) to leave his work in order to attend to them. Nor will he be considered a 'bad' father or husband as a consequence of his actions. By contrast, women's primary roles, as wives and mothers, requires attention 24-hours-a-day and, for working women, must be carried out simultaneously with the work role. Even when a working woman has domestic assistance, she is still held responsible for managing her family. If her child or husband is ill, she is expected (and grudgingly permitted) to interrupt her work in order to ensure that their needs are met. If she fails to do so, society tends to judge her as a 'bad' wife or mother. In the work place, women are often judged by two quite different and conflicting standards, as women, and as workers, placing them in a classic "no-win" situation. For example, good employees at the management level are usually expected to be decisive, articulate, assertive and clear about their goals and objectives. However in most cultures women, as women, are expected to be submissive, passive and demure. Thus a woman who displays the characteristics of a good manager may find that her supervisors are not appreciative because they are actually, and probably unconsciously judging, her as a woman, as well as judging a worker.

This analysis of the reasons for women's exclusion from decision-making and leadership suggests a number of strategies to work toward equal access for women to decision-making and leadership.

¹ See note 10.

The Beijing *Platform for Action* also identifies several specific issues that need to be addressed, including socialisation and negative stereotyping, which have kept decision-making the domain of men. The *Platform* calls on actors to: create a gender balance in government and administration; integrate women into political parties; promote women's participation in public life; promote gender balance within the UN system; work toward equality between women and men in the private sector; establish equal access for women to training; increase women's capacity to participate in decision-making and leadership; and increase women's participation in the electoral process and political activities¹².

At the personal level, perhaps the first thing that needs to be done is to change the way we rear our children. We must provide our daughters with opportunities to develop their decision-making and leadership capacities, and we must train our sons to respect their sisters as equals. In particular, we must ensure that daughters have equal access to the same quantity, quality and type of education as sons. Since this is a long-term objective, we must also take immediate steps to place more women in decision-making and leadership positions and, at the same time, provide them with the necessary catch-up training and experience, in order to be effective.

However, as the experience of capable women decision-makers has demonstrated, these measures alone will not be sufficient. We also need to address the institutional context of decision-making and leadership to create more 'women-friendly', and 'family-friendly', institutions and organizational cultures. Some industrial countries have already begun slowly to move in this direction, reducing working hours, introducing flexible time and career structures for part-time workers (most of whom are women) and providing government-subsidised or work-based childcare, and maternity, parental leave and emergency leave for caregivers. We also need to ensure that there are women in senior positions able to act as role models and mentors for young women and to establish women's networks that can support women in the same way that conventional male-dominated networks support the career development and promotion of men.

An essential step toward the more equal participation of women in decision-making and leadership is awareness-raising for men. Institutional cultures that are unfriendly to women are not usually the result of deliberate policies but the consequence of institutions developed over time to meet the needs and situations of men, who have for so long dominated the public domain and who have different needs, priorities and concerns from women. Men need to become aware of the ways in which their assumptions, attitudes and behaviour are gendered to reflect their own situation, exclude women's perspectives, and thus obstruct women's equal participation. Women and men together must then negotiate a new institutional setting that provides space for both groups.

The Role of Cultural Issues in Gender Discrimination

Regarding the development process we need to consider women's issues because:

1. We cannot have long-term sustainable development if half the population of the world is kept out of the developmental process.
2. To achieve women's participation in the development process, it is necessary to consider the requirements of the prevailing culture.

It is important to note that women's status in society – socially, politically, legally, economically – has been fundamentally the same across history for a majority of the world's population. Except for surface differences in manner and style, the basic arrangements for division of labour and power between men and women have been the same across the world. A woman's rights over major decisions about her children's future, place of residence, marriage, inheritance, employment and the like have been severely curtailed in most of the world during most of human history.

¹² See note 10.

Until the turn of the century, when New Zealand became the first country to give women the right to vote, there was no place on earth where women shared equally in the political process with men. Nor did they have the same chance to train for a job, get a job, or once having gotten it, receive equal pay or equal opportunity to advance.

Some of us who have worked in the field of women's rights know how difficult it is to get the idea across that the whole concept of development and progress hinges on culture change and that culture change involves a change in the relations of women with each other and with other members of society. We have worked hard over the years to achieve a consensus, at least in theory, that unless women are admitted to an equal, participatory partnership in the affairs of domestic and international society we will not be able to achieve the goals of fairness, justice, and development that humanity seeks. This consensus, reflected in a number of international documents of rights, is encapsulated in the first paragraph of the *Mission Statement of the final Platform for Action* of the Fourth World Conference on Women held in Beijing in 1995. For fulfilment of this purpose we are faced with some values, beliefs, customs and cultures, of individuals and nations, which need to be changed because they are very old, inefficient and inequitable¹³.

Culture is often used as an effective tool, for those who wish to prevent change, for glorifying the past or justifying the existing order of things, both in the West and in the developing world. Change is an elemental feature of contemporary life, but change does not happen to everybody in the same way or with the same speed. All development therefore is uneven, varied, and consequently multi-cultural.

Let us take the idea of Muslim culture as an example. Some half-a-billion women in the Muslim world live in vastly different lands, climates, cultures, societies, economies, and politics, spread from the Pacific Rim to the coasts of the Atlantic. Cultural change is a common requirement for all of them. Cultural development must be a creative process. It must include the elements in our collective past, that give us our sense of identity, while at the same time excluding those aspects that inhibit our blossoming into free and whole human beings. It must allow us to move in history without losing control of history. It must allow us to retain our identity without imprisoning us in the confines of patriarchal historical structures. To achieve this we must maintain our roots as we transcend them, by achieving a synthesis and a synergy between the local and the global.

In many societies there are equity laws between men and women, but still we observe gender discriminations. Sometimes because of cultural social structure, equity law may not lead to the removal of discrimination. In other words equity law can take two forms: *de jure* and *de facto*. If we are going to realise women's political participation we will need *de jure* and *de facto* equity law simultaneously. It means that we require some more laws that secure women's rights and liberties, as well as some further changes in social and cultural structures¹⁴.

Study of Women's Rights in Islam

The fact is that Islam neither limits women to the private sphere, nor does it give men supremacy over public and private life. One notices that the Greek and Roman cultures that preceded Islamic civilization did not produce a single eminent woman philosopher or jurist. Likewise, until the 1700s, Europe failed to produce a single female social, political, or legal jurist. Islam did exactly the opposite in every respect. Islamic history is replete with examples of female professors who tutored famous male jurists. Yet the sad legacy of our time is that we have taken women back to the pre-Islamic era by excluding them from public exposure or involvement. A modern scholar, Muhammad al-Ghazali, once described this phenomenon as "the ascendancy of Bedouin *fiqh* (jurisprudence)". What he meant by this is that much of contemporary culture and the modern world, revolves around men, and everything is channelled to their service¹⁵.

¹³ Afkhami. M. 'A Vision of Culture in Gender' (2002).

¹⁴ Kar M, *Women's Participation in Politics: Obstacles and Possibilities*, Women's Studies Press, Tehran Iran, 2001.

¹⁵ Abou El FadikH. 'In Recognition of Women' (2002), http://www.crescentlife.com/thisthat/in_recognition_of_women.htm

In fact, in the beginning Islam was the most revolutionary liberalisation of women's rights the civilized world has ever seen. However, some Muslims became ignorant of this and now Muslim countries are the scenes of some of the worst abuses of women's rights. As the Latin proverb says, *corruptio optimi pessiam* – "When the best is corrupted, it becomes the worst". The Koran expresses the same theme in Sura 95:6: "We created man in the best pattern, and later reduced him to the lowest of the low"¹⁶.

You might have heard that Islam teaches that women are "inferior" and "unequal" to men. Women are described as weak or inferior and these evaluations have been used to claim that women are unsuitable for performing certain tasks, or for functioning in some ways in society. Specific functions and roles have been attributed to each sex; the function of woman is often confined to her reproductive ability. It is thought that her primary function is to be mother and wife and that she would be lacking in her Islamic duty if she in any way did not fulfil this role in accordance with how society defines it¹⁷.

Yet the fundamental principle of Islam is *Tauhid* – the unity of the human race under the sovereignty of the One and Only, Universal Divine Allah. Islam's message of peace affirms the equality of all human beings, and rejects all discrimination on the basis of race, class and gender. In Islam, woman, as a partner, is equal to man. Man is father, and woman is mother, and both have essential roles and equal rights and duties in different dimensions of life.

We read in the Koran that *taqwa* (God – consciousness) is the only distinguishing factor between human beings.

O humankind! We created you from a single (pair of a) male and a female, and made you into nations and tribes, that you may know each other (not that you may despise each other). Verily the most honoured of you in the sight Allah is the most righteous (or God – conscious) of you. And Allah has full knowledge and is well acquainted (with all things)¹⁸.

A woman is entitled to freedom of expression as much as man is. Her sound opinions are taken into consideration and cannot be disregarded just because she happens to belong to the female sex. It is reported in the Koran and in the historical record that women not only expressed their opinion freely but also argued and participated in serious discussions with the Prophet himself as well as with other Muslim leaders¹⁹. There were occasions when Muslim women expressed their views on legislative matters of public interest, and stood in opposition to the Caliphs, who accepted the sound arguments of these women.

Historical records show that women participated in the public life of the early Muslims, especially in times of emergencies. Women used to accompany the Muslim armies engaged in battles to nurse the wounded, prepare supplies, serve the warriors, and so on. They were not shut behind iron bars or considered worthless creatures and deprived of souls²⁰. The Koran also gives detailed historical accounts of the active role of women in early Islamic societies.

For example, when Makkah (Fath Makkah) was recaptured by the Muslims, many women came to give their allegiance to the prophet of Islam, and this was at a public assembly of both men and women. Women like Asma, who is also in the Koran, were active in the workforce. She shared the responsibility of supporting her family with her husband by working away from her home. Women were given the responsibility of running the affairs of the State. The Prophet appointed another woman – Shifa bint abd Allah – controller of the market of Madinah. Umar reappointed her when he became Caliph. The Prophet left it in the hands of his wife, Umm Salamah, to advise the Muslims to forgo the *haj* and instead to sign the treaty of Hudaibiyya²¹.

¹⁶ 'Women's Rights and Equality in Islam' (2002) *Sisterhood Is Global Institute*, website: <http://members.aol.com/yahyam/equality.html>

¹⁷ Shams S. 'Women's Role in Contemporary Society' (2002) *Islam for Today*, website: <http://www.islamfortoday.com>

¹⁸ Sura 49: 13

¹⁹ Koran 58:1 4; 60:10 12

²⁰ Abdul Ati H. 'The Status of Woman in Islam' (2002) *Islam in Focus*, website: <http://www.jannah.org/sisters/statuswomen.html>

²¹ Shams S. 'Women's Role in Contemporary Society' (2002) *Islam for Today*, website: <http://www.islamfortoday.com>

Islam has granted some rights for women that were unprecedented before Islam. Freedom of women based on pure Islam and without borrowing from western culture is called Islamic feminism. Followers of Islamic feminism believe that women do not achieve their rights, not because of Islam, but because elite men's interests are threatened. If women achieve their rights, men will have to forgo some of their interests.

Conclusion

Creating Civil Society is the first priority of Islamic society to increase women's political participation. Civil society and democratic institutions can secure political liberties for all citizens including women. Political systems should be bound to protect women's rights and liberties in order to remove various discriminations. Through political liberties, people can indiscriminately take part in government and play their role in power transactions. Women's participation should be considered legally and culturally. Merely improving legal codes, without also providing a suitable cultural environment, may not be conducive to real participation. While keeping traditional principles and values in the society is very important, women's political participation without cultural development is impossible. If women are not really able to participate in the social and political aspects of the society the problem will generally be a cultural one, and thus, the remedy should also be cultural.

In addition to cultural development, laws to allow for women's political participation are also necessary in Islamic societies. While the Islam of 14 centuries ago let women have vote through paying allegiance (*bay'ah*), many contemporary Islamic societies deny women this right. While women in western societies generally gained the right to vote after World War II, many Islamic societies did not let women, or in some cases men, to benefit from this right and as a result these societies were mired in political underdevelopment.

The Koran tells of a society, before Islam during the 'days of ignorance' when news was brought to a man of the birth of a female child, his face darkened and he was filled with inward grief. Then the prophet of Islam comes and loves his daughter Fatimah, fully respects her, and gives the right to women. This is a tale of a revolutionary development and it describes the dynamic nature of Islam.

Therefore, Islamic societies should consider this right, the right to vote, as one that is based in Islam and should let women as well as men participate in various areas and in different realms. Enhancement of women's political participation to enjoy political development depends upon:

1. Developing strategies that contribute to the growth of women's incumbency in a variety of fields.
2. Facilitating programmes and national laws that provide appropriate political frameworks for increasing women's participation.
3. Providing opportunities for women and their organizations to promote women's skills and participate in political decision-making.
4. Contributing to qualitative and quantitative promotion of women participants in political processes and considering them a political force.
5. Extending women's participation in political processes through educational workshops for voting, candidacy and filling political posts, election campaigning, and the like.

These efforts will be conducive to increasing women's political participation as voters, and as members of parliaments, in Islamic societies.

Human Rights in the Asia-Pacific Region: Assessing the Prospects for a Regional Human Rights Framework



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1. Introduction

In recent decades the East Asia-Pacific region has emerged as a new locus of power in the post-Cold War political order. While this immensely complex and diverse region has known some great economic successes, it is regrettably notorious for extreme poverty, political instability, and striking abuses of human rights. However, 'despite the popularity of codifying measures to protect human rights in the post-World War II era, nations throughout Asia have, thus far, declined to take a regional approach to human rights recognition and enforcement'¹. While the other main regions of the world - including Europe, Africa, the Middle East and the Americas - have established human rights regimes, the Asia-Pacific region remains conspicuously lacking in this regard. Why this absence, and what are the prospects for the creation of an Asian-Pacific human rights framework, comprising the full panoply of a multilateral organisation, convention and enforcement machinery?

These questions have provoked considerable debate, and continue to be highly polemical today. This paper probes into this multi-faceted polemic, examining the major obstacles that could impede the development of a regional human rights regime, and considering the means by which such a regime could be created. This will involve an evaluation of other regional human rights frameworks as possible models for the Asia-Pacific region. It will also entail an examination of existing regional bodies in the Asia-Pacific to assess whether they could serve as the foundations of a pan-Pacific human rights regime. In addition, I will consider non-state efforts to create a regional human rights system. As the creation of a regional framework would have significant implications for Australia, the discussion also considers the different roles that Australia could play in promoting this goal.

2. Regionalism and human rights

This debate takes place against the backdrop of broad trends towards multilateralism and regionalism in addressing human rights issues, as illustrated by the regional frameworks that have evolved in the last fifty years. However, is a regional multilateral approach towards human rights appropriate in the Asia Pacific region? It appears that 'Asian states have had an aversion to dealing with problems on a multinational level and prefer bilateral solutions'². This traditional proclivity towards bilateralism thus poses one challenge to the development of a multilateral human rights framework in the region. While the emergence of regional bodies such as the Association of South East Asian Nations (ASEAN) suggests that sub-regional alliances are now forming, to what extent would a larger institutional alliance be feasible, bringing together all the nations of the region? This raises a fundamental issue - how to define what is meant by the 'East Asia-Pacific' region.

¹ Harris, S. 'Asian Human Rights: Forming a Regional Covenant'.(2000) 17 *Asian Pacific Law & Policy Journal* 17 1 at 12. <<http://www.hawaii.edu/aplpj>>. Visited 15.08.03

² See note 1 at 20

3. The East Asia-Pacific region

The difficulty of delineating the parameters of the "East Asia-Pacific" region highlights a critical theme of this discussion - the way in which this complex region defies simple definitions and classifications, and resists attempts to configure it as a united group. As one commentator aptly puts it, '[t]he world does not... break easily along neatly perforated lines. Rational regional divisions are difficult to establish'³. Various described as "East Asia", "Oceania" and the "Pacific", the region spans an enormous geographical area, and represents a highly amorphous, indeterminate classification. It draws together a fascinating geo-political cross-section of cultures, slicing the "north-south" and "east-west" divides, both theoretically and geographically. This discussion interprets the "Asia-Pacific" region broadly so as to include subregions such as 'South East', 'South West Asia', 'North Asia' and 'Oceania'⁴. The significance of the delimitation of the region lies in its implications for possible membership of a multilateral convention and organisation. Ideally, a human rights framework in the Asia-Pacific region would be supported by the broadest number of states possible, and would bridge the different sub-regions. However, what type of structure could unite such a disparate set of nations?

4. Structure and Form: Regional Human Rights Models for the Asia-Pacific

Ideally, a regional human rights framework in the Asia-Pacific would comprise three broad limbs: firstly, a covenant of some form, which would articulate human rights standards and states' enforcement obligations. This would represent the first significant step to developing regional cooperation on human rights, and would preferably be in the form of a binding convention. The second component would be a multilateral organisation with representatives from member states, serving as a forum for review and monitoring of human rights. The third and arguably most important component would be some form of enforcement machinery, to hear complaints and ensure compliance with obligations under the convention. The human rights structures existing in Europe, Africa, the Middle East and the Americas each 'spell out [their] own collection of rights, as well as providing for [their] own investigation and reporting systems, [and] complaint procedures'⁵. While they have common features, they differ in important regards. For example, while 'the European and Inter-American systems have innovative institutions and processes...the African system has distinctive norms'⁶. That being the case, which regional framework would be most suitable as a model for the Asia-Pacific region?

4.1 The European Model

The greatest inspiration for the Asia-Pacific region can probably be drawn from the European model in the form of the Council of Europe, the *European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)*⁷ and the European Court of Human Rights. Together, these constitute perhaps the definitive regional human rights model. The European system represented the first major regional human rights initiative, and its overall success has led it to be regarded as a useful blueprint for other regional forums. Most notable is its effective enforcement system, which permits individuals to complain directly to the court. This court arguably constitutes the most sophisticated enforcement machinery in the world, leading commentators to characterise the European system as "an enforcement regime"⁸. The creation of an enforcement mechanism will be critical in the Asian context, given that most Asian states have ratified most of the major human rights conventions, but have failed to implement them. Without an effective enforcement mechanism such as a court or commission, any human rights framework in the Asia-Pacific region would be significantly weakened. In a region where human rights are systemically abused, it would arguably be better to have no framework at all, if the absence of this crucial third element meant that member states could continue to abuse human rights with impunity. In this regard, the Asia-Pacific region could draw guidance from another European

³ Claude, I. 'Swords into Plowshares'. (1984) 4th ed, p102, extracted in *International Human Rights Context: Law Politics Morals*. Steiner, H.J. and Alston, P. (2000) 2nd ed., Oxford at 782.

⁴ This therefore includes: China, Japan, Republic of Korea, Democratic People's Republic of Korea, China, Mongolia, Thailand, Vietnam, Laos, Myanmar, Cambodia, Malaysia, Singapore, Brunei, Philippines, Indonesia, Australia, New Zealand, Papua New Guinea, the Federated States of Micronesia and other island states of the Pacific. It is contentious whether states such as India, Nepal Bangladesh and Bhutan are included in this classification.

⁵ Piotrowicz, R. and Kaye, S. *Human Rights in International and Australian Law*. (2000) Chatswood, Australia: Butterworths, 58.

⁶ Steiner, H.J. and Alston, P. *International Human Rights Context: Law Politics Morals*. (2000) (2nd ed). Oxford, Oxford UP, 779.

⁷ (1953) UKTS 71; 213 UNTS 221, CMD.8969, ATS 5. Adopted in Rome 4/11/1950, entered into force 3/9/1953.

⁸ Tang, J.T.H. ed. *Human Rights and International Relations in the Asia Pacific*. London: Pinter, 1995. 3

institution - the Organisation for Security and Co-operation in Europe (OSCE)⁹. Although pre-eminently a security organisation, it has also helped to foster a human rights culture and promote regional political cooperation. Although lacking a formal commission or court, the OSCE has arguably been more successful than the Council of Europe as an enforcement body as it can threaten the use of force, and thereby bring greater pressure on its members to respect human rights. It is submitted therefore that an optimal institutional model for the Asia-Pacific region would combine the roles of the Council of Europe and the OSCE, to ensure the establishment of the third crucial component of enforcement machinery. However, useful features may also be gleaned from other regional frameworks.

4.2 The Americas

The American regional model comprises the Organisation of American States (OAS), and several documents, including the *American Declaration on the Rights and Duties of Man*¹⁰, and the *American Convention on Human Rights*¹¹. Interestingly, the American Declaration contains ten articles setting out duties of the citizen - a feature that could well be adopted in the Asia-Pacific region, given its duty-oriented outlook. Human rights observance and monitoring is vested in two organs: the Inter-American Commission on Human Rights, which conducts admissibility review of complaints, and the Inter-American Court of Human Rights, which hears complaints referred to it by the commission.¹² This Court has been described by one commentator as a 'powerful organ with tasks and functions not found in the European system'¹³. For example, it 'not only hears petitions but also conducts *in loco* visits', a function which has no counterpart in the European system¹⁴. However, while this is a function which might be emulated in the Asia Pacific region, overall it appears that the model is unsuitable as 'the American system has ...been manifestly unable to prevent major human rights abuses taking place in OAS states'¹⁵. Its work has been partially hindered by the uncooperative attitude of the United States of America. The American example thus provides an important lesson for the Asia-Pacific - without the cooperation of China, the dominant power in the region, a human rights framework will undoubtedly be weakened.

4.3 The Middle East

The Arab model cannot be regarded as the optimal model for the Asia-Pacific region, primarily because it lacks an enforcement organ and because the Arab League and *Arab Charter* have failed to materially improve the living standards of people in the region. Oil-exporting states have tended instead to place more reliance on the Organisation of Petroleum Exporting Countries (OPEC) to achieve their collective and national aspirations. Steiner and Alston have thus characterised the human rights system as 'largely dormant'¹⁶.

4.4 Africa and the Organisation of African Unity

It has similarly been argued that 'the African system is virtually completely ineffective, and is by and large a dead letter'¹⁷. The African regional model is represented by the Organisation of African Unity (OAU) and the *African Charter on Human and People's Rights*¹⁸. While it has an African Commission on Human and People's Rights, it has no court¹⁹. Given this inadequacy in terms of enforcement, it is probably not the most suitable model for the Asia-Pacific. However, although 'the African system is the least developed institutionally'²⁰, it has 'a distinctive stress on duties as well as rights'²¹. This is a facet which might feature in a Pan-Asian convention²², given that '[one]

⁹ *Final Act of the Conference on Security and Cooperation in Europe* 1975 14 ILM 1292

¹⁰ (1949) 43 AJIL SUPP 133 OAS OFF REC OEA/SER.L/V/II.23, DOC.21, REV.6

¹¹ (1965) 65 AJIL 679, Pan American Treaty Series 36 (1970) 9 ILM 673. Adopted 22/11/1969, entered into force 18/7/1978.

¹² See note 5 at 76 77

¹³ See note 6 at 779

¹⁴ Harris, D. and Livingstone, S. (Eds). *The Inter American System of Human Rights* (1998), at 1, extracted in note 6 at 874.

¹⁵ See note 5 at 78.

¹⁶ See note 6 at 780.

¹⁷ See note 5 at 78.

¹⁸ (*Banjul Charter of Rights and Duties*) OAU CAB/CEB/67/3/REV4;21 ILM 59.27/6/1981, entered into force 21/10/1986.

¹⁹ In 1999 the OAU adopted a Protocol to the Banjul Charter on an African Court on Human and People's Rights (20 Hum.Rts L.J 269 (1999)) to establish a Court to complement the Commission. However, this has not yet come into force.

²⁰ See note 6 at 779

²¹ See note 6 at 779

²² See note 5 at 70.

aspect of Asian values... is the importance of duty as a counterpoint to right'²³. The African Charter is also a more tribal and communitarian document than the individualistic ECHR, by virtue of its references to 'people's rights'. This could be an important dimension of an Asia-Pacific convention, given the regional emphasis on communitarianism and the diversity of ethnic groups. An Asia-Pacific convention could therefore perhaps borrow terminology from the African model in these regards. While the European example represents the most useful model for the Asia-Pacific region, ideally an Asia-Pacific framework would synthesise the best aspects of existing regional supra-national models and inter-governmental security alliances. Although some progress towards this goal has been made, most commentators suggest that the task will be extremely difficult. I will outline the main obstacles facing the creation of an Asia-Pacific regional human rights structure, as well as some more practical challenges.

5. Obstacles

5.1 Practical & administrative obstacles

The task of creating a multilateral human rights system in the Asia-Pacific poses several practical challenges. For example, some argue that 'regional bodies in the human rights field would, at best, duplicate the work of United Nations bodies and, at worst, develop contradictory policies and procedures'²⁴. Proponents of this view might also argue that the goal of establishing a human rights organisation would be plagued by fierce political conflict about its structure, processes, headquarters, budget, priorities and resources. However, it is submitted that these bureaucratic and administrative challenges are secondary to more complex ideological and conceptual obstacles.

Ideological and conceptual obstacles

5.2 Challenges to sovereignty

One factor that could impede the development of a regional human rights structure is that it may be perceived as a threat to the sovereignty of Asian states. Involvement in a regional framework necessitates a certain degree of compromise, and could thus effect a devolution of power away from the state. This fear of potential destabilisation of sovereignty in a region already marked by 'fragile Statehood'²⁵ holds several important implications for a regional human rights regime. Firstly, 'state sovereignty represents one of the main barriers to recognition of rights for individuals and groups'²⁶. The creation of obligations to protect individuals' human rights could be regarded as harmful to the unity of a multi-ethnic state. Consequently, Asian states have invoked sovereignty as a defence mechanism, to 'protect what they claim as rights unique to the region or state'²⁷. This could mean that rights in a convention would be expressed imprecisely, so as to retain the power of the state over individuals. This stance is exemplified by states such as Singapore and Malaysia, where political stability is favoured over the advancement of human rights. For example, Lee Kuan Yew has argued that 'the exuberance of democracy leads to undisciplined and disorderly conditions which are inimical to development'²⁸. Similarly, Mahathir has asserted the need for 'a high premium on political stability by managing a balance between the rights of the individual and the needs of society as a whole'²⁹. Secondly, concern over sovereignty could manifest itself in a reluctance to submit to the supranational authority of enforcement machinery. As Harris explains, '[s]tates perceive any covenant that affords individual rights... as an encroachment upon the sovereign right of the state'³⁰, and thus, 'because of concerns for their own sovereignty, Asian states have refrained from intervening when other states suppress human rights'³¹. This view is reflected in one of the core tenets of ASEAN - 'non-interference by one member state in the

²³ Ghai, Y. *Human Rights and International Relations in the Asia Pacific*. James T.H. Tang, ed. London: Pinter, 1995. 12

²⁴ Twenty Eighth Report of the Commission to Study the Organisation of Peace, (1980), p.15, extracted in *International Human Rights Context: Law Politics Morals*. Steiner & Alston, 783 785, at 783.

²⁵ See note 23 at 5 6

²⁶ See note 14 at 10

²⁷ See note 14 at 13

²⁸ *China News* (Taipei), 21 Nov.1992, cited in 'SM Lee and his Pragmatic Approach to Development'. Susan Sim, *The Straits Times* (Singapore), Jan.28, 1996, 4

²⁹ *International Herald Tribune*, 22 July 1999

³⁰ See note 14 at 10

³¹ See note 14 at 20

internal affairs of another'³². Thus, the enforceability of rights would be reduced, as a convention's provisions for humanitarian intervention would probably be limited in scope. In turn, this may mean that non-governmental organisations and '[independent activist] groups will bear much of the burden of responding to transnational abuses'³³.

5.3 Cultural, religious and social heterogeneity

Perhaps the greatest obstacle facing the establishment of a human rights regime lies in the strong cultural, social, political and economic diversity of the Asia-Pacific region. This problem is succinctly articulated by Singaporean diplomat Bilhari Kausikan, who argues that 'the diversity of cultural traditions, political structures, and levels of development will make it difficult, if not impossible, to define a single distinctive and coherent human rights regime that can encompass the vast region from Japan to Burma, with its Confucianist, Buddhist, Islamic, and Hindu traditions'³⁴. This diversity represents a major challenge to drafters of a convention - how to articulate human rights so as to accommodate the needs of people with differing cultures, faiths, and political systems? And how to coalesce this diversity into a harmonised 'Asia-Pacific' view? As Hong Kong Professor Yash Ghai explains,

it would be surprising if there were... one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent. All the world's major religions are represented in Asia... To this we may add political ideologies like socialism, democracy or feudalism which animates peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures.³⁵

As a result, 'Asian and Pacific countries [have] generally argued that their region was much too heterogenous to permit the creation of a regional mechanism'³⁶. It is clear that a major factor contributing to the success of the European human rights models has been a commonality of culture, languages and values among European states³⁷. The lack of cultural homogeneity in the Asia-Pacific region could have a deleterious effect on prospects for a human rights framework. For example, it could adversely affect the drafting of a convention, in that it could either frustrate efforts to reach consensus on key issues, or ultimately result in expressing rights in language too weak and abstract to be of any real impact. Cultural divides could also cause a larger Pan-Pacific organisation to be rejected in favour of smaller, sub-regional organisations. However, while cultural diversity certainly represents an important challenge, it is submitted that it should not be used as an excuse for not endeavouring to foster greater cooperation in the region. A lack of commonality does not preclude action based on complementarity of values and cultures. Many advocates of human rights argue that cultural diversity should not pose a major obstacle, given that ultimately human rights are universal and indivisible, and therefore should be recognised as worthy of protection regardless of one's cultural heritage. This brings into question another major issue plaguing the debate on human rights in the Asia-Pacific region - the tension between universality and cultural relativism.

5.4 Cultural relativism vs Universality: the "Asian values" debate

The friction between these two perspectives is a perennial thorny issue in debates on human rights in the Asia-Pacific region. In response to proponents of universality and indivisibility, several Asian states argue that rights are instead relative to one's culture. This argument has been voiced strongly by Singapore and China, who contend that there ought to be large "margins of interpretation" for human rights obligations, in order to reflect states' means and capabilities. For example, a Chinese 'White Paper', states that human rights must be considered by 'bearing in mind the significance of national and regional peculiarities and various historical, cultural and

³² Acharya, A. 'Human Rights and Regional Order: ASEAN and Human Rights Management in Post Cold War Southeast Asia', in James T.H. Tang, ed. *Human Rights and International Relations in the Asia Pacific*. London: Pinter, 1995. 167-182, at 168.

³³ PoKempner, D. Symposium, 'Human Rights on the Eve of the Next Century: Human Rights & Non Governmental Organizations: Asia's Activists and the Future of Human Rights'. 66 *Fordham Law Review*. 677-686. 677

³⁴ 'Asia's Different Standard'. 92 *Foreign Policy* 24 (1993), cited in note 6 at 539-544.

³⁵ See note 23 at 6

³⁶ See note 6 at 780

³⁷ This is reflected in the Preamble to the European Convention, which refers to 'European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law'. Cited in note 6 at 787.

religious backgrounds³⁸. In a similar vein, the Vietnamese government has asserted that 'the particularities and traditions of the Orient are different than those of the Occident. One cannot apply to another that which only concerns oneself³⁹. Many Asian states thus maintain that there are different 'Asian values' and rights unique to the region; Kausikan speaks for example of "Asia's Different Standard"⁴⁰ of human rights. In response, Seth Harris argues that Asian states 'attempt to elude the growing international consensus through various defenses using the buzzword "Asian values"⁴¹. These values are said to be strongly influenced by Confucianism, and among others, include an emphasis on duties rather than rights, the centrality of the family, order, obedience⁴², and the principle of "community over self"⁴³. However, there is surely a certain paradox in the fact that many states rely on "Asian values" to rebut notions of universality, and then deny the existence of a common "Asian" perspective on human rights by arguing that the region is too diverse to reach consensus on an "Asian" view! The ostensibly united front of 'Asian' values thus belies complicated underlying fissures and faultlines. It is evident that ultimately, 'the reticence of Asian states in accepting the universality of those rights hinders the evolution of human rights in the region'⁴⁴. Part of this argument is that universality is linked to "Western" perspectives of human rights, as an example of 'cultural westocentrism'⁴⁵. This raises another interrelated obstacle, concerning the characterisation of human rights as a 'Western' phenomenon.

5.5 Human rights as 'Western' rights

Several Asian states argue that human rights are an essentially western construct, and that to establish a regional organisation, convention and enforcement machinery from a European blueprint would constitute a form of western neo-colonialism. This is a particularly sensitive issue given that the region contains many former colonies who have gained independence from western nations, and who may perceive external pressure and interposition on human rights issues as another form of western hegemony, or interference with domestic matters. Kausikan asserts that 'there is a general discontent throughout the region with a purely Western interpretation of human rights'⁴⁶. This reflects the view that human rights are acculturated and value-laden, and that they reflect their predominantly Judaeo-Christian origins. Two important other arguments flow from this labelling of human rights as 'western'. Firstly, the argument that human rights in the west have an overly individualistic focus, and secondly, that they give a disproportionate emphasis to civil and political rights. These two arguments will be examined in turn.

5.5.1 Individual rights vs Community needs

An ideological obstacle that could hinder cooperation on human rights in the Asia Pacific is the tendency of several Asian states to subordinate individuals' rights to the rights of the community. This argument takes the form that 'most of the rights which the West is purveying are ...oriented towards an individualistic society and therefore inappropriate to Asia where the values of communal action are highly prized'⁴⁷. For example, a Singaporean White Paper states that 'there is a major difference between Asian and Western values in the balance each strikes between the individual and the community; Asian societies emphasise the interests of the community, while Western societies stress the rights of the individual. The Singapore society has always weighted group interests more heavily than individual ones'⁴⁸. A potential danger stemming from this approach is that indigenous rights and rights of minorities may be repressed at the expense of protecting the rights of the majority group.

³⁸ See note 23 at 8, citing the "White Paper" *Human Rights in China*, para 8 at n1, published in 1991 'by the Chinese State Council to refute the charges of human rights violations in China'.

³⁹ Do Muoi, Secretary General, Vietnam Communist Party, addressing high level cadres March 1994. Cited in note 33 at 677

⁴⁰ Kausikan, B. "Asia's Different Standard". 92 *Foreign Policy* 24 (1993), cited in Steiner and Alston at 539 544.

⁴¹ See note 14 at 10

⁴² Patten, C. *East and West*. London: Macmillan, 1998. 161.

⁴³ Mahbubani, K. 'New Areas of ASEAN Reaction: Environment, human rights and democracy'. *Asean ISIS Monitor* 5 (Oct Dec 1992), p. 15

⁴⁴ See note 14 at 9

⁴⁵ Panikkar, R. 'Is the Notion of Human Rights a Western Concept?' 120 *Diogenes* (1982), 75 102, in Philip Alston, *Human Rights Law* Aldershot: Dartmouth, 1996. 161 189.174

⁴⁶ See note 40 at 26

⁴⁷ See note 23 at 4

⁴⁸ See note 23 at 11

5.5.2 Prioritising human rights

Another obstacle to the development of a human rights regime in the region is the argument that certain rights (and particularly the right to development) take precedence over others, reflecting the 'bifurcation of rights into civil and political on the one hand, and economic, cultural and social on the other'⁴⁹, as illustrated by the respective 1966 Covenants⁵⁰. In contrast to proponents of the indivisibility of human rights, some Asian states contend that certain civil and political rights, such as the freedom of assembly, are luxuries that can be advocated only when economic stability is attained. As one commentator puts it, 'do you give a starving man a loaf of bread or a milkcrate to vent his spleen on the passing world?'⁵¹ Thus, 'the economic backwardness of Asia has been used to establish the primacy of economic development over human rights. The argument is, in part, that civil and political rights are neither meaningful nor feasible in conditions of want or poverty. Therefore the first priority of State policy must be to promote economic development'.⁵² This reasoning has been extended by states such as China to assert that authoritarian governance is necessary to promote economic development. It could therefore be difficult to reach consensus on priorities within an Asia-Pacific forum comprised of economically disparate states. This raises an important interrelated issue - that of the important relationship between economics and human rights in the Asia-Pacific region.

5.6 Economics and human rights

The above argument suggests that economics will play an important role in the protection and promotion of human rights in the Asia-Pacific region. There is a clear link between strong economies and greater protection of human rights; however, there are also exceptions, such as Singapore and Malaysia, who despite their economic strength continue to have significant human rights problems. It has been argued that in western discourse, 'democracy, marketisation of economies, the promotion of human rights and the emergence of civil society [are]...all of a piece'⁵³. As a consequence, some Western nations have resorted to the use of 'conditionalities' in negotiating trade agreements. This linkage between economics and human rights performance was made explicit by former President Clinton's declared intention to press for human rights in China, in return for continuing to grant most-favoured-nation status to Beijing⁵⁴. Such measures are strongly resented by some Asian states, as illustrated by Mahathir's characterisation of it as 'cynical protectionism by other means'⁵⁵. However, it is submitted that economic cooperation will provide a useful avenue for the promotion of institutional human rights mechanisms in the region. As one commentator asserts, the 'globalisation of capital and markets should minimise rather than increase tensions between the West and the successful economies of East Asia. They enhance the interests and stakes of each side in the success of the other, and alliances are forged increasingly on transnational class lines than national'⁵⁶.

It is evident then that many of the obstacles to the creation of a human rights framework in the Asia-Pacific region are interrelated, such as sovereignty and cultural relativism, economics and prioritisation of rights. While these issues admittedly present formidable challenges, the picture is not all negative. Possible obstacles must be considered in the light of positive developments, in the form of past initiatives to develop a regional human rights system.

6. Multilateral human rights initiatives in the Asia-Pacific

Existing multilateral fora

There have been several significant regional and sub-regional initiatives towards the establishment of a regional human rights system in the Asia-Pacific. Some contend that the best path to improving regional cooperation on human rights is via an indirect approach - by extending existing regional groups formed upon economic and trade agendas. Three regional bodies which could potentially serve this role in the Asia-Pacific are ASEAN, the ASEAN Regional Forum (ARF) and the Asia-Pacific Economic Cooperation (APEC). Forging stronger regional links on economic and trade issues could ultimately have the positive collateral effect of engendering greater cooperation

⁴⁹ See note 23 at 2

⁵⁰ ie *International Covenant on Civil and Political Rights* & *International Covenant on Economic, Social and Cultural Rights*.

⁵¹ Tan, K, cited in "Human Rights: The East Asian Challenge". *The Straits Times* (Singapore), Feb.18,1996, p.1

⁵² See note 23 at 9

⁵³ See note 23 at 3

⁵⁴ See note 40 at 28

⁵⁵ Cited in Human Rights Law Lecture, May 30th, 2001.

⁵⁶ See note 23 at 3

in relation to human rights. In this way, one could '[keep] human rights on the diplomatic agenda, even if a back-door approach is the best one can expect'⁵⁷. While ASEAN has not traditionally had a human rights focus, human rights are now one of the "new areas of ASEAN reaction"⁵⁸. Thus one possibility would be to use ASEAN to bring states together economically, to establish a solid foundation for larger regional human rights structures. In this way regional human rights institutionalisation could be effectively combined with multilateral cooperation on other issues. This approach would seem to be a viable option, given that many Asian nations (and ASEAN) may prefer more loose, informal mechanisms to formal institutional measures.

NGO activity

There has also been considerable activity on the part of non-governmental organisations. As early as 1979, the NGO 'LawAsia' lobbied hard for the creation of an Asian Commission and Court of Human Rights⁵⁹, a call which has been taken up by other NGOs such as Amnesty International, Asia Rights Watch, and the International Commission of Jurists, who continue play an important role in promoting regional cooperation on human rights. One notable initiative is that of the Asian Human Rights Commission, which in May 1998 created a *Draft Asian Human Rights Charter*⁶⁰. This represents an important ambitious step towards creating a convention. In part, it was catalysed by the Bangkok NGO Declaration on Human Rights⁶¹, endorsed by all the Asian governments at the Asian regional preparatory meeting for the Vienna World Conference on Human Rights. In the Declaration, Asian NGOs 'endorsed the view that human rights are universal, and are equally rooted in different cultures'⁶², 'recommend[ed] international cooperation and solidarity for the promotion of human rights', and stated their 'support [for] the principle of the indivisibility and interdependence of human rights'⁶³. This highly progressive attitude evinces a growing local activism on the part of Asian non-state groups. These local NGOs will play a crucial role in pressuring their governments to improve their human rights records. It is submitted that continuing NGO activity will be an essential factor in creating broader regional human rights alliances. Perhaps equally critical will be the participation of states with a strong commitment to human rights, such as Australia. What specific roles could Australia play to promote such a system?

7. Australia's role in promoting a regional human rights framework

Australia is in some regards the odd nation out in the Asia-Pacific region. Along with New Zealand, it is in the unique position of straddling different cultures - situated in the Pacific, and yet categorised within the 'Western European and Others' group at the UN. This unique status gives rise to both advantages and disadvantages; Australia's western political and cultural orientation poses a major obstacle to being accepted as part of an 'Asian' forum. However, its strongly multicultural society, with many citizens with Asian heritages, makes it particularly sensitive to the challenges of inter-cultural dialogue and facilitating cooperation among diverse ethnic groups. Australia has already been involved in both regional and sub-regional initiatives to create a human rights organisation⁶⁴, and it is submitted that Australia can and should continue to engage actively in multilateral efforts towards this goal. Australia could play several important roles; it could use its unique status in the region to its advantage, to bridge the gap between 'western' and 'Asian' values, and promote dialogue on key issues. Australia could also serve important practical roles by offering legal and other expertise, and assisting the development of pan-Asian bodies for research and information-exchange⁶⁵. Australia also has the resources to run effective human rights education campaigns and stimulate greater human rights awareness in the region. Australia could also contribute by promoting greater economic cooperation, and furthering the economic development of the region. The involvement of Australia in the recent East Timor crisis illustrates

⁵⁷ Woods, Lawrence T. 'Economic Cooperation and Human Rights in the Asia Pacific Region: The Role of Regional Institutions' in James T. H. Tang, ed., *Human Rights and International Relations in the Asia Pacific*. London and New York: Pinter, 1995. 152-166.163

⁵⁸ See note 32 at 168.

⁵⁹ Diokno, J.W. 'Asian Lawyers, people's rights and human rights'. *New Zealand Law Journal* (3) 19 Feb. 1980. 43 47.46

⁶⁰ <http://is7pacific.net.hk/~ahrchk/ahr_draft_part2.html>. Visited 1.4.2001

⁶¹ Bangkok, 27 March 1993

⁶² See note 23 at 13.

⁶³ See note 23 at 13.

⁶⁴ Bailey, P.H. *Human Rights: Australia in an International Context*. Sydney: Butterworths, 1990, at 321.

⁶⁵ See note 5 at 194

that Australia can also play an crucial diplomatic and peace-keeping role, and highlights the need for an effective regional enforcement system to preclude the need for Australia to act as the region's 'policeman'.

However, in the current political climate, the Australian government is unlikely to make bold formal moves towards the creation of an intergovernmental human rights framework, largely because of its vested political and trade interests in the region. Given that Australia has received significant criticism on its own human rights record, and has failed thus far to establish a Bill of Rights, attempts to assume the role of a neutral 'leader' on regional human rights protection could be deemed hypocritical by other Pacific nations. Continuing informal moves will therefore be the likely course for the Australian government. More important however than Australia's involvement will be that of a greater power - China. Given its dominant position in the region, China's participation and cooperation is critical to the long-term success of a regional human rights framework.

An alternative: sub-regional bodies

At this stage, it seems that the development of sub-regional bodies will be more feasible than a larger pan-Pacific forum. This proposal has been endorsed in the *Asian Human Rights Charter*, which explains that 'the number of cultures co-existing in Asia lends itself to creating several smaller bodies, allowing multinational organs to operate with maximum participation and efficiency'⁶⁶. While 'other regions, such as the Americas, Africa, and Europe, only require one regional entity, because their similar cultural histories bind their memberships'⁶⁷, the Asia-Pacific region may be more well-suited to several smaller organisations. Thus, 'even though Asia lacks a cohesive force to bind the nations in the region as a whole, Asian states can use sub-regional organizations to group themselves according to homogenous interests'⁶⁸. While these regional initiatives fall short of the three-limbed ideal of a document, organisation and enforcement machinery as represented by the European system, they mark significant steps towards this goal.

8. Conclusion: Forecasts for the future

What then are the prospects for regional human rights developments in the Asia-Pacific? This discussion has only been able to canvass some of the main focal points of the debate, and, fittingly, has raised more questions than answers. It is clear however that there are mixed views on this debate. Some commentators have given a gloomy forecast, arguing that it is 'unlikely that there will be any further spread of the regional human rights phenomenon in the foreseeable future' and that 'the three existing systems will remain the only ones for some time.'⁶⁹ However this writer believes that the future is brighter, and that the medium to long-term prospects are good. While there are significant obstacles, they are not insurmountable. As discussed above, most of these challenges are animated by several important and fascinating tensions, including 'bilateralism vs multilateralism', 'sovereignty vs regional action', 'universality and cultural relativity', 'individual vs group rights', and 'east' vs 'west'. The success of human rights initiatives in the region will largely depend on how these frictions are addressed.

As this discussion has shown, the creation of a regional human rights system challenges these dichotomies in important ways, and reveals that human rights issues in the Asia-Pacific region cannot simply be reduced to polar oppositions but must instead be interpreted along on a more complex and subtle spectrum. It would seem that real progress can only be made by embracing the complexity of the challenges. As one commentator puts it,

...will the human rights dialogue between the East and East and Southeast Asia become a dialogue of the deaf, with each side proclaiming its superior virtue without advancing the common interests of humanity? Or can it be a genuine and fruitful dialogue, expanding and deepening consensus? The latter outcome will require finding a balance between a pretentious and unrealistic universalism and a paralyzing cultural relativism⁷⁰.

⁶⁶ See note 1 at 19

⁶⁷ See note 66

⁶⁸ See note 66

⁶⁹ See note 5 at 78.

⁷⁰ See note 40 at 31.

It is also evident that whatever shape a human rights system will ultimately assume, and however long it will take to implement, the resultant framework will be a balance and compromise of many forms. As this dynamic region continues to experience rapid social and economic change, Asian states may become more willing to adopt a culture of compromise. This trend has arguably already started: 'as countries in the region become more prosperous, secure and self-confident, they are moving beyond a purely defensive attitude to a more active approach to human rights'⁷¹. However, there is still significant resistance to the proposition and it will take concerted efforts on the part of states and NGOs alike to bring about change.

It is submitted that building consensus at a regional or sub-regional level would probably be the best way of building consensus on human rights developments in the Asia-Pacific region. The strong multilateral cooperative base represented by bodies such as ASEAN and numerous NGOs augur well for the future of multilateral initiatives to establish a human rights structure in the Asia Pacific. It appears that the best one could hope for at present will be incremental progress, beginning with a convention and ultimately the establishment of an organisation. A convention or declaration would at the very least signify a commitment to the objective of improving the human rights situation in the region. In shaping possible multilateral institutions, the Asia-Pacific region could draw considerable guidance from other regional human rights forums. At this stage the establishment of a fully-fledged enforcement system along European lines seems remote; in the meantime, human rights activists may have to be satisfied with more modest goals. It appears that 'progress will entail eschewing transcendent crusades or dramatic confrontations for patiently and quietly building consensus on modest, specific objectives through a still-evolving process of international law-making'⁷². As has been discussed, Australia can contribute much to this process by helping to promote dialogue in both state and non-state forums. Ultimately, the establishment of a regional framework in the Asia-Pacific will fill an important lacunae in the global network of regional human rights systems, and will thus complement and enhance the universal system of protection and promotion of human rights. This is a highly worthy – if elusive – goal, and there must be ongoing dialogue and activism to bring about its realization.

⁷¹ See note 40 at 25

⁷² See note 40 at 39

Gender and Race Intersectionality



The Sex Discrimination Unit, the Human Rights and Equal Opportunity Commission

“The idea of “intersectionality” seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, and economic disadvantage and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow amongst these intersecting axes contributing effectively to create a dynamic of disempowerment”¹.

Introduction

The intersection of gender and racial discrimination and the consequences of this intersection have been subject to little detailed consideration in the past. Problems are categorised as manifestations of either one form of discrimination or the other, but never both. As a result, this intersection has escaped analysis, and ineffective or inadequate remedies have been applied to situations which can be explained by the juncture of these two forms of discrimination. This paper addresses this intersection. It was written as a background paper to inform the consultation process HREOC undertook in preparation for attendance at the Fourth World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa from 31 August to 7 September 2001.

The terms racially privileged women and racially disadvantaged women are used to emphasise the experience of privilege/disadvantage, to underscore the idea that racism is contextual rather than an immutable characteristic of identity. Race disadvantage/race privilege will often, but not always, correspond to the more common white/black; first world/third world; North/South; coloniser/colonised divides used in academic and human rights discourse.

A discussion of the intersection of race and gender needs to begin with a recognition that there are ongoing problems of discrimination against racially disadvantaged women² that need to be identified, spoken about and addressed by the international and domestic human rights systems. There are also systemic and analytical problems in the approach to gender and race intersectionality that need to be thought through if the human rights system is to adequately deal with the experience of race and gender inequalities.

Intersectionality refers to the connection between aspects of identity, particularly race and gender. An intersectional approach asserts that aspects of identity are indivisible and that speaking about race and gender in isolation from each other results in concrete disadvantage. In Australia, race and gender intersectionality includes the experiences of women from non-English speaking backgrounds (NESB women) and Indigenous women. Although a race and gender intersection is most likely to cause disadvantage for these women, a discussion of intersectionality must be able to include all people. As we all have a race and a gender, although race or gender may be obscured where, for example, the race is whiteness or the gender male.

The experiences of racially disadvantaged women are *qualitatively* different from the experiences of racially disadvantaged men or racially privileged women and as a result they are likely to “fall

¹ Gender and racial discrimination, Report of the Expert Group Meeting 21-24 November 2000 Zagreb, Croatia.

² The terms “racially privileged women” and “racially disadvantaged women” are used throughout the paper to distinguish between women who benefit from their racial identity, such as white English speaking women, and women who experience disadvantage because of their race, such as migrant women of colour.

through the cracks” of current human rights systems. Their experiences are inadequately addressed in a system set up to recognise gender and race inequalities as distinct.

Demographics and the positioning of women in discussions of race

*"Identities are fluid and not fixed. At times we all occupy multiple, diverse and contradictory positions"*³.

The nature of race and gender disadvantage

Privilege and disadvantage are often experienced together. For example, it is possible to be the recipient of violence at home and be valued at work. It is possible to be positioned as the recipient of racism from parts of the community while participating in it towards other parts of the community.

Women also experience racism as migrants, as refugee women, as Indigenous women, or as women from backgrounds other than English speaking when they are single heads of households, living with disabilities, girl children, lesbian women, young mothers, or older women. Each of these facets of identity can compound the experience of racism.

The experience of race-and-gender discrimination is qualitatively different from race discrimination or gender discrimination. As evidenced by the example below, women often experience discrimination because of their identity as racially disadvantaged women in a way that cannot be understood by thinking about race or gender in isolation.

Fares v Box Hill College of TAFE & Ors (1992) EOC 92-391.

The complainant was from a non-English speaking background. She was employed at a TAFE that was found by the Victorian Equal Opportunity Tribunal to have a pervasive negative attitude towards NESB women over many years.

The complainant and other NESB women in her workplace were thought to be generally more emotional, highly strung, demanding and overly conscientious in their work, long-winded and unable to be concise, holding undue regard for academic qualifications as opposed to practical experience and thus ambitious for themselves.

A statistical overview of women and race in Australia

The section of the Australian population born overseas increased from 10 per cent in 1947 to 24 per cent at June 2000. In 1947, the majority (81 per cent) of the population born overseas were from the United Kingdom and Ireland. By 2000, the proportion of the population from main English Speaking Countries (the United Kingdom, Ireland, New Zealand, South Africa, Canada and the United States) was 39 per cent.⁴

Women from non- English speaking countries have lower English literacy levels rated at speaking English poorly or not at all, than men from similar backgrounds, (21 per cent and 16 per cent respectively).⁵ There is little evidence to suggest that English proficiency levels of women from non-English speaking countries change over time to be comparable with men.⁶

The labour force participation rate for women from non-English speaking countries was lower than the total Australian female population in 1999 (42 per cent compared to 53 per cent). It was also significantly lower than their male counterparts (63 per cent).⁷

According to 1996 data there is significant disparity in education levels for women over 15 years. Less than 22 per cent of Indigenous women obtained a post school qualification compared with 36

³ (Indigenous Immigrant and Refugee Women A place on the main stage: Speech delivered by Zita Antonios, former Race Discrimination Commissioner, Chisholm College Lecture, La Trobe University, 1998.

⁴ ABS 1301 Year Book 2003 Canberra 2003.

⁵ Commonwealth Office of the Status of Women *Women in Australia 1999* Canberra, 1999, at p69.

⁶ Adriana Vanden Heuvel and Mark Wooden, *New Settlers Have Their Say*, Department of Immigration and Multicultural Affairs, Canberra, 1999.

⁷ Commonwealth Office of the Status of Women *Women in Australia 2001* Canberra, 2002, at p174.

per cent of women in the total population and 26 per cent of Indigenous men.⁸ In 1996 13 per cent of Indigenous people said they spoke an Indigenous language or Australian Creole at home.⁹

Unemployment rates for Indigenous women as compared to the total population of women reflect a significant problem. In 1996 20.2 per cent for Indigenous women and 8.3 per cent for women in the general population.¹⁰ In 1994, the mean annual individual income for Indigenous women aged 15 years and over was \$12, 702 compared to \$15,124 for women in Australia overall.¹¹

There is very little statistical information available identifying Indigenous women, refugee women, and migrant women for comparison purposes.

The structure of the human rights and anti-discrimination systems: The human rights framework

From the inception of the human rights system, the principle of non-discrimination on the grounds of race and sex has been recognised. All of the major treaty documents recognise non-discrimination on multiple grounds, for example:

- The International Covenant on Civil and Political Rights (ICCPR) Article 2(1)¹² and 3;¹³
- The International Covenant of Economic, Social and Cultural Rights (ICESCR) Article 2(2);¹⁴
- The Convention on the Elimination of all forms of Racial Discrimination (CERD) Preamble and Article 7;¹⁵
- The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).¹⁶

While each document acknowledges other forms of discrimination, there is no sense of integration of race and gender, and this leads to problems outlined below.

The anti-discrimination framework in Australia

In Australia, international treaties have formed the basis of our federal anti-discrimination and domestic human rights system. The federal Government does not have the explicit power to pass laws on discrimination and relies instead largely on international treaties and the external affairs power of the Constitution. The three major federal anti-discrimination acts, *the Racial Discrimination Act 1975*, *the Sex Discrimination Act 1984* and *the Disability Discrimination Act 1992* are all founded in international agreements.

The “translation” of international treaties into domestic law means that there are significant commonalities between international and Australian human rights systems.¹⁷ Unfortunately, this also means that some of the weaknesses of the international system are replicated in anti-discrimination law.

⁸ Commonwealth Office of the Status of Women *Women in Australia 1999* Canberra, 1999, at p71.

⁹ ABS 4102.0 *Australian Social Trends 1999* Commonwealth of Australia Canberra 1999, at p16 17.

¹⁰ Commonwealth Office of the Status of Women *Women in Australia 2001* Canberra, 2000, at p174.

¹¹ Commonwealth Office of the Status of Women *Women in Australia 2001* Canberra, 2002, at p72.

¹² “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹³ The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

¹⁴ The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁵ Refers to the Charter of the United Nations and the Universal Declaration of Human Rights and their commitment to human rights without distinction of any kind.

¹⁶ The preamble refers to the enjoyment of rights “without distinction of any kind.”

¹⁷ Compared, for example, with a country such as the United States, where rights are constitutional and do not emanate from international agreements.

Inadequacies of the human rights system: race and gender

The international human rights system developed in a particular historical context, post World War II Europe and America, and in some ways entrenches the values of that period and place. As a result some of the themes of the human rights system work against a genuine recognition of the experiences of women and people in non-Western and colonised countries. For example, in the human rights system:

- Public harms are privileged over private, yet gendered harm is mostly experienced in the domestic sphere, within the family and “private” communities and relationships;
- Civil and political rights are privileged over social and economic, while racially disadvantaged women suffer disproportionately from social and economic inequality; and
- States, rather than individuals, are the primary actors in the human rights system so that racially disadvantaged women cannot rely on state protection as refugees or asylum seekers, or where their harms may stem from State action.

In addition, the structure of the human rights system creates artificial divisions between race and gender, so that those who experience disadvantage on both grounds may not have their experiences recognised.

The absence of racially disadvantaged women

The effect of setting up human rights structures that deal separately with race and gender is that they are often inadequate for dealing with the intersection of race and gender disadvantage. While there is no explicit claim within the domestic or international human rights system that these aspects of identity-based discrimination are mutually exclusive *they are discussed as if they are*. That is, race discrimination is generally discussed in relation to men, and gender inequality is discussed in relation to white women. The practical impact of the theoretical underpinnings of human rights law is that the experiences of race-and-gender inequality disappear.

This problem is also replicated in anti-discrimination laws. To make a complaint of discrimination, experiences of racially disadvantaged women have to be re-interpreted as being about sex¹⁸ or race. The following cases illustrate the artificiality of dividing race and sex for racially disadvantaged women.

Dao & Anor v Australian Postal Commission (1987) 162 CLR 317.

Two Vietnamese women made a complaint of discrimination to the NSW Equal Opportunity Commission after being denied employment with Australia Post for failing to meet minimum body weight requirements. They alleged discrimination on the grounds of race and sex.

This case went to the High Court and was decided on an issue of inconsistency of state and federal laws. However, the fact situation demonstrates that racially disadvantaged women may not be able to say that their experience of discrimination is because of race as distinct from sex. The women's body weight was “too low” because they were Asian women. An Asian man or a Caucasian woman may not have been excluded by the rule.

Djokic v Sinclair & Anor (1994) EOC 92-643

A female worker in a meatpacker complained to HREOC after she was harassed and inappropriately touched by her supervisor; called a “stupid wog bitch” by her co-workers for reporting unauthorised work breaks; subjected to rumours that she was sleeping with male co-workers and eventually dismissed.

The Commission described her as “broken in health but not yet in spirit”. It found that an abuse of power could constitute sexual harassment but had difficulty finding that the burden of proof was satisfied.

¹⁸ The term “gender” has been used in preference to “sex” throughout this paper to acknowledge the fact that sexism arises largely in relation to socially assigned roles rather than biology. However, the term “sex” has been used in this section to reflect the legislative provisions.

The case shows the difficulty in recognising harm where it has clearly occurred but is based on individual and (supposedly) separate grounds of discrimination: sexual harassment, race-and-sex discrimination may not separately amount to discrimination for the purposes for the law.

Race in conflict with gender

One of the most complex of gender and race issues in the human rights system involves specific cultural practices that cause harm to women. A commonly discussed example in recent years is genital mutilation, which is practiced widely in communities throughout Africa, the Middle East and parts of Asia as well as in smaller communities throughout the world.

Where the standards of a particular race or cultural community are set against the rights of individual women, the human rights system struggles to find a resolution.

Gender in conflict

Another crucial issue is the recognition that women's interests not only differ but may be in conflict. A classic example is the experience of colonialism and the participation, and continuing benefit, of racially privileged women in the suffering of Indigenous women in colonised nations such as Australia.

Racially privileged women may be loath to acknowledge their position of relative power, especially where that power is fragile, hard won and needs to be constantly re-asserted.

In addition, if the experiences of racially privileged women are the measure of gender progress, a distorted picture of gender experience emerges. For example, while many women have reached positions of power and been rewarded with higher status and wealth, these women are disproportionately racially privileged.

The lack of a system to redress absence

The mechanisms to redress gender discrimination are part of the same system that creates the problem. As evidenced by the examples above, the separation of race and gender at a systemic level can create difficulties in adequately addressing cumulative discrimination.

Racially disadvantaged women may also have greater difficulty in accessing remedies because of a range of barriers, including language difficulties, lack of financial resources and lack of access to information about their rights.

The growing recognition of intersectionalities for racially disadvantaged women internationally

Racially disadvantaged women have been working to get race-and-gender experiences recognised at a systemic and theoretical level for many years. Some progress has been made in that direction.

For example, there is now an enormous literature on intersectionality, and the various approaches and suggestions are too great to deal adequately with them here. However, the literature falls into the following general categories.

Experiences of racially disadvantaged women

Over the past decade, the experiences of racially disadvantaged women have received greater recognition in the public domain through the proliferation of material written by women based on their own experiences. Theoretical work, including feminist and critical race theory, has been challenged by counter-theories from women of colour, post-colonial theorists and Indigenous women who question many of the assumptions made by racially privileged women and men about their lives.¹⁹

¹⁹ See, for example Bhattacharjee Annanya (1997) "The Public/Private Mirage: Mapping homes and undomesticating violence work in the South Asian community," in Alexander and Mohanty (eds) *Feminist Genealogies, Colonial Legacies, Democratic Futures* New York Routledge 308 329; Bulbeck Chilla (1991) "First and Third World feminisms" *Asian Studies Review* vol.15 no.1 at p 77 91; Duclos, Nitya, (1993) "Disappearing women: Racial minority women in human rights cases" *Canadian Journal of Women & the Law* vol.6 p24 51; Lerodiasconou Mary Jabe (1995) "Listen to Us! Female genital mutilation, feminism and the law in Australia" *Melbourne University Law Review* vol.20, at p562 587; Abu Odeh, Lama, (1992)"Post colonial feminism and the veil: Considering the differences" *New England Law Review* vol. 26, at p1527 1542.

Making racial privilege visible

The failure of legal and political systems to “hear” the experiences of racially disadvantaged women relies on whiteness remaining invisible. That is, when race is spoken about, race means being Black, Asian, Indigenous or non-white. Whiteness is the “view from nowhere” – the luxury of not having to specify a racial identity, and thus to always be the centre or norm in any discussion.

Some literature has tried to critically analyse whiteness, to make it visible so that it will not retain the unchallenged centre of focus. This literature has been sporadic, mostly confined to academic circles and not widely influential.²⁰

It is extremely difficult to get women in decision-making roles, who are mostly white and middle class, to acknowledge their own race and to recognise the part that race plays in gender inequality. In part, this is because the legal and political reform that has benefited these women has come from arguing their case as “women”, not as a group with distinct race and class interests.

Responses to intersectionality in the human rights system

Despite these difficulties, there has been some progress towards recognition of race-and-gender intersectionality.

The following measures have been taken by human rights bodies towards acknowledging race and gender intersectionality.

- The significance of gender issues for racial discrimination was highlighted in both the Declaration and the Platform for Action drafted at the World Conference against Racism held in August- September 2001.²¹
- In March 2000 the CERD Committee adopted a general recommendation recognising the gender-related dimension of racial discrimination. The recommendation acknowledges that women and men experience and are affected by racial discrimination in different ways and that racial discrimination can be directed at women only or differentially than it does towards men.²²
- In June 2000 a special session of the General Assembly made several recommendations relating to the elimination of racial violence against women and girls.²³
- Beijing Platform For Action addressed three areas of intersectional racism and sexism; violence against women; women and armed conflict and the human rights of women. In relation to asylum seeker, refugee and immigrant women, the Beijing Platform For Action, [paragraph 46], recognises:

.....that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are Indigenous women or because of other status... Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well as for immigrant women and migrant women, including migrant women workers.

- The CERD Committee’s request that State Parties reports under Article 9 of CERD include gender representation.²⁴ A UNIFEM background paper to the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance suggests in its recommendations that the CERD Committee continue this by requesting that each of the articles is gender-sensitive and that all the reports attend to gender and violence aimed at women.²⁵

²⁰ See, for example Ruth Frankenberg *White Women, Race Matters: The social construction of whiteness* London Routledge 1993.

²¹ See in particular Articles 3 and 68 of the Declaration; and Articles 22, 57, 58 and 68 of the Platform for Action.

²² Gender and Racial Discrimination Report of the Expert group Meeting, 21-24 November 2000, Zagreb, Croatia, CERD/C/56/Misc.21/Rev3 at p1.

²³ See note 2.

²⁴ See note 2, at p3.

²⁵ UNIFEM *Integrating Gender into the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Background Paper*.

Possible responses to race-and-gender inequality

There is a strategic dilemma with respect to international legal structures and women. On the one hand, the attempt to improve the position of women through more generally applicable measures has allowed women's concerns to be submerged by what are regarded as more 'global' issues. On the other hand, the price of the creation of separate institutional mechanisms and special measures dealing with women within the UN system has typically been the creation of a 'women's ghetto', given less power, fewer resources and a lower priority than 'mainstream' human rights bodies.²⁶

This same problem exists for racially disadvantaged women. Some of the possible strategies to address intersectional disadvantage include the following.

Specialist bodies

Setting up specialist bodies to deal with racially disadvantaged women does go some way to addressing specific issues. However, by creating specialist knowledge outside of the mainstream, the concerns of such groups may never impact on ultimate decision-making bodies, and will be vulnerable to under funding and lower status.

Mainstreaming

The UN has responded to concern about the marginalisation of women in human rights systems by mainstreaming gender issues. The aim is to integrate gender concerns throughout the UN system and to spread responsibility amongst general UN staff. Some of the problems with mainstreaming are that "gender" is still considered to be synonymous with "women"; work on gender issues still remains with specialist staff and, in practice, mainstreaming has suffered from a lack of commitment and resources. It can also often mean that specialist units are downgraded.

For racially disadvantaged women the recognition of intersectional disadvantage has been even slower to gain ground. Treaty bodies such as CERD have been slow to acknowledge intersectionality and to include gender in concluding observations or general comments.²⁷

Radical mainstreaming

Radical mainstreaming would put gender first in any consideration of race issues. The basic principle of radical mainstreaming is that positive recognition of gender is necessary if systemic barriers to acknowledging intersectionality are to be overcome.

By making gender issues the centre of any discussion on race and race issues central to any discussion on gender, intersectionality will be recognised first rather than always disappearing from the human rights agenda. Radical mainstreaming has not been attempted in the international or domestic human rights systems.

Conclusion

International and national systems set up to protect human right need to be dynamic if they are to provide equal protection for all groups across society. Recognising that race and gender intersect to create a qualitatively different experience of discrimination to race discrimination or gender discrimination is necessary if the women caught at this nexus are to have their total spectrum of human rights protected. It is also necessary if there is in place a system which effectively deals with race and gender discrimination as it occurs.

²⁶ Charlesworth Hilary and Chinkin Christine (2000) *The Boundaries of International law: A feminist analysis*, Manchester Manchester University Press, at p219.

²⁷ In 1996 the Chairman of the CERD Committee referred to directives to include gender in state parties' reports as "fundamentally misconceived". Quoted in note 24, at p246.

Establishing the Aboriginal and Torres Strait Islander Women's Unit within the NSW Department for Women



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A commitment to reconciliation and to improving the status of Aboriginal and Torres Strait Islander women in New South Wales underpins the recent establishment of the Aboriginal and Torres Strait Islander Women's Unit within the NSW Department for Women.

The Department for Women aims to achieve safe, inclusive, participatory and economically developed communities in which women are full and equal participants, where women participate in and lead sustainable communities, social justice is embedded in planning and development at local, regional and state levels, and where gender equity and equity between communities is evident. A second critical outcome for the Department is to see the establishment of services appropriate to women and girls.

The work of the Department over the past 3-5 years has engaged with Aboriginal and Torres Strait Islander women in communities across NSW on a range of issues including the experience of family and community violence, access to health and support services, and opportunities for education, training and employment. Central to all these issues has been the opportunity for Aboriginal and Torres Strait Islander women to be involved in the decisions that affect their well-being and that of their families and communities. Although it is acknowledged that Aboriginal and Torres Strait Islander women's representations are central to effective decision making, they are barely represented or visible in decision making at all levels – even when their well-being and experience is central to the issues being discussed.

It became clear to the Department that a central focus which would represent their concerns and values was critical for effectively addressing the needs, aspirations and concerns of Aboriginal and Torres Strait Islander women. It also became clear that an identifiable point of entry for Aboriginal and Torres Strait Islander women into government would facilitate greater access to decision making and representation as well as providing a point of contact for networks and activity across the state.

The development of the Unit has also been predicated on recognising that Aboriginal and Torres Strait Islander women hold the key to affecting change and that exclusion and deprivation within and across the communities will not be shifted unless Aboriginal women are involved in the solutions. There is now in government and the community a greater level of general agreement that the leadership of Aboriginal and Torres Strait Islander women is a key to gaining successful outcomes on a range of issues in communities. One of the challenges for the Unit is to ensure the participation of Aboriginal and Torres Strait Islander women in formulating policy and determining the shape of programs addressing a wide range of issues.

The Unit is the first of its kind in jurisdictions across Australia. The focus and work of the Unit is necessarily multi faceted, crossing over and between many aspects of the issues impacting on Aboriginal and Torres Strait Islander women's lives and working at the local and regional community level, at the whole of government level and at the Departmental level. The Unit has been established to provide a centralised and coordinated point of reference and response to issues impacting on the status and well being of Aboriginal and Torres Strait Islander women in NSW, by both the Department and through whole of government and cross-agency activity. It is well placed to:

- Provide policy advice to the Department for Women, to whole of government, to cross-agency initiatives, and to the Commonwealth;
- Undertake project development with agencies and communities, as well as through the Department for Women;
- Undertake community development and community education with Aboriginal and Torres Strait Islander women and their communities, and with the broader community on issues impacting on Aboriginal and Torres Strait Islander women and their communities; and
- Engage and interact with Aboriginal and Torres Strait Islander women to develop strategies to better manage and overcome issues as they identify them.

The Unit also provides a structure for informed and coordinated policy and program responses to:

- Social justice as it impacts on Aboriginal and Torres Strait Islander women;
- Economic and community development for Aboriginal and Torres Strait Islander women in and with their communities;
- Cultural and spiritual healing and well-being of Aboriginal and Torres Strait Islander women and their communities;
- Aboriginal family violence and the prevention of violence (including sexual assault);
- Leadership, and the participation of Aboriginal and Torres Strait Islander women in decision making;
- Criminal justice issues affecting Aboriginal and Torres Strait Islander women; and
- Young women's affairs (including child protection).

The Unit works at the interface between the issues impacting on the status and well-being of Aboriginal and Torres Strait Islander women and an acknowledgement of the strengths, knowledge and practices they bring to solutions and change. Re -engendering culture and kinship as the basis for building women's strength is a core practice for meeting the challenge of shifting what might appear to be insurmountable problems. As such it empowers women to deal with and manage issues in ways that enable them to move forward and build safe, strong and economically viable communities. The Department has worked through camps, workshops, communication and liaison with women in communities such as Brewarrina, Bourke, Wilcannia, Lightning Ridge, Goodooga, Toomelah and Boggabilla to facilitate Aboriginal women's participation in personal and organisational decision making on issues and projects, including on engendering a safe environment for women and girls.

Culture, spirituality and kinship was the focus on a camp/gathering for women in Boggabilla/Toomelah. The women of Boggabilla/Toomelah decided that they need a group of women who are strong to lead the way. They believe that the family unit has disappeared and that they need to get their women interested in their community again. The cultural, spiritual and kinship camp was aimed at building women's capacity to develop strategies to better manage difficulty issues within their communities. The outcomes from the camp include information about education and discussion around kinship and totems that also assisted the women to understand their role in protecting one another and especially their children; greater awareness of the effects of drug and alcohol misuse including impact on family violence and child abuse; break down of some of the barriers between the women of the two communities which facilitated open sharing about grief and loss in relation to individuals and also community. This enabled the women to comfort each other and talk about ways that they could implement change when they returned home.

The Unit necessarily works simultaneously on small and localised strategies and processes and on state and national strategies. Bringing these together is a dynamic process and one that can be seen in the formulation of a NSW Aboriginal and Torres Strait Islander Women's Plan. The Plan brings together initiatives on leadership, safety, and economic development and sets them against benchmarks identified at a national level to improve the well being of Indigenous communities. At the same time the Unit works with Aboriginal and Torres Strait Islander women to contribute to the development of a national Indigenous Women's Action Plan.

The dynamic is also evident in the meetings the Unit holds with women in both very small local communities and in larger regional centres. These might take the form of gatherings and camps. Forming relationships at this local level builds a strong foundation for women to gather at state level community conferences. The Unit, led by the Director has held meetings at Inverell, Maitland, Bowral, Brewarrina, Lightning Ridge, Goolooga, Collarenebri, Moree, Toomelah and Boggabilla to develop a better working relationship with the communities and a more in-depth understanding of local issues and concerns such as health, dealing with loss and grief, violence, employment, education, child safety, and alcohol and other substance abuse. The Brewarrina Women's Forum held in February 2003 was aimed at developing a voice for women in the Brewarrina, Walgett and Bourke region.

Leadership (both collective and individual) and engaging Aboriginal and Torres Strait Islander women is a key focus. Supporting Aboriginal women to access decision making and representation recognises that some Aboriginal women have been disempowered and need the support of other women, family and community to operate at their fullest capacity. The Department funds Partnership Projects through its Women's Grants Program. One such project focuses on leadership development throughout the Murdi Paaki region. *Valuing Women's Voices* is a partnership project between Barriekneal Housing and Community on behalf of the Regional Women's Advisory Group of the Murdi Paaki Region and the Department for Women. The project aims to provide the women of the Murdi Paaki Region with a number of strategies to increase the representation of Aboriginal women in decision-making bodies at a number of levels.

While working from the strengths of Aboriginal and Torres Strait Islander women is central, the approach of the Unit nonetheless acknowledges the deep seated causative factors impacting on the status and well being of Aboriginal and Torres Strait Islander women and recognises that long term and sustainable change requires strong and committed partnership. Two Partnership Projects illustrate this.

The *North West Plains Aboriginal Women's Community Development Partnership Project* aims to harness the renewed energy of Aboriginal women, to collectively address issues such as child abuse, family violence and substance abuse, through skilling and fostering Aboriginal women's leadership and to use a community development framework that is culturally and spiritually appropriate in addressing the needs of Aboriginal families in the Shires of Moree, Narrabri, and Walgett shires of NSW.

A Partnership Project with the Aboriginal women of Boggabilla and Toomelah focuses on building community capacity through leadership development and training, mentoring programs, and social, economic and healthy relationship programs to assist women achieve safer, stronger and healthier communities. The programs address grief and loss, violence prevention, and leadership training that targets basic skills in corporate governance, project and financial management, communication, conflict resolution, public speaking and other community issues.

The Unit has been established within the context of both Commonwealth and NSW state initiatives including the Council of Australian Governments Women and Reconciliation Plan, the Ministerial Council an Aboriginal and Torres Strait Islander Affairs Framework for Indigenous Outcomes. The Unit has facilitated the development of a NSW Aboriginal and Torres Strait Islander Women's Plan and contributed with other jurisdictions to a National Indigenous Women's Plan through the Ministerial Council on the Status of Women. The Unit builds on the principles of reconciliation,

social justice and partnerships based on justice, equality and respect, as set out in the NSW Government Statement of Commitment to Aboriginal People (November 1997).

Wherever the Unit works – within the Department for Women, on whole of NSW government initiatives, in providing advice to the Commonwealth, or working with women and communities – it simultaneously brings and develops a body of evidence based knowledge about culturally informed and appropriate responses to issues impacting on Aboriginal women, their families and communities. So for example, the Unit is in a position to broker approaches on building community capacity through women's leadership; to work with women to develop sustainable models for the prevention of violence in communities; and to identify the pathways to enterprise development and economic regeneration. Underpinning this approach, are mechanisms for effective and sustainable dialogue and partnerships with women in communities, including through Gatherings and funded partnership projects.

Planning for and establishing the Unit has taken the Department and Aboriginal women involved in its development, through a number of stages – understanding and negotiating the languages, perceptions, experiences and priorities of Aboriginal and Torres Strait Islander women; finding ways to embed Aboriginal women's priorities and knowledge into government led initiatives and program development; identifying appropriate processes for dialogue and representation; coming to an understanding of the cultural specificities of Aboriginal and Torres Strait Islander women's business.

The Unit within the Department facilitates Aboriginal and non-Aboriginal women working and learning together, sharing skills and information, working towards narrowing the cultural divide, and creating understanding and respect as a foundation for developing strategies that reflect the aspirations and knowledges of Aboriginal women.

Equality and Dignity for All: Weight Discrimination in Australia



Victoria Lenton is the 2003 winner of the annual WATL Student Paper Competition.

The enactment of the first legislation dealing with discrimination in Australia in the 1970s was a reflection of the growing international concern over the protection of human rights and the concomitant ideas of equality and human dignity.¹ The concept that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, as encapsulated in Article 26 of the International Convention on Civil and Political Rights (ICCPR),² has been at the core of the implementation of anti-discrimination legislation in Australia, both at a State and Federal level. This goal of equality for all persons before the law has been approached in Australia by prohibiting discrimination on the basis of a select number of attributes, such as race, gender, impairment and sexuality, with the aim of preventing “widespread discriminatory practices in society”.³ However, any notion that such anti-discrimination legislation has contributed in any significant way to social justice in this country must be tempered by the fact that discrimination against the obese has been allowed to become system in our society. The exclusion of weight or physical features as attributes that warrant protection under anti-discrimination legislation has a severe impact on the ability of the overweight to participate fully in society, as it amounts to the denial of the basic dignity of being judged on individual merits rather than appearance. Thus, the widespread discrimination against the obese in all aspects of life and the absence of any statutory protection against such discrimination means that unless reform occurs, the main aim of anti-discrimination legislation will not be achieved.

This essay contains three major threads. Firstly, it shall be demonstrated that the overweight and obese face severe discrimination in Australian society. Secondly, it shall be asserted that obese people as a discrete segment of Australian society warrant protection under anti-discrimination legislation. Finally, it will be argued that current anti-discrimination law in this country does not provide sufficient protection against weight discrimination. The combination of these three threads together prove conclusively that anti-discrimination law in Australia does not fulfil the goal of equality of all before the law, and that all the States of Australia should follow Victoria's lead and amend their anti-discrimination legislation to include “physical features” as a protected attribute.

I. The Existence of Weight Discrimination

According to Taussig,⁴ “now that prejudice against most formerly stigmatized groups has become unfashionable, if not illegal, one of the last acceptable forms of prejudice is that against obese persons”. This development is also evident in Australia where there has been a growing awareness in recent years that prejudice against those considered obese is one of the “most widespread forms of discrimination that exist in Australia today”.⁵ Recent studies demonstrate that the overweight and obese face discrimination in almost all aspects of life, including employment, education, health and the provision of goods and services.⁶ Weight discrimination in employment has been of particular concern to researchers. Studies have shown that overweight employees are seen as “lazy or sloppy; having poor personal hygiene; lacking self-discipline or self-control; less competent, conscientious, healthy, or able to get along with others; and more likely to have

¹ Rice, S. 'Discrimination' (2002) 40 *Hot Topic* 1 at 5

² Note 2

³ Gaze, B. 'Context and Interpretation in Anti Discrimination Law' (2002) 26 *Melbourne University Law Review* 325 at 329

⁴ Taussig, W.C. (1994) 'Weighting in Against Obesity Discrimination: *Cooks v Rhode Island, Department of Mental Health, Retardation, and Hospitals* and the Recognition of Obesity as a Disability under the *Rehabilitation Act* and the *Americans with Disabilities Act*' 35 *Boston College Law Review* 927 at 932

⁵ Lily O'Hara quoted in Green, G. 'They ain't heavy, they're human' *The Courier Mail*, December 10, 2002, pg 15

⁶ Theran, E. "Free to be Arbitrary and ... Capricious": Weight based discrimination and the logic of American Anti Discrimination law' (2001) 11 *Cornell Journal of Law and Public Policy* 113 at 152

emotional and personal problems or be absent from work".⁷ These stereotypes affect all aspects of employment, from hiring, wages, promotion and termination.⁸ A pertinent example of this is a recent study by the University of Michigan which showed that the individual net worth of moderately to severely obese women was around 56% less than that of women of normal weight. Weight-based discrimination is also evident in Australia.⁹ For example, four of the eleven people who were unsuccessful in their applications for the adoption of children in 2002 were rejected on the sole basis that their BMI (Body Mass Index) exceeded "the acceptable level".¹⁰ Thus, it is clear that discrimination against the obese is widespread both in Australia and overseas, and has a significant impact on different aspects of an obese person's life, from employment to the personal. This raises the question as to whether anti-discrimination legislation should protect the obese from unfair discrimination.

II. Should anti-discrimination legislation protect the obese?

The first step in considering whether there should be legal protection for the obese is to examine the purpose for which anti-discrimination law was introduced in Australia. Throughout the implementation of anti-discrimination legislation in Australia, both as a state level and federally, the concepts of equality before the law and the importance of human dignity have been emphasized. For example, the Long Title of the *Anti-Discrimination Act 1991 (Qld)* (the ADA(Qld)) states that "everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination." It also recognizes that "the equality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone." It is clear that the systemic discrimination against the overweight and obese in Australian society does not fulfil the objectives of equality and dignity inherent in the anti-discrimination legislation.

However, the approach taken in both Australia, and internationally, does not conform to a view of discrimination law that prohibits all forms of discrimination. Australian anti-discrimination law is based on prohibiting only some forms of discrimination, that is, discrimination based on certain "protected attributes", such as race and sex, and only in certain areas of life, such as employment. Thus, the question is raised: is it appropriate to extend the current list of protected attributes to include a new protected attribute in the form of weight or physical features, if this is required to give protection from discrimination to the obese? In order to answer this question, it is necessary to address two separate issues: firstly, can the list of protected attributes be extended at all, and secondly, is weight an appropriate attribute to protect?

In response to the first issue, the development of anti-discrimination law in both the United States (US) and in Australia clearly demonstrates that expansion of the coverage of anti-discrimination law is entirely consistent with the purposes of the legislation. In both the US and Australia, the first anti-discrimination statutes prohibited discrimination solely on the grounds of race.¹¹ However, since then, what Fiss¹² calls a "proliferation of the Protectorate" has occurred, whereby there has been extension over time of the types of groups that receive protection from discrimination. In Australia, the list of protected attributes, has grown to include gender, disability, sexuality, pregnancy, gender identity, religious belief or activity, and political belief or activity.¹³

This "proliferation of the Protectorate" continues to occur in Australia and elsewhere because there is explicit acceptance of the notion that the "patterns of inequality"¹⁴ in society are evolving. What

⁷ Roehling, M.V. 'Weight Based Discrimination in Employment: Psychological and Legal Aspects', (1999) 52 *Personnel Psychology* 969, 971-83

⁸ Puhl, R. & Brownell, K.D. 'Bias, Discrimination, and Obesity' (2001) 9(12) *Obesity Research* 788 at 790

⁹ 'Fat not just a feminist issue but a financial one' *Australian Financial Review*, December 6, 2000, p35

¹⁰ Harvey, B. 'WA rejects bid by fat people to adopt' *The Age*, March 15, 2003
<<http://www.theage.com.au/articles/2001/03/14/1047583703349.html>>

¹¹ McCrudden, C. 'Introduction' in McCrudden C (ed), *Anti discrimination Law*, Dartmouth, Aldershoot, 1991 at xiii

¹² Fiss, O. 'The Fat of an Idea whose Time has come: Anti discrimination law in the second decade after *Brown v Board of Education*' (1974) 93 *Harvard Law Review* 1 in Note 11 at xiii

¹³ Anti Discrimination Act 1998 (Tas), Anti Discrimination Act 1991 (Qld), Anti Discrimination Act 1977 (NSW), Equal Opportunity Act 1995 (Vic), Equal Opportunity Act 1984 (WA)

¹⁴ Beteille, A. *Harmonic and Disharmonic Social Systems*, Sydney University Press, Sydney at 7 in Thornton, M. *The liberal promise: Anti discrimination legislation in Australia*, Oxford University Press, Melbourne, at 44

was considered acceptable discrimination in the 1970s when the first Federal and State legislation dealing with discrimination was passed no longer reflects contemporary community values.¹⁵ Therefore, the States have consistently amended their anti-discrimination legislation in order to keep it in line with current community attitudes and emerging patterns of inequality. For example, all States have amended their legislation to include sexuality or sexual orientation as a protected attribute,¹⁶ reflecting the growing awareness of the need to educate the community that discrimination on the basis of sexuality is no longer acceptable. Therefore it is clearly appropriate to extend anti-discrimination law to cover new grounds of discrimination.

However, it is also clear that a kind of universal discrimination principle where discrimination of all forms is prohibited is neither warranted nor workable. Not all grounds of discrimination should be protected by anti-discrimination legislation. Thus a second issue is raised, that is, is weight or body size an appropriate attribute to protect from discrimination?

Elizabeth Kristin,¹⁷ argues for the affirmative. She contends that the principles of equality and fairness provide sufficient justification for the incorporation of protection against weight discrimination. The principles of equality and fairness (or justice) are fundamental to the concept of liberalism, which underpins modern Western society.¹⁸ Kristin proposes that neither the principles of equality or fairness in themselves give a justification for the enactment of anti-discrimination legislation in relation to the overweight or obese. Instead, she argues that it is the interaction of the two principles together that point towards this being an appropriate extension of anti-discrimination law.

She makes this argument by first examining the notions of equality based on the respective theses of Balkin and Fiss. Balkin has a status-hierarchy approach to equality, arguing that inequality based on a particular attribute should be addressed where it is used to "create a system of social meanings or define a social hierarchy that helps dominate and oppress people".¹⁹ Fiss on the other hand develops an approach to anti-discrimination law called the "group-disadvantaged principle",²⁰ that is concerned with the destruction of caste systems in society, where groups in a perpetually subordinate position in society should receive protection and relief. Fiss outlined two characteristics of a group for his purposes; firstly, that the group members identify themselves by reference to their membership in the particular group, and secondly, that the well-being of the members of the group is dependent on their identity as a member of that group. Based on these two approaches, Kristin then argues that obese people are a group deserving relief under Fiss' scheme due to the fact that a person's status as an overweight person is usually part of their self identity, and that as we have already seen, weight discrimination has an impact on all elements of life, from employment to the provision of goods and services. She also argues that using Balkin's scheme, a social hierarchy of weight exists that has been used to "oppress fat people and benefit thin people".

However, Kristin argues that membership in an oppressed group that deserves equality is in itself not enough to justify the extension of the existing protection against discrimination to the overweight and obese, since it has a potentially unlimited application to any group that can satisfy the criteria. Thus she also points to Rawls' argument²¹ that fairness also requires a system of justice based on principles that would be chosen if a 'veil of ignorance' existed, and you did not know what attributes you will possess in that society. This formulation of "fairness as justice" emphasises that justice requires that irrelevant considerations should not be taken into account when making a decision. So, based on a combination of the requirement of fairness or justice in eradicating discrimination on the basis of irrelevant consideration, with Balkin and Fiss's conceptions of equality that require the elimination of 'group hierarchies', Kristin argues that it is

¹⁵ Catanzariti, J. 'A brave new approach to discrimination' (2000) 4 May *Law Society Journal* 38

¹⁶ Note 13

¹⁷ Kristin, E. 'Addressing the Problem of Weight Discrimination in Employment' (2002) 90 *California Law Review* 57

¹⁸ Bottomley, S & Parker, S. *Law in Context*, 2nd ed, The Federation Press, Sydney, 1997 at 15

¹⁹ Balkin, J.M. The Constitution of Status, 106 *Yale Law Journal* 2313 at 2366 in Note 17 at 74

²⁰ Fiss, O. Groups and Equal Protection Clause, (1976) 5 *Phil & Pub Aff.* 107, 108 109 in Note 17 at 75

²¹ Rawls, J. A Theory of Justice, 10 rev ed, 1999 in Note 17 at 76

appropriate for the extension of the existing attributes protected from discrimination under US anti-discrimination legislation to include weight.

It can also be argued that Kristin's thesis has validity when applied to the Australian legal situation also, as the twin pillars of her argument are similarly satisfied. It is clear that the weight discrimination that has occurred in Australia is similar to the discrimination faced in the US, so that the overweight and obese in Australia would probably constitute an oppressed group under Balkin's and Fiss's formulation. It is also evident that there is a similar emphasis in the Australian legal system on the liberal principles of equality and justice²². The concepts of equality and fairness are inherent in all anti-discrimination legislation in Australia. In fact, the appropriateness of protection of the obese from discrimination has already been acknowledged in one Australian State, Victoria, where the Equal Opportunity Act 1995 (Vic) was amended to include "physical features" as a protected attribute. Physical features includes a persons' weight or size. In proposing this amendment, the Victorian Office of the Attorney-General stated that the justification for the amendment was that "performance criteria and merit should be used to judge a person's suitability for a job, not their physical features."²³ This is a reference to the Rawlsian notion of justice, which requires that irrelevant considerations not be taken into account. Thus, both elements of Kristin's argument are therefore satisfied in Australia, so there is justification for the extension of the grounds of discrimination in Australia to include weight.

III. Is There Protection Against Weight Discrimination in Australia?:

Having determined that the obese as a discrete group in Australian society warrant protection under anti-discrimination law, the question becomes one of evaluating the protection currently offered. As mentioned previously, Victoria is the only State in Australia that has enacted legislation that specifically provides that discrimination on the basis of "physical features" (including weight and body size) is prohibited²⁴. The Federal statutes also only prohibit discrimination on the grounds of race, sex and disability. Thus, it is evident that there is largely no specific protection from weight discrimination under Australian anti-discrimination law.

However, there is some argument that it is possible to provide protection for the overweight and obese on the basis of the existing grounds of discrimination, for example, under the prohibition of discrimination on the basis of a disability. It has been argued in the American context that obesity as a condition should be recognized as an actual disability under anti-discrimination legislation as it is a "physiological condition that affects several bodily systems"²⁵. The Australian case of *McCarthy v Metropolitan (Perth) Passenger Transport Trust (Transperth)*²⁶ does include *obiter dicta* stating that "it may be that obesity *per se* could constitute an "impairment"²⁷ for the purposes of the Equal Opportunity Act 1984 (WA). However, the definition of 'impairment' in the Western Australian legislation is flexible, compared with other State legislation and the *Disability Discrimination Act 1992* (Cth) (the 'DDA'). The only other case significant case in Australia dealing with obesity discrimination, *Cox v The Public Transport Corporation*²⁸, has *obiter dicta* that indicates that obesity will only constitute an impairment where it is so severe that it comes within the definition of impairment²⁹. This means that while it is possible that a person who is so obese that their condition comes within the ambit of the protection provided by the Federal Disability Discrimination Act, or as an 'impairment' under most State anti-discrimination legislation, will be shielded from discrimination, this protection will probably not extend to those whose weight does not.

On the other hand, Lynch argues that there is some hope for those whose obesity is not so severe that it constitutes an impairment, based on the 'perceived disability' theory developed in weight

²² Thornton, M. *The liberal promise : anti discrimination legislation in Australia*, Oxford University Press, Melbourne at 22.

²³ 'News Release From the Office of the Attorney General: New Grounds of Discrimination' May 4, 1995.

²⁴ <http://www.dpc.vic.gov.au/domino/Web_Notes/pressrel.nsf/0/5180326aa07ee61f4a256372001f2f80?OpenDocument>

²⁵ Lynch, A. 'Is obesity a disability actual or perceived under the Disability Discrimination Act 1992?' (1996) 3(2) *Deakin Law Review* 161 at 161

²⁶ Note 4 at 957.

²⁷ (1993) EOC 92 478

²⁸ (1993) EOC 92 478 at 79, 478 in Note 24 at 178.

²⁹ (1992) EOC 92 401

³⁰ (1992) EOC 92 401 at 78, 862 in Note 24 at 175.

discrimination litigation in the US. The definition of a disability under the DDA includes “a disability that is imputed to a person”³⁰. All State anti-discrimination legislation (except for Tasmania) also include a provision prohibiting imputed disability discrimination. Thus, using this approach, a person who was discriminated against on the basis of their weight may be able to argue that the discrimination was based on a perception that they were disabled or impaired under the particular Act.

However, Lynch identifies a number of deficiencies in this approach. The most substantial problem of using the ‘perceived disability’ theory of discrimination is illustrated by the case of *Cox v The Public Transport Corporation*. It should be noted that this case was heard prior to ‘physical features’ being included as a protected attribute in the *Equal Opportunity Act 1995* (Vic). This case involved Cox, an obese man, who was refused employment as a tram conductor on the basis that his weight meant that he was at risk of cardio-vascular disease. Apart from Cox’s obesity, he was in “all other respects healthy”³¹. Mr. Cox argued that he was discriminated against on the basis of an imputed disability, here an increased risk of heart attack. However, the Board found in that this argument failed because an increased risk of heart attack was not an ‘actual impairment’ under the Act, since it is merely a risk of future impairment³². So, under the State legislation, it is unlikely that an obese person could claim discrimination on the basis of a ‘perceived disability’ unless they could show that the discriminator thought they were impaired in some way at the present time.

Lynch points out that this is not the case under the DDA, which specifically prohibits discrimination based on a “disability that may exist in the future”³³. So there is some potential for an obese person who is discriminated against on the basis of a risk of future health problems, to receive protection under the DDA. However, Lynch calls the potential protection offered by the DDA a “clumsy, and perhaps inappropriate, means of redress”³⁴. He argues that the ‘perceived disability’ approach leaves it open for the person discriminating to refute such claims by arguing that they were aware that the person in question was not disabled, but that they merely perceived them as an obese person who they do not want to hire on that basis alone³⁵.

Thus it is clear that there is potentially some protection for the overweight and obese under current Australian anti-discrimination law, either as an actual disability if the obesity is severe enough, or if it is not, under the DDA using the ‘perceived disability’ approach. However, it is also evident that this protection is significantly limited, and indirect. Therefore, it is only by specifically providing for weight as a protected attribute for the purposes of discrimination legislation, that the obese will receive adequate shielding from unfair and unequal treatment.

In conclusion, three main concepts should be apparent from this discussion. Firstly, that discrimination on the basis of weight is a widespread phenomena in Australia, and has a significant and detrimental impact on many different aspects of an obese individual’s life. Secondly, that the underlying purpose of enacting anti-discrimination law and the values underpinning modern Western society, that is, equality and fairness, in fact require that the obese receive protection from this discrimination. Finally, it should be clear that the current system of anti-discrimination legislation in Australia does not provide adequate protection against weight discrimination. It becomes clear from the convergence of these three concepts that it is incumbent upon all jurisdictions in Australia to pass legislation preserving ‘weight’ or ‘physical features’ as an attribute attracting protection from discrimination under the law. Unless such steps are taken, the unfair, arbitrary and unreasonable discrimination of a significant segment of Australian society will continue, and the fundamental goal of anti-discrimination law in providing for the equality and dignity of every individual will never be achieved.

³⁰ s4(k) in Note 24 at 164.

³¹ *Cox v The Public Transport Corporation* (1992) EOC 92 401 at 18, 859 in Note 26 at 174.

³² Note 24 at 175.

³³ s4(j) *Disability Discrimination Act 1992* (Cth) in Note 26 at 175.

³⁴ Note 24 at 182.

³⁵ Arrigo Ward, M.J. ‘No Trifling Matter: How the Legal System Supports Persecution of the Obese’ (1995) 10 *Wisconsin Women’s Law Journal* 27 at 58 in Note 26 at 181.

Abstracts of papers submitted to the WATL Student Paper Competition 2003



War as Unjust – a Feminist Perspective

Helen Bode

This essay explores war from a feminist perspective, and judges it to be unjust at both a material and a conceptual level. The inherently unjust nature of war is determined through analysing women's positions in war. Not only are women the greatest victims of war, but contemporary warfare is a narrow manifestation of dominant male perspectives. This essay argues that the practice of conflict and conflict resolution needs to be interrogated and reformed using a feminist perspective in order to make war more just.

Domestic Violence

Jessie Morwood

According to World Bank figures, at least 20% of women around the world have been physically abused or sexually assaulted. In India, studies have found that more than 40% of married women reported being kicked, slapped or sexually abused for reasons such as their husband's dissatisfaction with their cooking or cleaning, jealousy, and a variety of other motives. In Australia, according to Trish O'Rourke of Griffith University's School of Applied Psychology, 10-30% of Australian women have experienced domestic violence and more than 90% of victims of domestic violence are women; with Australian indigenous women being ten times more likely to be victimized. While in the US, it accounts for more hospital admissions than rape, muggings and road accidents combined. Domestic violence is the most common form of violence in the world and is also the world's single biggest cause of injury to women.

This paper will look at domestic violence: why it occurs, how it works, its impact on victims; why some victims choose not to leave; and what can be done within society and the judicial system to make a change.

Women and the Law: The Female Mediator

Tanja Stephan

This paper deals with the role of female mediators as third persons in mediations. The paper points out some of the possible difficulties that may arise in communicating with the parties involved.

The paper takes a close look at the mediator's role within the bargaining process. It then determines gender issues, and the advantages and disadvantages of a female mediator involved in the session. The paper then takes a closer look at the communication process and skills needed by a mediator, and points out the differences between male and female language and communication capabilities. The paper concludes by offering some suggestions as to how a female mediator can be a successful and effective communicator.

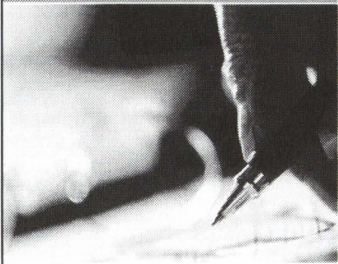

Book review: *Dark Victory* by David Marr and Marian Wilkinson

Kelly McClymont graduated from the University of Queensland in 2000 with a Bachelor of Arts (Honours) majoring in Spanish and German and is currently completing the final year of a MBBS.

Dark Victory is the first collaboration between Marr and Wilkinson, both distinguished Fairfax journalists, and both with prior book credits. It details the period leading up to the Australian election in November 2000, with a focus on the Howard government's "anti refugee" and "tough on terror" strategies. These are worthy topics for discussion, given that the Australian people convincingly endorsed the Liberal-National government at the ballot box.

A work of extraordinary political journalism, the book exposes the inner workings and machinations of Howard's populist resurrection and foreshadows the present third term of government. All the significant institutions get a work-over. The Australian military, from Chief-of-Staff Chris Barrie down, tango to the tune. The immigration, defence and foreign affairs departments bow their knees before Max Moore-Wilton and his army of Liberal party organisers. Nebulous spy and counter-terrorism organisations such as the Office of National Assessment and ASIO provide logistic support. Finally, the amazed and bemused opposition parties and media wonder what to make of it all.

From late August to early November 2000, all other considerations come second to the Tampa and the Twin Towers, and for a moment it seems there is no agenda to privatise health and education. For those with a penchant for poison, the book fairly oozes venom: gory details of government misrepresentations, obstinate oligarchs and liberal doses of double-speak. It is rather heady and depressing reading. For the book's many critics, there is perhaps more than a little solace in the fact that the Australian public believe the hype, and continue to vote John W. Howard back in. For the rest of us, Marr and Wilkinson's meticulous election history shows that the age of investigative journalism is far from over in Australia. For mine, the best Australian political writing since Frank Hardy's *Power Without Glory*.

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