

# Pandora's Box



## Women & Peace

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# *Pandora's Box*

## 2006



Editors  
Gail Blaber & Bridget Daly

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## *Editors' Note*

We are pleased to present Pandora's Box for 2006.

The theme of this year's edition of Pandora's Box, "Women and Peace", was derived from the focus of this year's International Women's Day celebrations, "Women Striving for a Peaceful Society".

In this year's edition of Pandora's Box we aimed to recognize that, although peace is still not a reality for many women throughout the world, there are many dedicated individuals striving for a peaceful society both in Australia and internationally.

There are a number of people to whom we would like to pass on our thanks. Firstly, the contributors for giving their time and expertise in order to pass on their insights for the issue, "Women and Peace". Secondly, Ms. Clare Cappa, from the University of Queensland Law School, for adjudicating the Magistrates Work Experience Program Essay Competition. Thirdly, all WATL members, especially Kathryn Purcell (President) and Shona Duniam (Vice-President) for their support throughout the year. Finally, we would like to pass on our deepest appreciation to Chris Henderson. Chris assisted us greatly through the year, not only volunteering to write our foreword but also by passing the word around about Pandora's Box and connecting us with two of our contributors for 2006.

We hope that reading the 2006 edition of Pandora's Box not only provokes consideration of the daily struggles of many women towards peace, but also inspires action as exemplified by the women identified in the following pages.

*"To many people war is seen as something masculine and peace as feminine. In fact both men and women need to work together to build genuine peace...I wish your efforts every success."*

- The Dalai Lama.

Gail Blaber and Bridget Daly

*Editors of Pandora's Box for 2006.*

*Whilst the editors have checked the references for authenticity, any mistakes belong to the authors*

## Foreword

Chris Henderson<sup>1</sup>

I am writing on 21<sup>st</sup> September – a date established by the United Nations in 2001 as International Day of Peace. Until last year I saw this day as a symbolic if innocuous public affirmation of hope. As an activist I have left such events to others while I concentrate on projects that I have considered to have more chance of making a difference. The potential of this day was brought home to me by frontline aid workers. For them, peace for one day means a global ceasefire and a day of peace and non-violence. This becomes a day when food and medical supplies can be distributed; when people can be transported to safety; when dialogue can be initiated.

Naming a day is a powerful sign of ‘ordinary’ people power and it is gaining purchase as a real possibility, even though it may not reach or affect the outcome for a woman raped in a remote village at gunpoint today or on the day you read this. One hundred and ninety two member nations of the United Nations (UN) created peace activities today. In my city, Brisbane, it has become a week-long series of events, with the conservative tabloid providing an astounding double page spread, and a youth peace parliament taking over Parliament House for a day with the support and involvement of MPs. From little things, big things grow and from the aid workers and this year’s International Day of Peace I have learned a sobering lesson.

What counts as ‘peace’ though? The UN focuses not on defining peace, but on what defines and creates a *culture* of peace: ‘a set of values, attitudes, modes of behaviour and ways of life that reject violence and prevent conflicts by tackling their root causes to solve problems through dialogue and negotiation among individuals, groups and nations’.<sup>2</sup>

This issue of Pandora’s Box offers a challenging and insightful intersection of articles that allows us to study and make known those underlying causes of violence and injustice and to celebrate and learn from the work of activists such as Aung San Suu Kyi and Jane Dai.

How we respond is, for me, the key question. Do we read and move on, concerned bystanders leaving practice to others? Does cynicism, procrastination or resignation discount the potential of action before it has begun? In part, our response will depend on becoming present to the peace we want in our own lives as a powerful base from which to act.

Set free by this issue of Pandora’s Box, thank goodness, is *hope*, consciously aware and grounded in wisdom. Left to its own devices, hope will wither. Combined with informed, strategic action in our own lives and in our communities, it can support us in the long haul essential for creating a sustainable culture of peace.

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<sup>1</sup> With special thanks to Spiderlily Redgold who assisted with the final polish.

<sup>2</sup> (UN Resolutions A/RES/52/13: *Culture of Peace* and A/RES/53/243, *Declaration and Programme of Action on a Culture of Peace*).

So what else does Pandora offer this year? Ah yes – an analysis of UN Security Council Resolution 1325: Women, Peace and Security - a tool for creating peace and justice, for addressing women's security and, crucially, for ensuring that women's voices and gender mainstreaming inform and are included in all aspects of the peace process.

UN resolutions, the minute they are passed by the UN, become part of the body of international law. In Australia, UN resolutions are not automatically reinforced or supported by domestic law. It is up to us as citizens to make the government create law in the spirit of each and every resolution passed by the UN. We have a government deeply committed to war but apparently not to peace or to women's involvement in the peace process, given that our government has declared war since this resolution was passed in 2000, and has not acted to transform this international obligation into domestic policy.

This academic journal for women in law will be read by a wider audience. It is likely to be read by those with privilege and position, by those with education. My question: who will take up and champion this issue if not us – you and me?

If you walk in the world knowing that peace is truly possible and can be created by your actions, what are you prepared to do? Where would you start?

Consider that we – every one of us who picks up this journal and begins reading – can create world peace through our actions. I invite you to join an organisation that works to create a culture of peace. I belong to the Women's International League for Peace and Freedom which is an international champion of resolution 1325. Maybe there are other organisations that suit you better. Belonging to an organisation means that you stand up to be counted, even if you do not have the time to attend meetings. Your endorsement through joining a peace organisation will support others and therefore create and sustain action and possibility.

I thank and commend the editors and authors of this year's Pandora's Box for lifting the lid on creating a culture of peace. International Day of Peace has blossomed and borne fruit. I look forward to marvelling at the actions we will take as a result of delving into this edition and for the transformations we will cause together.



## *Speech Delivered at the Queensland Government's Office of Women celebrations for International Women's Day 2006.*

### **Maree Klemm**

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*Maree Klemm was recognised as a "Woman of Peace" by the Queensland Government's Office of Women for the celebrations of International Women's Day, 2006. Maree's main areas of community interest have fallen into four broad categories: social justice and human rights, internationalism and multiculturalism, sustainable development and women's equity. As such, she has volunteered for many organisations including Amnesty International Australia, Rotary International and the Ethnic Community Council of Queensland.*

*Maree Klemm has enjoyed a long and fruitful career in the financial services and resource sector. While still heavily involved in her career, events unfolding in Australian society relating to asylum seekers motivated Maree to move from being purely a 'funder' of good causes, to someone who gets out there and takes a stand. In Maree's own words: she now walks the talk.*

*Maree encourages people to connect with others of a like mind and openly communicate our hopes for peace. In her words, "In your own personal way, voice your thoughts and feelings about your visions of peace in your communities and you will attract like-minded people. Then your collective voice becomes louder and more influential, you become stronger in your convictions and the proliferation of peace spreads from your local communities to the wider world."*

*The following is the speech Maree presented at the International Women's Day celebrations 2006.*

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It gave me a great thrill of affirmation to be invited to represent the countless women striving for a peaceful society and to participate in the Queensland Government's Office of Women celebrations for International Women's Day.

As I read through the profiles of the women speaking here today. I found many sources of inspiration. One that sticks in my mind is Reverend Alex's description of "being just a nobody that knew she had a gift and a destiny". It captures the individuality of all "nobody" women of peace:- the gift of that inner peace and conviction that anchors us and keeps us clear sighted in our advocacy and destiny for a universal culture of peace.

At a personal and community level, we come together to celebrate the themes of International Women's Day, and to nurture each other in our solidarity for peace. That solidarity is a priceless gift. We are strengthened, knowing that there are others who share our hope & vision for peace, and who will help us to reach that most necessary, desirable and achievable destiny, diverse and peaceful societies around the world.

Studies in “Peace and Conflict Resolution” draw a strong correlation between violence on a personal and local community level, with violence on a national and international scale. Throughout history those societies displaying absolute power & violent, warlike aggression were those in which the structure of society was designed to maintain dominance of men over women and adults over children, through violence or the threat of violence. In contrast, in societies where the rights of women and children are protected, the national character is far less aggressive and violent, and developmental progress thrives in a pre-dominantly peaceful environment. Riane Eisler’s studies of 89 countries show that the status of women is a more accurate indicator of the nation’s general quality of life, than any financial or economic indicator.

As we meditate on our theme for International Women’s Day, “Women Striving for a Peaceful Society” let’s be mindful that intimate violence in our homes and schools is as monstrous as armed warfare fueled by economic, social and political injustices. How many social customs and public policies accept, condone, even promote intimate violence? Who raises their voices against this violence in the home, school and local community? Simple logic tells us that early conditioning to accept violence as a means of imposing one’s will on another, is universal training for violent and repressive regimes. Violence (meaning the lack of peace) on the domestic scale sadly does scale up to warfare and conflict on an international scale. The vicious cycle of the abused child becoming the abuser, is well understood. Let’s strive to intervene for the better, in the cycle of violence, and create instead the circle of peace.

Human relations and our value of human rights are learned in the family, observing the relationship between our parents and their relationships with their children. In past times (for some), and in more authoritarian and patriarchal societies, the control of these relationships, with force and violence, by the male was condoned by law, religion and custom. Our inability to sustain peace, is the grim legacy of this structure, which entrenches subservience and repression.

Eleanor Roosevelt, advocating for the acceptance of the Universal Declaration of Human Rights, said that our rights are a very difficult concept to define across cultures and around the world. However, she said with great wisdom, we will universally recognize basic human rights in “small matters that are close to home”. The Universal Declaration of Human Rights is truly a declaration and charter for peace on all levels, from the personal to the global.

The sad statistics reveal that violence against women and children are the most widely violated human rights across all societies. This correlation of intimate violence and war is so often overlooked or suppressed on the global political stage and dismissed as insignificant “small matters close to home”, a mere

domestic issue, nothing relevant to the world's power- brokers and peace- brokers.

How wrong that view is and how detrimental to peace.

We might reflect on how our personal contribution to world peace begins with small matters close to home. With this conviction, we can be empowered to make our world more peaceful and to know that our individual contribution to peace is significant, validating and reinforcing for us all. Individual protection, respect, indeed reverence of women and children and of all humans, is the basis of attaining and sustaining peace. We "nobody women of peace", share the gift of our vision for peace and ask you to join us in reaching and holding that destiny – peaceful societies.

## *Women and security: 'You cannot dance if you cannot stand'*

**Elisabeth Porter**

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*Elisabeth Porter has taught Politics, Peace and War and Sociology at Flinders University of SA, University of Ulster and Southern Cross University. She has published widely on women and politics, dialogue across difference and feminist ethics. Her *Peacebuilding: Women in International Perspective* (Routledge) will be available 2007. Lis is Professor and Head of School of International Studies at University of South Australia. Three adult children, a granddaughter and fabulous partner provide joy. She believes that justice, equality, rights and compassion are central to peacebuilding. ([Elisabeth.Porter@unisa.edu.au](mailto:Elisabeth.Porter@unisa.edu.au))*

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*To translate Resolution 1325 into reality, we must understand that there are gendered and cultural views on security, and include women in formal political processes, says Elisabeth Porter.*

### ***Can women make a difference to peace and security?***

Yes, if the rhetoric about including women is translated into reality. Before suggesting how, I must make three qualifications. First, I am Australian and have worked in Northern Ireland during 1990, from 1994-1999 and since 2004. Personally, it is not possible to live in a divided society that is inherently violent and where patriarchal attitudes and values pervade everyday living (despite progressive equality legislation) without feeling committed to working toward change. Yet in a place where identity markers define both exclusion and inclusion, it is not easy to work as an 'inside-outsider', living in the culture, aware of its limitations and possibilities, yet always being conscious of being different in a culture where diversity is not yet celebrated.

The second qualifier regards the involvement of women in Northern Ireland in peace processes. Northern Ireland has a history of strong women making a difference. However, I write this in mid-September 2005, after the worst riots in Belfast for a decade. Last Saturday, the road I live in was blocked by loyalists (many other roads were also blocked) in support of the Orangemen's protests about having their march redirected 100 metres (in order to lessen offence to a nationalist community). I gained permission from the police to walk my dog through the line of protesters and was appalled to find the bulk were young women and children and kept thinking, why did I find this so appalling? We have seen more than a week of violence, disruptions to normal activities, hijacking of cars and buses, burning of vehicles and shops, shootings and violence aimed at the police, accusations of police brutality and the invoking of



much tension and fear. Many loyalist women and children visibly support this violence. There are few women elected political representatives and few women publicly voicing alternatives. The message is clear, women potentially can make a difference but we must never assume they always will.

In many places, women socialise children into a cultural identity that includes the learning of ethnic hatred. Some Catholic and Protestant women in Northern Ireland perpetuate sectarianism that promotes violence. In Rwanda, many women encouraged revenge for the dead. Women have been liberation fighters in Eritrea, Nicaragua and Indonesia. In Eritrea, Sri Lanka, South Africa and across Latin America, women are one-third of the guerrilla armies.

My third qualification refers to the significance of Resolution 1325 and practices within the United Nations. In April 2005, I attended the United Nations University Directors meeting in Bonn, Germany. United Nations University acts as a UN think-tank and has both 'Peace and Governance' and 'Environment and Sustainable Development' strands. I was astonished to find that at this meeting, there were 23 men and two women. Aren't universities supposed to be enlightened institutions where matters of equality and inclusion of difference are taken seriously? Several directors agreed with me that there should be more women present. Why? For reasons of gender equity, plural inclusivity and because of women's potential unique contribution.

Thus, I turn to the main points of this article and affirm that women can make a difference, that 1325 is unprecedented in calling on persons to take action in: increasing women's participation in decision-making and peace processes; including gender perspectives and training in peacekeeping; encouraging the protection of women; and integrating gender mainstreaming in UN programs by assessing the in/equality implications for women and men of all policies and programs.

Yet in each of these four key areas, there are stark failures in translating the rhetoric into reality. Three changes are necessary: expand the concept of peace-building in order to transfer skills acquired in informal work to participation in decision-making; understand that security means different things to different groups and; keep insisting on the need for quotas and benchmarks.

### *Women as victims of armed conflict and as peace-builders*

While I have already mentioned that women are actors in armed conflict, more women are victims of conflict. Women are vulnerable, because whether it is Burundi, Afghanistan, Kosovo, Algeria or Jerusalem, internal conflicts are not fought primarily in battlefields but in villages and towns where women and

children remain. Further, violence often flows back home. In Northern Ireland, men in security forces have approved arms because of being potential targets, while paramilitary groups retain illicit arms.

In war zones and in conflict societies, women are not just victims, many are active peace-builders. The 1995 Fourth World Conference on Women, in Beijing, was instrumental in defining those areas of concern considered to represent the major obstacles to women's advancement and making recommendations for change. Since then, the global network of NGOs working on women's rights has expanded. This includes lobbying the UN in the lead up to the 24 October 2000 Security Council session on Women, Peace and Security. The resultant resolution is a global advocacy tool.

It is a necessary resolution because women are active in informal peace protests, community dialogue, promoting intercultural tolerance and in practical peace initiatives. However, they are overwhelmingly absent in formal peace processes. They must be included in formal processes in order to establish meaningful gender equality.

### *Why should women be present at negotiating tables?*

Does it really matter if women are present at negotiating tables or in formal peace processes? Yes it does.

- First, women and men are affected by conflict and therefore also are affected by the consequences of peace agreements. These agreements are not merely about ending war, they are also about establishing the conditions for new just societies where plural perspectives are taken into account.
- Second, women's inclusion in all stages of peace processes is essential for inclusive social justice.
- Third, the presence of women in political, policy and legal decision-making contexts often makes a difference to the sorts of issues addressed like education, health, nutrition, childcare and human security needs in places as varied as South Africa, Israel, Palestine, Liberia or Guatemala.

Women universally are prime carers in families and communities and they have a huge interest in community stability, so they play important roles in peace-building in unofficial ways. Some women are peace activists advocating for non-violence, others are mediators, trauma healing councillors, practitioners addressing the root causes of violence, educators or facilitators of capacity-building. Many women assist dialogue between husbands or brothers in warring factions, tribes, clans or ethnic groups. Women often bridge divides across

traditional ethnic, religious and cultural divisions, coming together on the shared concerns about practicalities of life. In Azerbaijan, Colombia, the Democratic Republic of Congo, the Great Lakes Region, the Middle East, Northern Ireland and Somalia, women work collaboratively across ethnic and religious lines to make valuable contributions to peace processes despite little awareness of 1325. Stella Tamang of one of Nepal's largest indigenous groups argues that women at the negotiating table "will introduce practical workable solutions to the conflict". The Mano River Women's Peace Network of women from Liberia, Guinea and Sierra Leone opened pathways of communication between warring factions that led to reopening of borders and restoring of diplomatic relations.

### *Why should the understanding of peace-building be expanded?*

Narrow definitions of peace-building sit within the post-conflict reconstruction stage, after peace settlements. This definition has two significant consequences for women.

- First, it overlooks all the hands-on, unofficial work women do to build peace in grassroots groups, communities and families.
- Second, it provides inadequate validation for including women at negotiating tables. Failure to accord acknowledgment for women's active conciliation in all stages of peace processes, consistently results in their exclusion from political decision-making.

I am suggesting that peace-building is a *process* that needs to flow through the pre-conflict, conflict and post-conflict stages and elaborate this in my forthcoming book, *Peace-building: Women in International Perspectives*.<sup>1</sup> Peace processes consist of both formal and informal activities. Women are prominent in informal peace work. However, despite 1325, they are rare in formal peace processes as defined by the UN to include "early warning, preventive diplomacy, conflict prevention, peacemaking, peace-building and global disarmament".

The UN distinguishes between different aspects of these processes. *Peacemaking* includes mediation, conciliation, arbitration and negotiation to bring hostile parties to agreement. *Peacekeeping* involves keeping parties from fighting or harming each other through multinational forces of armed soldiers and police. *Peace-building* includes constructing the conditions of society to foster peace through development, aid, human rights education, reconciliation and the restoration of community life. In the UN, peace-building typically refers to formal approaches used in post-conflict reconstruction.

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<sup>1</sup> Elisabeth Porter, *Peace-building: Women in International Perspectives* (2006).

As Christine Chinkin argues, for many women this concept of 'post-conflict' is a problem.<sup>2</sup> When active conflict or violence ceases, women still have to deal with traumatised children, family members who were combatants and the inevitable difficulties of meeting everyday needs while dealing with intense traumas. The notion of 'reconstruction' may also seem meaningless for women who never have known full citizenship, social justice or a respect for human dignity and rights.

So it is a positive thing that the UN Secretary-General, Kofi Anan is expanding his view and says, 'the participation of women and girls and inclusion of gender perspectives in both formal and informal peace processes are crucial in the establishment of sustainable peace'. Certainly, UNIFEM's emphasis on peaceful, just relationships of equality contrasts with orthodox emphases on structural reconstruction.

Most women's understandings of peace-building are far broader and more holistic than UN or conventional usages of the term. As Sanam Anderlini writes in *Women, Violent Conflict and Peace-building: Global Perspectives*, "the intricate tapestry of what constitutes real peace and security...[includes] social justice, domestic reform, women's rights, co-existence, tolerance, participatory democracy, transparency and non-violent dialogue as necessary ingredients for addressing social differences and building sustainable peace".<sup>3</sup>

### *Human security and well-being*

Part of translating 1325's rhetoric into reality is understanding that there are gendered and cultural views on security. Whilst foreign policy assumes that a military presence tightens security, such militarism threatens security for women who are victims of war-rape or are used sexually by peacekeepers.

In their book, Susan McKay and Dyan Mazurana provide examples of how women understand peace-building and security.<sup>4</sup> In South Sudan, for Nuer women, "making peace means figuring out how to meet the material, social and spiritual requirements of life". Similarly, with women in Somalia, "peace is not seen as a matter of discussion, but as a way of living, of security and food for

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<sup>2</sup> Christine Chinkin, 'Peace Agreements as a Means or Promoting Gender Equality and Ensuring Participation of Women' (Background Paper presented at the Expert Group Meeting of the United Nations Division for the Advancement of Women, Ottawa, 10-13 November 2003).

<sup>3</sup> Sanam Naraghi Anderlini, Rita Manchanda, and Shereen Karmali, 'Women, Violent Conflict and Peace-Building: Global Perspectives'. International Conference, London, May 1999 (London: International Alert, 2000).

<sup>4</sup> Susan McKay and Dyan Mazurana, *Where are the girls? Girls Fighting Forces Northern Uganda, Sierra Leone and Mozambique, Their Lives After The War* (2004).



your family, of the future for your children". In Sierra Leone, building peace means "taking in the children of neighbours, friends or family members who were killed in the war". In Kosovo, "peace work means rebuilding damaged houses as well as friendships with former neighbours who had turned against them during conflict". Lebanese women discover peace-building is building bridges between factions involved in the civil war. All these activities revolve around connections, healing, spiritual wounds, rebuilding relationships and meeting everyday family needs.

Accordingly, when women are present around negotiating tables (Guatemala, South Africa, Northern Ireland, East Timor), they initiate different issues – questions related to human security and well-being – like feeling safe and being inclusive, as well as focusing on the practical needs of food, water, health, education, land rights and economic livelihood. As Johan Galtung puts it, 'human security' initiates a new paradigm where people's needs are central to international security and root causes of insecurity are tackled.<sup>5</sup>

### *What is the difference that makes the difference?*

In Guatemala, women's participation in formal negotiations resulted in specific commitments to women on housing, credit and land, attempts to locate children and orphans, penalising sexual harassment and creating the National Women's Forum. In South Africa, women across all parties agreed that each party should have one-third female representation in each negotiating team for the Constitution process. The South African Constitution includes a comprehensive Bill of Rights with gains for women on reproduction, property rights, healthcare, education and culture. In Northern Ireland, the two representatives of the Northern Ireland Women's Coalition lobbied for mixed housing and the early release and reintegration of political prisoners.

There are many positive instances of 1325 helping women to make a difference.<sup>6</sup> In Sri Lanka, in 2002, the Government and the Liberation Tigers of Tamil Eelam, supported by Norway, established a subcommittee on gender issues to elaborate gender-sensitive guidelines for the peace process. In Somalia, in 2002, fifty women undertook training in negotiation skills and the provisions of 1325 in order to take part in the peace process.

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<sup>5</sup> Johan Galtung, 'The Security Approach and the Peace Approach: Factors Conditioning the Choice' (Presented at the United Nations World Culture Open – Building Peace Through Harmonious Diversity, New York, 9 October 2004).

<sup>6</sup> United Nations Inter-Agency Task Force on Women, Peace and Security. *Inventory of United Nations Resources on Women, Peace and Security* (2004)

<<http://www.un.org/womenwatch/osagi/resources/wps/Inventory-11Oct2004.pdf>>

It is overwhelmingly the case that it is women in NGOs and feminist academics who are really utilising the resolution – more than politicians and policy-makers. In Rwanda, even in a context where almost every woman survivor of the genocide has a dramatic story of rape, hunger, fear, flight and loss – women began forming groups to confront common problems. By 1999, Rwandan women's organisations exceeded 15,000. After 1994, the UNHCR began the Rwanda Women's Initiative, taking a practical approach to assisting income, agriculture, land title, childcare and gender-related violence. When Erin Baines, researcher, asked a Rwandan woman if the Initiative had made a difference in her life, she replied, "you cannot dance if you cannot stand".

Many women's organisations involve both Hutu and Tutsi groups. These groups concentrate on what *unites* rather than divides, that is, the commonalities women face everywhere such as poverty, violence against women, feeding their children and shelter. *Pro-Femmes?* the umbrella organisation of women's groups mobilises women "to spearhead the promotion of a culture of peace, tolerance and non-violence in grassroots activities". There is the view among survivors that women are better than men at forgiving, reconciling and building peace.

Ironically, Rwanda has now surpassed Sweden as the country with the highest proportion of women legislators. From the 2003 elections, women hold 48.8% of the seats in the National Assembly and nine out of 28 ministerial posts. Funding from the Netherlands trained women in decision-making and political awareness. Such a commitment helps translate rhetoric into reality.

But let us return to Northern Ireland, where there are many dedicated women peace activists and hundreds of small women's groups, for a final example. Betty Williams and Mairead Corrigan led large demonstrations of Catholics and Protestants to protest against terrorist violence in 1976 and were awarded the Nobel Prize. Despite being deeply divided politically, activists in Northern Ireland come together over basic issues of childcare, housing, education and job skills, avoiding political differences. Two historic examples of women making a difference include the Northern Ireland Women's Coalition and their place at the negotiating table, and the McCartney sisters' stance against the IRA and the demand that there can be no peace without justice.

'The Northern Ireland Women's Coalition was initiated by women with long histories of engagement in civil, human and workers' rights. The Women's Coalition adopted equality, human rights and inclusion as their principles. They also agreed that participants should acknowledge their political identity differences rather than do what is more typical in Northern Ireland, keep silent or fight about controversial differences. An explicit discussion of differences, divisions, discord and political dissonance is necessary to move beyond

intolerance of others' views and sectarian attitudes and practices.<sup>7</sup> In 'transversal politics', you keep your identity intact while openly trying to understand others' identities. In 1996, the Coalition gained enough votes to secure two seats in the multi-party peace negotiations on the future of Northern Ireland that led to the *Belfast Agreement* in April 1998. They put on the agenda issues like victims' rights, reconciliation and the need for a Civic Forum.

Monica McWilliams, the Coalition's leader talks of "women's central role in conflict prevention, peacekeeping and peace-building"; of the dangers of sectarianism, which see "the world exclusively in terms of the interest of your "own" side as against the other side"; and of the importance of "working with, not burying, our differences". The Coalition made a noteworthy difference to electoral politics in Northern Ireland, with forthright and positive women presenting a vision of how politics should be different. Whenever the parties were bogged down, the women brought the debates back to personal issues of bereavement, loss and hopes for children's future.

In a bar fight on 30 January 2005, Robert McCartney was murdered by a known leader of the IRA and several of his associates. McCartney's five sisters – Paula, Catherine, Gemma, Claire and Donna – and his fiancé Bridgeen Hagans are demanding justice. These women "are being seen as a metaphor for where the nation finds itself – still struggling for unity, torn by savage grief yet looking for justice, peace and reconciliation".<sup>8</sup> Five days after the murder, the women held a candlelight vigil attended by 600 people to protest at the IRA cover-up. Sometimes, women prompt the conscience of the nation. Since 1982, Sicilian women have challenged the iron grip of the mafia; since 1996 the committee of soldiers' mothers in Russia have campaigned against conscription in the war in Chechnya; and more recently in Northern Ireland, the McCartney sisters have taken an important stance. Paula McCartney says, "Yes, absolutely, this is about women standing up. The men tend to huff and puff and egos come in to play, and it goes round and round, and it always ends in more violence...But we want real justice, not more violence". Peace and violence cannot coexist. Anger is 'a crippling emotion' when tied with revenge.

These women say, "we have no fear of the IRA...and we will not be bullied by them". This is worth mentioning because Northern Ireland sectarian conflict has claimed more than 200 lives since the paramilitary organisations called their 1994 ceasefires and only thirty people have been prosecuted for murder. Such women motivate other families who have lost family through paramilitary murders.

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<sup>7</sup> Elisabeth Porter (2003)

<<http://www.opendemocracy.net/articles/www.peacestudiesjournal.org.uk/docs/Security.pdf>>

<sup>8</sup> Jo-Ann Moriarty, *The Republican*, 14 March 2005.

### *So – is the rhetoric of Resolution 1325 being translated into reality?*

Yes and no. Women's global participation in peace and security concerns continues in mediation, conciliation, trauma counsel, healing and memory work, providing health care for survivors of rape and HIV/AIDS sufferers. Women and men continue to build bridges across ethnic, religious and cultural divisions, opposing war and militarism in innovative and creative ways.

Despite the significance of Resolution 1325 on Women, Peace and Security, women remain absent or are marginalised from negotiating tables, political decision-making opportunities and senior advisory positions. Inclusion matters. Without plural inclusivity, there is no peace with justice and equality and 1325's call to "all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective" goes unheeded. The substantive content and implementation of peace agreements require balance between women-specific provisions and gender mainstreaming.

What exactly do I mean by the latter? "Mainstreaming gender equality" means transforming the "mainstream" and focusing on the systems and structures that create disadvantages for women and men. Mainstreaming gender is all about working within institutions to integrate equality concerns into all policies, programs and projects so that issues of gender equality become part of organisations' actions, beliefs, values, priorities, needs and actual decisions. Sometimes, this can result in a token gesture, so an organisation makes sure there is a woman on a committee but some men still make sexist jokes or ridicule the woman's contribution. Thus, often it is important to have women-only events to enable women's voices to come through clearly, particularly if there are sensitive issues to discuss like women's discrimination, rape or dowry price. For example, Astrid Heiberg was a Norwegian representative to a Gender Sub-Committee to the Sri Lankan peace talks of 2003. She tells how women's interaction in negotiations between the Government of Sri Lanka and the women in the Liberation Tigers of Tamil Eelam became more open when the Government men left, and she created a "women-only space".

In 2000, Sanam Anderlini gave four warnings in a preliminary audit on the international community's response to women, peace and security.<sup>9</sup> First, while the explicit endorsement of women's groups and civil society participation in peace processes is unprecedented, the absence of actual quotas, benchmarks and timelines is of concern. Second, while the endorsement of the need for peacekeepers and civilian personnel in peace processes is clear, "without the core commitment of governments to provide additional funds, these measures can be

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<sup>9</sup> Sanam Anderlini, *Women, Peace and Security: A Policy Audit. From the Beijing Platform for Action to UN Security Council Resolution 1325 and Beyond* (2000).



ignored or not implemented adequately". Third, with regard to protection of women, "without an effective monitoring and evaluation mechanism and incentives for compliance...it is likely that the necessary changes are not made". Fourth, much more gender mainstreaming needs to be done to translate rhetoric into concrete progress. Ways to reduce gender disparity need to be built into organisations' policies, programs and projects. The UN Economic and Social Council (ECOSOC) define gender mainstreaming as "a strategy for making the concerns and experiences of women as well as men an integral part of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated". Five years on, these concerns remain.

During 2001 and 2002, Elisabeth Rehn and Ellen Johnson-Sirleaf<sup>1</sup> travelled to Bosnia and Herzegovina, Cambodia, Colombia, the Democratic Republic of Congo, East Timor, the former Yugoslavia Republic of Macedonia, the Federal Republic of Yugoslavia, Guinea, Israel, Liberia, the occupied Palestinian territories, Rwanda, Sierra Leone and Somalia to present an independent assessment in their *Women, War and Peace*. They found terrible stories, but also women who were surviving trauma and rebuilding communities.<sup>2</sup> Yet, "time and again women described the wonderful documents that had been created and signed – and the failure to implement most of what has been promised".

Lack of will among member states, consistently seeing women's participation as not a priority, institutionalised sexism and patriarchal cultural mores remain major obstacles in translating the grand rhetoric of Resolution 1325 into practical reality. To include women in political decision-making in transitional societies is to take seriously gender justice, gender equality, women's human rights and the rebuilding of relationships in formerly militarised societies.

Peace-building is a process that is important in pre-conflict, conflict and post-conflict stages in both formal and informal settings. Practical peace-building must be truly inclusive of women and men from all branches of life. The 2005 World Summit Document commits states "to fully and effectively implement Security Council Resolution 1325". This commitment must translate into reality.

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[http://www.opendemocracy.net/democracy-resolution\\_1325/dance\\_293.jsp](http://www.opendemocracy.net/democracy-resolution_1325/dance_293.jsp)

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<sup>1</sup> Katharine Houreld, *I am woman, hear my roar* (2005) Open Democracy

<<http://www.opendemocracy.net/debates/article.jsp?id=3&debateId=130&articleId=2903>>

<sup>2</sup> UNIFEM 'Experts Visit Colombia as Part of Global Assessment on the Impact of War on Women and Women's Roles in Peace-Building' (News Release, 26 November 2001)

<[http://www.unifem.org/news\\_events/story\\_detail.php?StoryID=74](http://www.unifem.org/news_events/story_detail.php?StoryID=74)>

# Women and Religion in the Legal System of Brunei Darussalam

Dr Ann Black

This article is an abridged version of a chapter 'Islamisation, Modernity and Re-positioning of women in Brunei' in Amanda Whiting & Carolyn Evans (eds) *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region*, published by Koninklijke Brill NV in 2006.

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## INTRODUCTION

Since achieving independence in 1984, the Sultanate of Brunei Darussalam ("Brunei, the Abode of Peace") has been seeking to define its own particular national identity, while striving to be a leading nation amongst the states of Asia. The abundant political rhetoric announcing these dual aims is supported by strategies for practical implementation, and concrete initiatives in both directions are evident. To construct its national identity Brunei has implemented a national ideology, *Melayu Islam Beraja* (known as MIB) which translates as Malay, Islam, Monarchy. This ideology permeates every aspect of life in the Sultanate. To become a leading state in Asia in political<sup>1</sup> as well as economic<sup>2</sup> terms, Brunei has used its petro-carbon derived wealth to improve the living standards of its people (currently second only to Japan in the region), has embraced high technology, and has been positioning itself as a leading banking and financial centre. However, there is a tension inherent in these choices: one path follows the route of modernisation and development, in line with the forces of globalisation;<sup>3</sup> while the other charts a return to traditional Malay customs and

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<sup>1</sup> In 1984, Brunei joined the following organizations: ASEAN (Association of Southeast Asian Nations); ARF (Asean Regional Forum.); APEC (Asia Pacific Economic Co-operation, as a founding member); ASEM (Asia European Meeting ); PECC (Pacific Economic Co-operation Council). In 2000, Brunei hosted the annual APEC meeting. Brunei is a member of the Commonwealth of Nations, the United Nations, the International Monetary Fund and the World Bank. It is also a member of Islamic bodies such as OIC (Organisation of Islamic Conference) and ISESCO (Islamic Education, Scientific and Cultural Organisation).

<sup>2</sup> The Eighth National Development Plan in 2001 was designed to diversify the economy away from dominance of the oil and gas sectors, towards tourism and establishing Brunei as an offshore financial centre. The difficulty for Brunei in promoting itself as an International Financial Centre is that it has to compete with nearby Labuan (in Malaysia) as well as Singapore and Hong Kong.

<sup>3</sup> A prevailing view in Southeast Asia is that modernisation inevitably means westernisation or globalisation. See Edwin Thumboo, "Introduction" in *Cultures in ASEAN and the 21<sup>st</sup> Century*, ed.

practices, a re-assertion of Islam as a religious and legal priority, and an endorsement of an undemocratic political regime.

The position of women in the Sultanate reflects the duality of national purpose. On the one hand, this is a time when women in Brunei have access to free education to tertiary level, are able to engage in a wide range of professional occupations and in business, have a free and internationally accepted high standard of health care, have comparatively high disposable incomes and are not subject to the social restrictions which occur in regions with *purdah* or women's seclusion zones. These benefits are the result of the nation's commitment to modernisation, national unity and economic development. However, these same Bruneian women are disenfranchised<sup>4</sup> and, if Muslim, are subject to the Sultanate's recently implemented policy designed for the 'Islamisation' of laws and legal institutions.

Islamisation is the process by which a society, generally with State support, and in line with Islamic revival and resurgence elsewhere in the Muslim world,<sup>5</sup> seeks to reassert its Islamic identity. It does so by according greater importance to designated Islamic laws, institutions, values and practices than has previously been the case.<sup>6</sup> Given the centrality of law, described as the 'the core and kernel of Islam itself,'<sup>7</sup> it is axiomatic that re-establishing Islamic law and legal institutions would be required by this direction. Given that women are seen as the symbolic role bearers of a society's cultural and religious values and traditions,<sup>8</sup> it was inevitable that women's roles and gender identity would be integral to the process. This is where law and religion directly intersect the lives of Muslim women in the Sultanate today.

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Edwin Thumboo (Singapore: University of Singapore Press, 1996), xx.

<sup>4</sup> There have been no elections in Brunei Darussalam since 1962 when the state of emergency was declared. The Constitution of 1959 gave legislative authority to a Legislative Council, but Parts VI and VII of the Constitution, which set out the form and procedure for the Legislative Council, continued to be 'temporarily suspended' in the 1984 Revised Constitution at independence. Although the Sultan re-convened the Legislative Council in September, 2004, all of its 21 members were appointed. The Sultan has foreshadowed that there will be a minority of elected members (15 elected and 30 appointed) in the next Legislative Council though the time frame and details for an election have not been announced. However, as Ranjit Singh notes 'even if the Constitution was to operate *in toto*, the delegation of powers and functions to the various bodies is a façade'. See DS Ranjit-Singh, "Executive Power and Constitutionalism in ASEAN States: the Brunei Experience," in *Constitutional and Legal Systems of ASEAN Countries*, ed. Carmelo V. Sison (Manila: Academy of ASEAN Law and Jurisprudence, 1990), 42.

<sup>5</sup> Obaid ul Haq, 'Islamic Resurgence: the Challenge of Change' in *Islam and Society in Southeast Asia*, ed. Taufik Abdullah & Sharon Siddique (Singapore: Institute of Southeast Asian Studies, 1986), 332.

<sup>6</sup> Chandra Muzaffar, "Islamisation of State and Society: Some Further Critical Remarks" in *Shari'a Law and the Modern Nation State: A Malaysian Symposium*, ed. Norani Othman (SIS Forum (Malaysia) Berhad, Kuala Lumpur: SIS Forum, 1994), 113.

<sup>7</sup> Joseph Schacht, *Introduction to Islamic Law* (London: Oxford University Press, 1964), 1.

<sup>8</sup> This is a theme developed by Modhadam and is discussed later in this chapter. See Valentine M. Moghadam, ed. *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective* (Boulder: Westview Press, 1994).

The path of Islamisation has even wider ramifications, as it also impacts upon the women in the Sultanate who are not Muslim, including the indigenous non-Malays. While section 3 of the Constitution allows for other religions to be practiced in 'peace and harmony', law and policy informed by MIB act in practice to restrict the religious practices of the non-Malays. With strong government support for a robust *Melayu masuk* (becoming Malay) agenda, the result is that there are powerful disincentives for non-Malay women to freely adhere to their religious practices and to transmit these to their children. The steady numbers of indigenous non-Malays who are being absorbed, though Islamic conversion, into the Malay mainstream highlight the powerful mix that law and religion can exert over vulnerable and indigenous minorities.

## ISLAMISATION IN BRUNEI: CONSEQUENCES FOR MUSLIM WOMEN

### *Why Islamisation?*

For almost 100 years, Brunei straddled two cultures as well as two systems of law. This duality was the legacy of the competing and complementary forces that had interacted there over the preceding century. Once able to chart its own course in the post-Independence era, the Brunei government re-evaluated this legacy and decided to reclaim what it saw to be its own unique Bruneian identity. This gave rise to the ideology of MIB. This state ideology provided a map for conceptualising and rationalising what should be the desirable values and priorities in public and private life, as well as in economic and non-economic life. Being so small in size, population and infrastructure, this became imperative not only because of the colonial inheritance and the dominance of English laws and institutions, but also because of the continuing hegemony of Western values and practices. MIB was to be the filter through which such offerings from the West would be accepted or rejected. Whilst detractors contended that MIB was invented to sanctify the consolidation of absolute political, economic and spiritual power in the hands of the current Sultan and a self-consolidating elite,<sup>9</sup> there is no doubt that the state ideology drew on three components – Malay culture, Islam, and the Monarchy – that had been dominant in shaping pre-colonial Bruneian institutions, practices and sense of identity. Just as official state ideology has been used in other post-colonial Asian nations,<sup>10</sup> MIB was

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<sup>9</sup> G. Braighlinn, *Ideological Innovation under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei* (Amsterdam: VU University Press, 1992).

<sup>10</sup> Indonesia has the *Pancasila*, Malaysia has *Rukun Negara* with its 'the Four Pillars', and Singapore promulgates Confucianism as defining its national values.



employed to maintain cohesion within Brunei society against further inroads from monolithic western, democratic and secular culture.

At the heart of MIB is Islam. This is not Islam in the narrow sense of “religion” that is employed in secular countries. Siddique explains that the inadequacy in seeking to understand Islam as *merely* a religion is that it leaves unanalysed Islam’s political, economic, legal and social aspects.<sup>11</sup> He argues that Muslims do not conceptualise Islam in terms of Western, and thus Christian, derived sociological categorization of religion, which inevitably places the individual at the centre of all analysis. Rather than a focus on the personal relationship between God and the individual, Islam’s mission extends beyond the individual dimension to direct all economic, political and legal processes towards an entire Islamic social order.<sup>12</sup> Whilst Islamisation occurred across many aspects of life in the Sultanate, the Islamic blueprint for life meant that there were to be consequences for women in the Sultanate.

### ***Brunei’s Model of Islamisation***

Islamisation is not a uniform process whereby the same model is replicated in each nation that reaffirms its national commitment to implement Islamic law. Whether it is Iran, Pakistan, Nigeria or Indonesia, the re-affirmation of commitment to Islam occurs but the re-assertion of each Islamic identity is distinctive and culturally specific. Throughout the twentieth century there have been different interpretations of the sources of Islamic law, as some scholars challenge restrictive interpretations whilst others passionately confirm the veracity of orthodox *fiqh* in the respective schools. Integral to choice between orthodox<sup>13</sup> and modernist<sup>14</sup> interpretations of Islam is the issue of gender differentiation, or, more precisely, inequality, between men and women in Islamic law. If the country pursues that mode of Islamisation which adopts literalist, patriarchal or Arabic interpretations of Islamic law, the consequence will be increased differentiation of women’s rights, duties and entitlements from those of men. It also would countermand those aspects of modernization based on contemporary internationally-derived conceptions of gender equality and of women’s inherent rights, as declared by the United Nation’s Charter and the

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<sup>11</sup> Sharon Siddique, “Conceptualizing Contemporary Islam: Religion or Ideology?” in *Readings on Islam in Southeast Asia*, ed. Ahmad Ibrahim, Sharon Siddique & Yasmin Hussain (Singapore: Institute of Southeast Asian Studies, 1985), 338.

<sup>12</sup> Ibid, 338.

<sup>13</sup> Orthodoxy can be defined as doctrine embodied in the Syariah around the tenth century AD. It refers to Sunni doctrines of belief and practice. The orthodox view does not seek to compete or be compared with West but aims to preserve the status quo to safeguard Islam and Islamic law.

<sup>14</sup> Modernism proposes that Islam can be interpreted in a way that is dynamic, modern and able to compete with Western secularism with no sacrifice of its essentially Islamic character.



Universal Declaration of Human Rights as well the specific Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Brunei chose the orthodox path to Islamisation. However it permitted some modifications, in acknowledgment of strong arguments from modernist Islam and in deference to its own modernization agenda more generally. Whilst Brunei did not become a signatory to CEDAW,<sup>15</sup> it did endorse the equality of women in the economic and educational and vocational spheres. At the same time, it rejected Western style equality in matters pertaining to the family, such as marriage, divorce, custody, succession and in the law of evidence. In keeping with MIB, the nation wanted to retain and 'tighten' the Islamic model of laws for family relations so that the law reflected the orthodox position of the Shafi'i school. This, it was argued, was in keeping with the significance of Islamic family law for most Muslims. As one of the few remaining components of Islamic law preserved through the colonial era, family law was the symbol of the Syariah in the Sultanate. As well, Poulter notes that many Muslims sincerely believe that the best way to preserve their own families from what are seen as the corrupting forces and 'evils' in Western societies – prostitution, pornography, child abuse, abortion, marital breakdown, extra-marital affairs, single mothers, same-sex relationships, neglect of the elderly – is to operate on the scale of family values embodied in Islamic law.<sup>16</sup> This perspective is reflected in Brunei, where it is frequently argued at official and popular levels that such social ills will be reduced by 'tightening religious laws'<sup>17</sup> and when Islam assumes a greater role in Brunei.<sup>18</sup>

In taking this course, there was acceptance of the validity of those orthodox interpretations of the primary sources of Islamic law – the Qur'an and Sunnah – regarding the differential rights and obligations of men and women in Islamic family law. At the same time, there was sensitivity to transnational discourse and to international movements that demanded an end to religious laws and customary practices that treated women and men unequally. Brunei's solution was to adhere to orthodoxy, but to modify particular components in order to avoid perceived, or actual, injustice to women. Such compromises are a recurring theme throughout the new legislation on family relationships.

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<sup>15</sup> Other Muslim countries who refrained from signature/ratification of the Convention include Bahrain, Djibouti, Mauritania, Niger, Oman, Qatar, Iran, Kazakhstan, Saudi Arabia, Somalia, Sudan, Syria and the UEA.

<sup>16</sup> Ibid, 147.

<sup>17</sup> Mohamad Yusop bin Awang Damit "Negara Brunei Darussalam: Light at the End of the Tunnel" *Southeast Asian Affairs* (2002): 81.

<sup>18</sup> Malai Hassan Othman "Increasing Social Ills Jolt Religious Authorities into Action" Brudirect News: [www.brudirect.com/DailyInfo/News/Archive/Oct02/051002/nite01.htm](http://www.brudirect.com/DailyInfo/News/Archive/Oct02/051002/nite01.htm); CT Haji Mahmud, "Public awareness in a Caring Society," *Borneo Bulletin*, 31 October, 2002.

## *The Brunei Compromise*

The ways in which Brunei has retained but modified the orthodox Shafi'i school of Islamic law to reduce the unfairness to women illustrates both Brunei's form of Islamisation and its selective modernisation. The modifications to the laws dealing with marriage are quite minor, but they still provide some safeguards against what could be unreasonable outcomes for women. Polygyny is a case in point. Although the term polygamy is used in the English version of the *Islamic Family Law Order (1999)*, it is technically only polygyny<sup>19</sup> that is lawful in Brunei. In the Order, the classic Sunni right of a husband to four simultaneous marriages<sup>20</sup> has been retained. Although the number 'four' is not actually specified, the phrase 'in accordance with the *hukum Syara*' (Islamic law) allows for this. But there is a modification. Now, additional marriages can only occur with the written permission of a Syar'ie judge<sup>21</sup> According to section 23(2) of the Order, this may be granted after the judge has reviewed the husband's application stating why the polygynous marriage is 'just and necessary,' and also stating the husband's 'present income', 'current ascertainable financial obligations and liabilities', the 'number of dependents as a result of the proposed marriage' and whether the 'consent or views of the existing wife' have been obtained.

Through this modification, Brunei has adopted a compromise position on a law that has engendered considerable debate in Muslim countries, and been the subject of considerable advocacy by Islamic women's organisations because of its differential treatment between men and women. Although not widespread, polygyny is accepted and condoned in Brunei. In the last two years, there had been 164 applications submitted to the court. It is probable that if living standards continue to improve, so will the polygyny rate,<sup>22</sup> since multiple wives

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<sup>19</sup> Polygyny is one category of polygamous marriage. It allows for a husband to have more than one wife at the same time, and is contrasted with polyandry which allows for a woman to have more than one husband. Polyandry is prohibited in Islam.

<sup>20</sup> Surah 4:3 "...then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one....". Polygyny is also supported by the Prophet's own *sunnah* of marrying more than one wife.

<sup>21</sup> *Islamic Family Law Order (1999)* s 23. If a marriage occurs without permission a \$2000 fine or imprisonment for 6 months can be imposed. It has been noted in Malaysian states with similar provisions that some men contract polygynous marriages without court permission and simply pay the fine and retrospectively register the marriage, obviating the need to make a court application. See Nik Noriani Nik Badlishah, 'Country Report Malaysia: Polygamy' at Sisters in Islam, 'Report on Regional Workshop and Justice for Muslim Women', held Kuala Lumpur, 8-10 June, 2001. [http://www.sistersinislam.org.my/reports/810\\_062001.htm](http://www.sistersinislam.org.my/reports/810_062001.htm) # source- SIS? . Also Recent Bruneian legislation uses the term Syar'ie judge in its official English version which is a variation on Syaria judge.

<sup>22</sup> Gavin W Jones, *Marriage and Divorce in Islamic South-East Asia* (Kuala Lumpur: Oxford University

can be a status factor for men and symbol of wealth. As the male members of Royal family, including the Sultan, have married more than one wife, there is no overt or public criticism of the practice. However, the Malaysian based women's organisation Sisters in Islam argues that Muslim women should be empowered to curtail the practice by being made aware at the time of marriage of the option to stipulate in their marriage contract a condition that legally binds a husband not to take a second wife during the duration of their marriage.<sup>23</sup> In some Islamic nations, such as Iran, such clauses are a standard feature of marriage agreements.

Brunei has an integrated, well educated, relatively affluent, skilled or professionalised female population. In such a context, the retention of the legal requirement for a woman to have the consent of a male marriage guardian (*wali*) for the marriage to be valid demonstrates the continuing priority given to Shafi'i<sup>24</sup> orthodoxy in the Sultanate. This is especially so given that it is not a Quranic requirement, but one based a *hadith* of the Prophet<sup>25</sup> which coincided with existing patriarchal customary practices Islam encountered as it spread through the Middle- East, Africa, and Asia. Getting her *wali's* <sup>26</sup>consent means permission from her father, paternal grandfather, brother or other male relative (determined in the order of agnatic inheritance laws). A woman cannot perform the role of a *wali*.

As with polygyny, Brunei has adopted a compromise position in relation to the function of the *wali*. If her *wali* 'refuses to give his consent without reasonable grounds'<sup>27</sup> a woman can go to the Syariah Court where a *wali Hakim* (a Syarie judge who inquires into the issue of consent) will be appointed. Of course, the gender differentiation remains. A women's consent to marriage still requires validation by a man, either by her *wali* or *wali Hakim*, whereas there is no such limitation on men, who, regardless of age at the time<sup>28</sup> are legally able to give their own consent to a marriage contract. It arguable that this provision is difficult to justify in present day Brunei, where the educational standard,

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<sup>23</sup> Press, 1994), 271 and Jamila Hussain, *Islamic law and Society* (Leichhardt: Federation Press, 1999), 73.  
<sup>23</sup> "Add no-polygamy clause in marriage contract, says SIS" in *Star News*, 18 January 2003 at: [www.polygamyinfo.com/intna1media%20plyg%20168star.htm](http://www.polygamyinfo.com/intna1media%20plyg%20168star.htm).

<sup>24</sup> The Hanafi school does not have this requirement.

<sup>25</sup> 'Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals' cited in Shaheen Sardar Ali, *Gender and human rights in Islam and International law: equal before Allah, unequal before man?* (The Hague: Kluwer Law International, 2000), 164.

<sup>26</sup> Section 12 (a) *Emergency (Islamic Family Law) Order* (1999).

<sup>27</sup> Section 12 (b) *Emergency (Islamic Family Law) Order* (1999).

<sup>28</sup> The new Order does not establish a legal age for marriage between Muslims. Thus the classic Syariah position applies that a person of either sex who has reached puberty can consent to marriage. The general marriage age under civil legislation in Brunei is 13 years, but data from the Ministry of Religious Affairs for 2000 shows that there were just eight girls under 15 who were married and that the most popular age was 20 -29 years. Ignatus Stephen, "Brunei's 14-year Itch Causes Marriage Breaks" at [www.brudirect.com/DailyInfo/News/Archive/Jan03/200103.02.htm](http://www.brudirect.com/DailyInfo/News/Archive/Jan03/200103.02.htm).

economic independence and employment rates for women are comparable to those of men, and where, furthermore, child marriages are relatively rare.<sup>29</sup> On this basis, Islamic reformers such as Norma Maruhom<sup>30</sup> question the need for continuing patriarchal assumptions about a woman's inability to make decisions about her life.

One aspect of Islamic family law where there has been major modification of the orthodox position is *talaq* divorce. This is also possibly the most criticised aspect of Islamic family law in the West, because *talaq* divorce gives a husband alone the unilateral right to extrajudicial divorce, without cause, simply through the pronouncement of one, two or three *talaqs* (statements of intention to divorce).<sup>31</sup> Although the Quran was progressive in its time by providing divorce options for wives, the fact that a *talaq* divorce was the preserve of a husband has been condemned in the present day as discriminatory. This is so because, in comparison with the ease by which a husband may initiate a *talaq* divorce, a wife must attend a court and convince a judge that she had genuine grounds for divorcing her husband; otherwise she faces the difficult task of buying her way out of the marriage.<sup>32</sup>

What the new Order has done is to abolish the unilateral and extrajudicial components of *talaq* divorce. Now, either husband or wife can present an application for *talaq* divorce to the Court, setting down the reasons for the application and particulars of the marriage.<sup>33</sup> This is a radical reform. Other aspects of the *talaq* law are retained, in that it remains a revocable divorce requiring a period of time *iddah* (three menstrual cycles)<sup>34</sup> in which it is possible, and in fact encouraged, that there be *ruju*, or reconciliation. Both husband and wife will be counselled by a Family Adviser to 'achieve a reconciliation' and 'resume conjugal relations'<sup>35</sup> and the traditional role laid down in the Qur'an<sup>36</sup> for family members to act as arbiters for both sides (*hakam*) is also retained.

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<sup>30</sup> Sisters in Islam, 'Report on Regional Workshop and Justice for Muslim Women', held Kuala Lumpur, 8-10 June, 2001. [http://www.sistersinislam.org.my/reports/810\\_062001.htm](http://www.sistersinislam.org.my/reports/810_062001.htm)

<sup>31</sup> After three *talaqs* there can be no reconciliation and remarriage to each other unless the wife has an intervening marriage. Quran, surah 2:229.

<sup>32</sup> In *khulu* or *cerai tebus talaq* (divorce by redemption) a wife with the court's permission could buy her way out of an unhappy marriage by returning the marriage gift to her husband. It could be a severe financial impost because she lost not only her marriage gift but could lose maintenance entitlement.

<sup>33</sup> *Islamic Family Law Order* (1999), s 42. After the application, the court serves a summons on the other party and a copy of the application and requires both to appear before the court. If the other party consents to the divorce and the court is 'satisfied that the marriage has irretrievably broken down', the judge will advise the husband to pronounce *talaq* before the court.

<sup>34</sup> Per the Quranic requirement in 2:228: 'Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what God Hath created in their wombs, if they have faith in God and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation.'

<sup>35</sup> *Emergency (Islamic Family Law) Order* (1999), s 41(10).

Despite the significance of this reform of *talaq* divorce, which would seem to obviate the need for other Islamic divorce procedures, these other forms are all retained essentially unchanged from their classic form. One inexplicable provision, given the seemingly progressive nature of the reform, is the inclusion in the Order of *zihar*. This is a virtually extinct Arabian (and pre-Islamic) form of divorce not used elsewhere in South-East Asia<sup>37</sup>

## WOMEN AS THE TRANSMITTERS OF CULTURE AND RELIGION

Where there is a context of “intensification of religious, cultural, ethnic and national identity” as is occurring in Brunei, researchers such as Moghadam argue that there will inevitably be a ‘politization of gender, the family and the position of women’.<sup>38</sup> Thus women become important achieving the new Bruneian national identity. With Brunei’s articulated national identity centred on Islam and Malay culture, it is inevitable that the idealised woman is the embodiment of Muslim Malay identity. Within this Muslim Malay ideology, “virtue” is considered integral to the relationship between husband and wife and supports the longstanding cultural and legal requirement that a wife be obedient to her husband. This ideal of loyal and obedient wife and good mother then mirrors the ideal relationship between caring ruler and loyal obedient subject.

The requirement for loyalty and obedience is reinforced by the Islamic legal concept of *nusyuz* (disobedience, not fulfilling one’s marital duties). For a husband, *nusyuz* is failing to maintain and support his wife; for a wife, it is her refusal to obey her husband’s lawful wishes or commands. It arises from one of most debated verses in the Quran – Surah 4:34.<sup>39</sup> The orthodox interpretation

<sup>36</sup> Surah 4:35. On Islamic arbitration in Brunei see Ann Black, “Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes” *Bond Law Review*(2001): 305.

<sup>37</sup> It comes from the pre-Islamic practice among Arabs to degrade their wives by declaring them ‘like their mothers’, in the sense of being prohibited to them sexually, and then abandon them, but on occasions return to them later. *Zihar* is mentioned in two verses of the Qur’an (33:4 and 58:2-3) which stipulate that if men declare their wives like their mothers and abandon them, they can not return to them until they have freed a slave. Modern jurists have argued that as such practices do not exist in other Islamic societies, and furthermore as today there is no institution of slavery, therefore *zihar* should be treated considered to have no contemporary application. More orthodox jurists hold that instead of freeing a slave, a husband can fast ‘for two consecutive months’ as a form of atonement or proceed with divorcing his wife by statements of *zihar*.

<sup>38</sup> Valentine M Moghadam, ed, *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective* (Boulder: Westview Press, 1994), 18.

<sup>39</sup> ‘Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore righteous women are devoutly obedient, and guard in (the husband’s absence) what Allah would have them guard.

As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next),



has been that Allah has given men authority and control over women and so women are to be obedient to men – be they husbands, fathers or brothers. It also has been interpreted to allow for (mild) physical punishment to be given to a disobedient woman.

The new Order in Brunei retains the legal categorisation of *nusyuz*.<sup>40</sup> Not only is it an offence for a wife to ‘wilfully disobey an order by her husband in accordance with *Hukum Syara*’<sup>41</sup> but she faces the consequence that by refusing ‘to obey the lawful wishes or commands of her husband’, she may lose her basic entitlement to maintenance from her husband.<sup>42</sup> The notion of ‘disobedience’ can refer a range of behaviour and attitudes, such as a wife’s refusal to respect her husband’s directives regarding whether or not she work, or his sexual ‘wishes and commands’. In keeping with the reforming pattern already established, the determination of *nusyuz* no longer remains at the husband’s discretion alone, but is to be decided on the advice of the Syar’ie judge.

In a similar way, the laws of custody and guardianship reflect the significance of women as transmitters of values and culture to their children and nation. The importance of transmitting Islamic values and practices is seen in laws dealing with custody of young (*mumaiyiz*)<sup>43</sup> children during marriage and after dissolution. Custody is given to the mother at least until the child attains puberty; however, a woman can lose custody if her role as transmitter of proper values becomes suspect. Hence the Order provides that if she remarries,<sup>44</sup> is of bad conduct in a ‘gross and open manner’, changes her place of residence so as to make it difficult for the father to exercise necessary supervision of his child, neglects or abuses the child or becomes an apostate,<sup>45</sup> then custody will be lost. The inclusion of apostasy as an automatic ground for losing custody of one’s child shows the significance of the mother as the transmitter of Islam and its practices, ethos and values.

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refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High, Great (above you all).

An outline of arguments in this debate on interpreting 4: 23 can be found in Shaheen Sardar Ali, *Gender and Human Rights*, 63-70.

<sup>40</sup> It should be noted that disobedience is a separate legal category from ill-treatment of a husband or of a wife. The new order makes ‘ill-treatment’ an offence where either spouse is found by a court to ‘ill-treat her husband or wife’.

<sup>41</sup> The section provides an escalating scale of punishment: the *nusyuz* wife is liable to a fine not exceeding \$500 for the first conviction, and \$1000 for any subsequent offences.

<sup>42</sup> *Islamic Family Law Order* (1999), s 61.

<sup>43</sup> Defined as a ‘child unable to differentiate a matter’ but in practice means a child who has not attained puberty. Generally in Islamic law this is considered about 9 years of age.

<sup>44</sup> Section 90 (a) where the man she marries is not related to the child ‘thereby prohibiting him from marrying the child’.

<sup>45</sup> These are contained in s90 (b) – (e).

## *The role of women in Brunei's Islamisation agenda*

To what extent can Bruneian women participate in the debates and institutions shaping the national priorities and laws that govern their lives and relationships? In general, women in Brunei have not participated in this discourse, though there is a pervasive acceptance at official, and also individual level, that Islamisation was welcomed and is appreciated by all Brunei Muslims.

Islamisation was first enunciated in broad statements in *titahs* of the Sultan and in speeches by his Ministers, which were then transmitted to Bruneians through reposts in the mass media. The details of what would be entailed in the 're-enactment of the Syariah judicial system' were never publicly clarified. Without parliamentary debate,<sup>46</sup> without effective political parties,<sup>47</sup> without 'green papers' enabling a community consultative processes, the women of Brunei had no input into the legislative agenda that would impact directly upon their lives. Unlike their Muslim counterparts in Malaysia and Indonesia, the women of Brunei are denied a vote and thus a voice – either in support or in rejection – of social and legal Islamisation. Whilst this is true for men (who were also disenfranchise since the declaration of the State of Emergency in 1962) the significance for women has been greater, as the authoritarian and paternalistic nature of the political process ensured the perpetuation of male discourse and dominance. This is because there are almost no women's voices in the corridors of powers. The appointment of 21 men as the 21 members of the 2004 reconstituted Legislative Council re-enforces this view. There are no female Ministers in Cabinet and few in the higher echelons of government. Except for a handful of Permanent Secretaries and a female ambassador (the Sultan's sister, HRH Princess Hajah Masna) the steering of the government is in male hands. In keeping with the dominance of the Royal family in public life,<sup>48</sup> the women selected to speak publicly on behalf of the women of Brunei are typically members of the Sultan's family.<sup>49</sup> Women too are absent from the consultative

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<sup>46</sup> Parliament has not met since 1962. Brunei has remained in a state of Emergency since that time.

<sup>47</sup> Brunei's two registered political parties, Brunei National Solidarity Party (PPKB) and the People's Awareness Party (PAKAR) have had dwindling memberships down to less than 100 members. Whilst the PPKB has been gently advocating democratic reform it was cautious to not want 'anything that is outside MIB'. See Rosli Abidin Yahya, "Brunei's Political Scene in Disarray following Mass Resignations" *News Express*, February 24, 2001. However, the recent reconstitution of the Legislative Council and the official statements that in future there may be elections for additional members to join the appointed and nominated members on the Council, may serve to revive these parties. Political debate may also be stimulated. Government regulations forbid public servants from becoming members of political parties even if the parties recognize the supremacy of the institution of monarchy. See: B. A. Hussainmiya, *Brunei Darussalam: A Nation at Peace* at <http://www.niu.edu/cseas/outreach/bruneipaper.htm>

<sup>48</sup> The Sultan is also the nation's Prime Minister, Minister of Defence, Minister of Finance, Chancellor of the national University, Superintendent General of the Royal Brunei Police Force, and leader of the Islamic faith.

<sup>49</sup> For example: HRH Princess Hajah Masna presented the report for Brunei at the APEC Second

process set up in 1992, known as 'grass-roots democracy,' through which government decisions are explained to the people and popular responses are received back by government.<sup>50</sup> The village elected headmen (*ketau kampong*), who are given the role of government 'mediating agents'<sup>51</sup> are also male.

One of the repercussions of Brunei's lack of democracy is that vigorous debate on matters of faith, law and social policy, and gender issues does not occur; or, if it does, this is never made public. Again, this situation stands in contrast with neighbouring Malaysia and Indonesia, where Muslim women can, and do, use the political process directly, and where they use women's organisations to project a voice that reaches both the public and the government. Such women's voices are missing from Brunei. Apart from restrictions on political parties and activities<sup>52</sup> there is no prohibition on such discourse. But it seems there is a culture self-censorship, in which adherence to MIB has become the major test of citizen loyalty.<sup>53</sup>

The absence of effective political parties and women's organisations to express opposition or alternative views on women's issues is compounded by the media's compliance with the government. The licensing requirements for locally printed newspapers, as well as the unfettered power of the Minister for Home Affairs to refuse or revoke printing permits and to prevent overseas publications from entering Brunei, means that only those views are aired that uncritically accord with MIB, and thus with the government's particular Islamisation policy. Even the advent of the Internet and its on-line chatrooms, such as BruNet, has not allowed for totally open political debate and commentary. If postings are too critical of the government the lines are closed down. Press<sup>54</sup> and media censorship silences women's (and men's) views that may dissent, question, or challenge any aspect of three tenets of MIB. The consequence for Bruneian

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Ministerial Meeting on Women, Mexico, September 2002.

<sup>50</sup> A. Mani, "Negara Brunei Darussalam in 1992: Celebrating the Silver Jubilee" *Southeast Asian Affairs* (1993) 99. Also Mark Cleary & Shuang Yann Wong, *Oil, Economic Development and Diversification in Brunei Darussalam* (London: St Martins Press, 1994) 126.

<sup>51</sup> BA Hussainmiya, "Philosophy for a Rich, Small State" *Far Eastern Economic Review* 10 February 1994, 31. District officer, Dato Paduka Hj Dani outlined their role as ensuring 'harmony and peace is attained in their respective communities', listening 'carefully to grievances', and 'implementing government guidelines and policies at the grass root level'- see Bahreen Hamzah, "New Village Heads Appointed," *Sunday Borneo Bulletin* 28 January, 2001.

<sup>52</sup> See n 95 and Rosli Abidin Yahya, "Brunei's Political Scene in Disarray following Mass Resignations," *News Express* February 24, 2001.

<sup>53</sup> "Negara Brunei Darussalam in 1991: Relegitimising Tradition" *Asian Survey* 32 (1992:2)128.

<sup>54</sup> All newspapers must be owned and all directors of a newspaper company must be Brunei citizens or permanent residents. Publication can only occur with a government permit is required which requires payment of B\$100,000. There is self-censorship anyway as the Sultan's brother Prince Mohamed's QAF Group owns the *Borneo Bulletin*. The Sultan's other brother Prince Sufri is a partner in the Company that owns the *News Express*. See Ray Mitton, "Waiting for Dawn," *Asiaweek* (August 1999):17. More strident censorship is through the *Undesirable Publications Act* (1982), *Censorship of Films and Public Entertainments Act* (1962) and the *Internal Security Act* (1960).

women is explained by Moghissi who argues that the absence of a truly free press and independent media allows a male-serving value system to decide what comes to public attention.<sup>55</sup>

This acquiescence of Brunei women to government policy and apparent acceptance of Islamisation as being in their best interests has meant that the stage appears set for the introduction of Syariah criminal law. The implications of this would be very serious for Brunei's women, if the experience of women in nations where it is currently in force (such as Pakistan, Sudan and the northern states of Nigeria) is any indication. Unlike Islamic family law, Islamic criminal law and its controversial and very harsh punishments have not been a part of Brunei's legal tradition. Paving the way for this possible new phase of Islamisation was the *Syariah Courts Evidence Order* (2001), which is already in force in Brunei. This Order stipulates the number and gender requirements of witnesses in particular *hudud* offences. For example, a conviction for *zina* requires evidence of four male *syahid*;<sup>56</sup> for theft, highway robbery, false accusations and consuming alcohol, evidence of two male *syahid* is needed<sup>57</sup> whilst corroboration of wealth requires three male *syahids*.<sup>58</sup> The Order makes the classic distinction between *bayyinah* and *syahadah* evidence with women (and non-Muslims) excluded from giving *syahadah* evidence, except in matters pertaining to designated women's issues: 'matters relating to menstruation, birth, breastfeeding and of embarrassment to a female'.<sup>59</sup> Additionally, the principle that the evidence of a woman is weighted at half that of a man prevails through the Order, since, with the exception of those offences specifically referred to,<sup>60</sup> *syahadah* evidence shall be given by two male *syahid* or one male and two female *syahid*.

The prospect of introducing Islamic criminal law concerns many non-Muslims in the Sultanate, including the indigenous non-Malays who already feel their traditional practices, religion and way of life is threatened by the committed policy of Islamisation.

## IMPACT OF ISLAMISATION ON NON-MALAY INDIGENOUS WOMEN OF BRUNEI

Although non-Muslims in Brunei are not subject to the jurisdiction of the Syariah Court and to the specific statutes discussed above,<sup>61</sup> the impact of Islamisation

<sup>55</sup> Haideh Moghissi, *Feminism and Islamic Fundamentalism* (London: ZED Books, 1999) 82.

<sup>56</sup> *Syahids* are persons the court finds are able to give *syahadah* evidence, *Syariah Courts Evidence Order* (2001), s 106(1)

<sup>57</sup> *Syariah Courts Evidence Order* (2001), s 106(3)

<sup>58</sup> *Syariah Courts Evidence Order* (2001), s 106(2)

<sup>59</sup> *Syariah Courts Evidence Order* (2001), s 106(5)

<sup>60</sup> Section 106 (1)-(5)

<sup>61</sup> This is in general terms as non-Muslims can be called to give *bayyinah* evidence in the Syariah

reaches all residents in the Sultanate. This is because the aim of MIB is to promote one culture (Malay) and one religion (Islam). The ethnic and religious diversity that was apparent on the island of Borneo from earliest times is thus suppressed, as assimilation into Malay culture is encouraged in order to create a mono-cultural Brunei.

The government acknowledges that Brunei is 'a poly-ethnic society,' but is firm in its resolve that the national culture is Malay and the national religion is Islam. For the indigenous non-Malays whose culture and religion pre-dates the arrival of Islam, the policy of Islamisation threatens the survival of their way of life. For these women, it not the intersection of Islamisation with goals of modernisation that causes tension, but the impact of Islamisation on their indigenous Bornean traditions and spirituality. Their religion extends in a continuum to Borneo's pre-Islamic, pre-European, animistic way of life. Animism is a system of beliefs used to explain the natural world, and how humans should interact with each other and with natural phenomena. In the dense and rugged tropical rainforests, the early peoples of Borneo constructed a belief system where the natural and supernatural merged, and where the souls or spirits of people, animals and the deities constantly interacted. The concepts and procedures for the settlement of disputes were intimately linked with the spiritual, so that ritual redress complemented the secular. Animism supported egalitarian notions including gender equality, and relied on established practices for maintaining harmony between people and their natural environment. Women were always important transmitters of these cultural and religious values and in some cases women were bearers of high religious office, mediums for communications with the spirit world, and custodians of religious ritual. The Dusun of Brunei is one indigenous group where religious leadership was almost exclusively female through the *belian*, or Dusun priestesses. *Belian* conduct ritual ceremonies and perform exorcisms and essentially are the agents of religious transmission.<sup>62</sup>

Despite Constitutional guarantees that 'other religions may be practiced in peace and harmony,' there are significant restrictions on the practice of any religion other than Islam. However animism which is polytheistic and linked with the supernatural spirit world is of particular concern to the authorities in modern Brunei, just as it was earlier Muslim leaders, who considered that peoples without holy scriptures, the 'non-believers' or *kafirs*, were not entitled to the protections that were afforded *dhimmis* (people of the book).<sup>63</sup> Given rules for

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Court: *Syariah Courts Evidence Order* (2001), s 103(2)

<sup>62</sup> For a detailed study of Dusun religion and in particular the role played by women see: Eva Kershaw, *A Study of Brunei Dusun Religion: Ethnic Priesthood on a Frontier of Islam* (Borneo: Borneo Research Monograph Council, 2000)

<sup>63</sup> Abdullahi Ahmed An-Na'im, "Towards an Islamic Reformation: Islamic Law in History and Society Today" in Othman, *Shari'a Law and the Modern Nation State*, 17. In orthodox Muslim communities the subjects are classified as Muslims, *Dhimmis*, 'People of the Book' because they



modesty in dress, Muslims can be offended by the clothing of indigenous non-Malay women and find their practices living in longhouses, hunting and eating *haram* foods of concern. In addition, governments in Southeast Asia generally consider the indigenous religious practices as primitive or backward, as commentators like Winzeler have observed.<sup>64</sup>

There are particular obstacles for the indigenous people of Brunei in retaining their own identity and religious practice. The first is the legal categorisation of six of the distinctive indigenous ethnic groups as Malay for the purposes of Bruneian nationality.<sup>65</sup> By using the legal categorisation of 'Malay,' the Bruneian state condescendingly overrules indigenous peoples' adherence to other belief systems and ignores their cultural self-identification.<sup>66</sup>

A second repercussion of Islamisation is the barrier it provides to inter-ethnic marriage. It impacts upon the indigenous Bruneians because marriage between a Muslim and non-Muslim is not lawful until the non-Muslim converts to Islam.<sup>67</sup> Any children of the marriage are automatically Muslim, thus sealing the end of affinity to indigenous religion and culture. This is because the conversion does not only mean observance of a new religion, but also: a new identity through the taking of an Islamic name;<sup>68</sup> changes in outward appearance by the wearing of Brunei Malay clothes;<sup>69</sup> new daily practices;<sup>70</sup> dietary change from regular consumption of pig to all *halal* foods; and no alcohol (rice wine is integral to many indigenous ceremonies and festivals).

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believed in revealed scriptures from God, and *kafirs* or 'unbelievers. *Dhimmis* were granted some rights of citizenship, provided they paid a special tax (*jizyah*), and could practice their religion provided they did so in private and did not attempt to convert Muslims. They could not hold positions of authority over Muslims, Unbelievers had fewer rights and at times were killed unless granted safe conduct (*aman*) by Muslims.

<sup>64</sup> Robert L Winzeler, ed. *Indigenous Peoples and the State: Politics, Land, and Ethnicity in the Malayan Peninsula and Borneo* (New Haven, Conn.: Yale University Southeast Asia Studies, 1997) 12-13.

<sup>65</sup> *Brunei Nationality Enactment* (1961) s4 (1). The Constitution of Brunei recognized seven indigenous ethnic groups as *puak jati* (original tribes) which includes these six groups plus the Brunei Malays.

<sup>66</sup> Braighlinn, *Ideological Innovation under Monarchy*, 19 ascribes to this view, detecting an imputation that non-Malay indigenous groups lack 'enough authentic culture or valuable culture to be considered anything better than 'sub-groups' of the dominant Malay population.'

<sup>67</sup> *Religious Council and Kadis Courts Act*(1984) s 134 required both parties to profess the Islam religion, however, The *Emergency (Islamic Family Law) Order* (1999) s 10 states that: 'A marriage shall be void unless all the necessary conditions, in accordance with *Hukum Syara*' have been satisfied.'

<sup>68</sup> Report from *Brunei Bulletin* 3 June 2000 under 'Two families embrace Islam' states that two Iban families from Ulu Belait converted and sets out the new names of each. 'The family of Dyg Kalong Anuk Gindau, 43, is now known as Dyg Nur Rashidah bte Abdullah Gindau and her 11 year old daughter, Chin Yuk Moi, as Dyg Nurhafizah bte Abdullah.'

<sup>69</sup> Dress of *tudongs* (veils) and angle-length loose gowns for women and girls, and *songkit* or MIB shirts for men.

<sup>70</sup> A Muslim is required to observe the five pillars of Islam, which include prayers five times a day, and fasting during the month of *Ramadan*, as well as the annual payment of *zakat*, a pilgrimage to Mecca during one's lifetime, and belief in God and Mohammad as his messenger.

The third factor that has adverse consequences for the indigenous non-Malays and their religion is the law on proselytising. While law is used to prohibit and punish the proselytising of any religion other than the Shafi'i sect within Islam, there is no prohibition in reverse. In accord with the state ideology of MIB, the government actively pursues and funds the propagation of Islam to non-Muslims. The Islamic *Dakwah* (Propagation) Centre of the powerful Ministry of Religion exists solely for this purpose. A conversion to Islam automatically accords the convert Malay status as well as provides tangible benefits, such as cash payments,<sup>71</sup> promotion at work, grants of land and houses and improvements in public works.<sup>72</sup> Representatives from the *Dakwah* Centre visit longhouses and villages, concentrating firstly on obtaining the conversion of the headman, and after than the remaining members of the longhouse or village. Employers are encouraged to ask non-Muslims if they are planning to convert to Islam, and it is not discriminatory for an employer to request that only Malays apply. School students are frequently converted to Islam: indeed, once fourteen and a half, they can convert without parental consent. All students may attend Government schools; but once there, all of them, non-Malays included, must take subjects on Islam and MIB and wear Malay dress, including the *tudong*. There are no classes on non-Malay indigenous culture, languages or practices. The steady conversion rate<sup>73</sup> suggests that the survival of non-Muslim indigenous groups in Brunei is precarious. One researcher has predicted that by 2050 all the ethnic groups in Brunei will have been converted to Islam and thereby assimilated into the official Malay state sponsored culture.<sup>74</sup>

## CONCLUSION

Brunei became independent just twenty years ago, and during that time the Sultanate has focused on reclaiming its Islamic Malay identity while striving to

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<sup>71</sup> Bernstein, "The De-culturation of the Brunei Dusun", 174 indicates that the figure of B\$200 per month is given to each convert.

<sup>72</sup> Azaraimy H Hasib also reports that are financial incentives given to new Muslim converts and quotes Awang Hj Jaman bin Ali, a Religious Propagation Officer from the Ministry of Religious Affairs, as stating homes valued at around \$42,000 are being built and given to converts in the hope of improving 'their well-being and living quality', together with 'water tank supply and power generators which may cost around \$2500 to \$5500 each'. See Azaramy H Hasib, "Brunei Takes Giant Strides towards Islamic Conversions" <http://www.brudirect.com/Daily Info/News/Mar01>. Bernstein similarly reports that road and other public improvements do not occur until the conversion to Islam of a household, when the work is immediately executed. See Bernstein, "The De-culturation of the Brunei Dusun", 174.

<sup>73</sup> In 2000 it was reported that 222 atheists or non-believers (terms used for those adhering to indigenous animistic religions) converted to Islam. The figures for 2000 also show that 121 Iban, 104 Dusuns, and 10 Murut converted. However, it has been suggested by some Iban that a percentage of conversions take place in order to receive the monetary advantage, but in practice, earlier beliefs (animistic or of another religion) continue to operate. This is not unlike the notion of the 'rice Christian' conversions in Asia.

<sup>74</sup> This is the prediction of Maxwell, cited in Bernstein, "The De-culturation of the Brunei Dusun", 177.

be a modern and influential nation in the region. Modernisation comes in different forms, and in Brunei the aim is not to jettison the past and replicate the West but to modernise whilst retaining its Islamic and Malay character. Similarly, Islamisation, as a re-assertion of Islamic identity, takes distinctive cultural and political forms. However, the intersection of the two - Islamic resurgence and modernisation - creates inevitable tensions and creative solutions.

In the last decade, the choices the government of Brunei has made for women in the Sultanate reflect the inherent tension in reconciling modernisation and Islamisation. Three themes have been apparent in this article. One is that women themselves have been largely excluded from the debate - they have not informed it, nor have they had any decision making role in the choices being made about law and religion. In rejecting democracy, Brunei chose not to adopt a key plank of the Western modernisation agenda and signalled a leaning to conservative Islam. The consequent effect of paternalism for women in Brunei goes beyond denying them of a right to vote and to participate in government. It has restricted what information can be accessed, what organisations are allowed, and whether they can change their religion or practice it openly.

The second theme relates to choices made in formulating legislation in accordance with Islamisation and the extent to which modern concepts - whether derived from western or international norms or from reformist Islam - should prevail over the orthodox Shafi'i interpretations. In matters of family law, Brunei has essentially retained the orthodox stance but, cognisant of particular inequities and wider criticisms, made modifications to reduce injustice. This pattern of compromise can be seen in laws on polygyny, *wali* consent and disobedience of a wife. Greatest revision occurred in the case of *talaq* divorce which has been made available to both husband and wife. In contrast, the introduction of the pre-Arabic *zihar* divorce shows the competing influences in the sensitive area of family law. Possibly the greater impact of law and religion on women in the Sultanate could come if Islamic criminal laws were to be introduced.

The third aspect of the tension between Islamisation and modernisation is the impact for indigenous non-Malay women. Those who adhere to their animistic beliefs which were essentially egalitarian, some with sacred roles reserved for women, find these belittled and under challenge. Modernisation renders their religion and way of life 'backward and primitive', being out of keeping with modern development in the technological age. Islamisation, which under MIB strives for a monoculture of the Muslim Malay, necessitates the absorption of the indigenous Borneans into the dominant Malay, a process which can only occur through conversion to Islam. Positive discrimination in favour of the Islam and

of the Malay, coupled with inducements to convert and restrictions on other religious practices, means the choices for indigenous non-Malay women are limited.

It can be seen that as the Sultanate attempts to reconcile prioritising of Islam with the demands of modernisation, women can be caught in conflicting, and sometimes, shifting ideological paradigms. Yet it becomes clear that the main direction for law and religion in the 21<sup>st</sup> century is towards the Islamic world and its solutions. In keeping with the tradition attributed to the prophet that 'whosoever imitates a community, is actually part of it',<sup>75</sup> Brunei Darussalam is veering away from its inherited secular colonial model to join other Muslim states<sup>76</sup> on the route to greater Islamisation.

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<sup>75</sup> Ravindra S Khare, *Perspectives on Islamic Law, Justice, and Society* (Lanham: Rowan & Littlefield Publishers, 1999), 166.

<sup>76</sup> Islamisation has been taking place in Libya, Pakistan, Sudan, Nigeria, Iran and the Malay states of Kelantan.

# *Gender, Sex Work and Law. The impact of a new regulatory regime on women workers in the Queensland sex industry*

**Dr Barbara Sullivan**

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*After more than a decade of being a dentist (public health, private practice and Aboriginal community-controlled health services), Dr Sullivan commenced studies in politics at Macquarie University before moving to the University of Queensland and completing a Masters Qualifying and PhD (1994). She was appointed to the School in 1993 but also spent 3 years (1994-96) as a Post-Doctoral Fellow at the Research School of Social Sciences, Institute of Advanced Studies, Australian National University. In 2001 Dr Sullivan was a Visiting Professor at the Centre of Criminology, University of Toronto and at the Belle Van Zuylen Institute of Multicultural Gender Studies, University of Amsterdam.*

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There is little in the way of 'peace' for most workers in the sex industry in the world today. The vast majority of sex workers are women and they face hard, often daily, battles because of the illegality and stigma associated with their work. They are battered, raped and murdered on the streets; harassed and arrested by police; fined and imprisoned by courts; evicted by landlords; exploited by pimps and traffickers; subjected to forced medical examinations in the name of preserving 'public health'; and detained and deported if found working outside their country of citizenship. However, like most workers, sex workers are merely pursuing a means of supporting themselves and their families.

In Australia over the last two decades there has been a moderate opening in some jurisdictions of more space for legal sex work. Brothels may now legally operate in Victoria, Queensland, New South Wales and the Australian Capital Territory (subject to various licensing, registration and planning requirements). Escort work is also legal in many jurisdictions and some public soliciting for the purposes of prostitution is permitted in New South Wales. This paper explores the impact of changes in the state of Queensland and addresses the following questions: has the situation of sex workers improved over the last decade? In particular, have the human rights and worker rights of women working in prostitution been enlarged since the introduction of legal brothels in 1999? The overall argument will be that there have been some improvements in the situation of sex workers although significant problems remain. Some women are now able to work safely and legally in licensed brothels; they are thus free of the threat of prosecution and able to receive some of the benefits of mainstream work environments (for example, the protections offered by state laws addressed



to occupational health and safety in the workplace). However, in part because of the historical legacy of an illegal industry, workers in legal brothels do not enjoy adequate rights as workers. Moreover, they are subject to (what is effectively) mandatory health testing every six weeks. All the public health literature indicates this is both unnecessary and unreasonable; women prostitutes in Australia are not key actors in the transmission of disease although they clearly bear the burden of our culture's *fear* of disease, sexuality and 'promiscuous' women. The mandatory health testing of sex workers in Queensland is both oppressive and actively involved in the stigmatisation of an already marginal group of women workers.

Workers in other areas of the prostitution industry are also not clearly better off under the new regime for managing prostitution in Queensland. Private workers – who work alone from their own premises – have been legal for many years. However, they remain vulnerable to violent clients and newly subject to the vagaries of an intense official surveillance of their advertising and policing strategies designed to entrap private workers engaged in illegal escort agencies. Under the new regime for controlling prostitution, street workers in Queensland are also subject to intense policing and significantly increased penalties.

### *History of Prostitution in Queensland*

Prostitution has had a long and colourful history in the Queensland context. Until the 1990s prostitution law looked similar in Queensland to elsewhere in Australia. So, while it was not illegal to practise prostitution, a wide range of prostitution-related activities were illegal. For example, it was illegal to solicit in a public place for the purposes of prostitution, to own or operate a brothel, or to live on the earnings of the prostitution of another. However, brothel prostitution was officially 'tolerated' (or 'contained') in Queensland until the late 1950s. This involved a police determination of how many brothels would be allowed to operate and in what areas. In 1959 Brisbane's tolerated houses of prostitution – some of which had operated openly for more than a century – were closed down by the Police Commissioner. It has been suggested that this was due, not to the success of any moral or reform campaign, but to the collapse of long-established criminal networks that organised the prostitution industry (see Sullivan 1997:106-108). Police were central to the maintenance of this network and the brothels were closed to prevent this coming to public attention. In the mid-1980s, in the final years of the Bjelke-Petersen government, investigative journalists began to expose evidence of police corruption associated with gambling and prostitution rackets in Queensland. This eventually led to the establishment of the Fitzgerald Inquiry in 1987 and a wide-ranging investigation which resulted in the jailing of a number of high-profile figures including the former

Commissioner of Police. Fitzgerald recommended further research and inquiry into prostitution and said he thought a system of regulated/legal prostitution would be the best way to prevent this situation arising again. The task of inquiring into prostitution and coming up with specific recommendations for law reform was given to the newly-formed Criminal Justice Commission (which eventually became the Crime and Misconduct Commission, the CMC). In a report published in 1991, the CJC recommended a system of licensed/legal brothels (CJC 1991). However, the Goss Labor government declined this recommendation and instead introduced a range of new offences and tougher penalties for most prostitution-related activities (see Sullivan 1997:208-212). These laws were widely criticised by sex workers, feminists, and activists from across the political spectrum.

### *The 1999 Prostitution Act*

After the Labor government of Peter Beattie was elected in 1998, new prostitution laws were put in place (the *Prostitution Act of 1999*). These instituted a system of small, 'boutique brothels' to be overseen by an independent statutory authority, the Prostitution Licensing Authority (PLA). Those who want to own or operate a legal brothel have to go through an extensive investigation of their background and of their associates. The aim was and is to ensure the elimination of criminals and criminal networks from the legal prostitution industry in Queensland. Brothel owners also have to obtain permission from their local council to develop a brothel business and to pay hefty annual license fees (presently in the range of \$15-20,000 per annum). Brothels can only be established in industrial areas or commercial areas and have to be located at a clear distance from homes, schools etc. Private workers – who operate alone from their own premises – are not subject to licensing and remain legal. Private workers may also do outcalls or escort work but this must not be facilitated or supported by any other person – for example, by another sex worker, receptionist or driver, or even by a friend looking out for the safety of the private worker/escort. Under the 1999 Act unlicensed brothels, escort agencies and all public soliciting for the purposes of prostitution continues to be illegal. It is also an offence to provide or receive commercial sex without a prophylactic; this applies both to brothels and (since 2003) private workers.

In December 2004 the CMC reported on its review of the implementation of the *Prostitution Act of 1999* and made twenty nine separate recommendations (CMC 2004). In 2005 it also investigated and made an interim report on the provision of escort services in Queensland (CMC 2005). There is currently a bill before the Queensland parliament – the Prostitution Amendment Bill of 2006 – that takes up some of the recommendations contained in both these CMC reports.

### *The Current Regulatory Regime and Its Impact on Sex Workers*

The current regime for regulating prostitution in Queensland presents some major problems for sex workers. There are only two ways of working legally – in a licensed brothel or as a private worker – and both of these have some major disadvantages. Legal brothels do provide the safest working environment for sex workers. Workers are not vulnerable to prosecution and are protected by a number of proven safety measures including alarms, the presence of other staff and general measures required under state laws to achieve Workplace Health and Safety (PLA 2004). However, there are also significant problems with brothel employment in Queensland. There will always be some sex workers unable to gain employment in this sector of the industry. SSPAN (Sexual Service Providers Advocacy Network), which includes members who work in licensed brothels in Queensland, has recently claimed that older workers, transgender, male, and disabled workers are not hired by brothel owners because they are not seen as mainstream/marketable commodities (SSPAN 2006). SSPAN has also described Queensland's licensed brothels as "oppressive work environments" (2006:2). As in Victoria (Murray 2003), workers are paid as independent 'sub-contractors' rather than as 'employees'. This means they do not have access to basic employment entitlements (including sick leave, recreation leave, employer contributions to superannuation etc) and are responsible for paying their own tax.<sup>88</sup> The CMC recently reported (2004:105) that most brothel owners have:

contracts with individual workers which state that the worker is an independent service provider, that no relationship of employer/employee is created between the parties and that the sex worker is not subject to any control by the owner.

Brothel owners claim this sort of contract reflects the actual organization of the work. They say that brothels charge male clients a set fee for the rental of a room and that then it is up to the client and the worker to negotiate the services to be provided (without any involvement by the management). However, both the CMC and sex workers have disputed this claim. The CMC (2004: 106) says their researchers observed what many sex workers had reported, that in many cases the brothel receptionist, manager or licensee negotiates an overall fee for the room rental and extra services before the sex worker even meets the client. SSPAN (2006: 2-3) says that, despite stressing the independent status of their workers, brothel owners and managers impose a wide range of controls on

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<sup>88</sup> This also means applying for an Australian Business Number (ABN) and conforming to the accounting requirements of tax law in this area.

workers including “the hours they can work, what they can wear to work and the prices they may charge for their services”. Workers “cannot even always decide to whom they choose to provide sexual services” and workers who refuse to see particular clients or who “commit other forms of ‘misbehaviour’ in the brothel owners’ eyes are subject to sanctions”. Sanctions take the form of being given quiet shifts with fewer opportunities to earn money and even being removed from the roster all together (which is effectively a dismissal without notice). Brothels owners will threaten expulsion if workers decide to work shifts at another licensed brothel or if they conduct (legal) private work outside the brothel (SSPAN 2006:3).

As Murray (2003:18) has argued,<sup>89</sup> it is “clear that women working in the legal sex industry are not supplying sexual services in their own right, on conditions and at prices they determine”. So they do not, in reality, have a sub-contractor relationship with brothel owners. However, the law has frequently accepted the assignment of a sub-contractor relationship and this has been used to deny sex workers access to basic employment entitlements. Murray (Murray 2003:19) argues that sex workers have also sometimes been deceived into believing that this is in their own best interest. They are told by employers that the advantages of a ‘flexible’ work environment (for example, the availability of part-time and casual work) are dependent on their acceptance of sub-contractor status and that employee status will result in a loss of earnings. Murray argues (2003:19) that sex industry operators have “actively exploited” sex worker fears in this area in order to inhibit the process of workplace reform and to limit the establishment of basic workplace rights and entitlements. As she maintains, a sub-contractor relationship is not the only way to achieve flexible work arrangements;<sup>90</sup> “employment relationships can accommodate flexibility” (Murray 2003). However, as the CMC (2004:106) has recently commented, the high licensing fees for brothels make them ‘different’ from other businesses and thus, by implication, perhaps less able than other businesses to ‘afford’ adequate employee benefits. But this simply calls attention to the way that the new regulatory regime for prostitution embraces a set of priorities that preclude the establishment of basic employment rights for workers in brothels.

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<sup>89</sup> Murray’s (2003) arguments are made specifically in relation to legal brothel employment in Victoria. However, it is clear that these are also directly applicable in the Queensland situation; both jurisdictions license brothel owners and operators in a similar way.

<sup>90</sup> This is also a point that the CMC should note. They have recently commented (2004:106) the ‘flexibility’ of being able to refuse to provide sexual services or to take time away from work when it is necessary for a sex worker’s wellbeing ‘is not consistent with the usual expectations of regular employment’. This is clearly not true. All sorts of leave (most notably sick leave) are available for regular employees. Moreover, in Victoria, brothel workers are legally able to refuse to provide sexual services of any specific type and have the right to refuse particular clients. There are analogies for this in the general workforce for example, employed doctors and nurses are not required to perform or participate in the provision of abortion.

The licensing regime and new institutional framework established under the Queensland *Prostitution Act of 1999* clearly prioritises the elimination of organised crime from the prostitution industry. The CMC has recently claimed that this has been achieved in the legal brothel industry (CMC 2004:xii). While this may have some benefits for sex workers, the costs borne by women working in the industry (and the benefits enjoyed by largely male licensees) are high. The long and expensive process for obtaining a brothel license is likely to be beyond the means of most sex workers. And, due to the historical criminalisation of their work, many older sex workers will have criminal records that preclude them from becoming licensees. So, under the present regime, it is unlikely that sex workers will be able to establish their own brothel business. Moreover, as the current licensing and regulatory regime is organised around the vetting of brothel owners and operators, it has little real capacity to pay attention to industrial issues for workers. This is a significant and ongoing problem for workers as another historical legacy of the illegal industry is that there are no established 'normal' working conditions (as exists, for example, in most other occupations in Australia). As most workers in the prostitution industry are young, casual and non-unionised this means that brothel owners and managers are handed significant power to set in place working conditions that are problematic for brothel workers.

This situation is compounded by the fact that sex workers have no direct voice in the new regulatory regime. Under the 1999 Act, a Prostitution Advisory Council was established that included a representative of sex workers in Queensland. However, this Council was formally dissolved in 2003 and many of its functions were transferred to the PLA. The Board of the PLA includes representatives of the police, the minister, lawyers and public health personnel; since 2003 it has also included two people who represent 'community interests'. However, there is no representation of sex workers.

Sex workers in licensed brothels are also subject to onerous and oppressive regimes of health examinations. Under sections 89 and 90 of the 1999 Act it is an offence for a prostitute to work while infected with a sexually transmitted disease (STD) or for a brothel owner/manager to permit a prostitute to work with an STD. Interestingly, it is not an offence to seek out the services of a sex worker (ie to be a client) if you have an STD; and it is also not apparently a serious problem if you give or receive sexual services while infected with non-sexual bugs (for example, a cold or the flu). A defence to charges under sections 89 and 90 of the *Prostitution Act* is established if the worker has been regularly screened for STDs. In practice, brothels currently require workers to be tested every six weeks and if this is not performed the sex worker is not allowed to work.



Now the compulsory examination of prostitutes for STDs has a long and oppressive history in Queensland and in other jurisdictions (Sullivan 1997: 21-22; Evans 1984). In late 19<sup>th</sup> century Britain one of the first avowedly feminist campaigns was waged against the Contagious Diseases acts which imposed compulsory medical examination on known prostitutes (but not, of course, their clients) and included the incarceration in 'lock hospitals' of sex workers found to be suffering from an STD. These sorts of laws achieved very little in terms of controlling the spread of STDs but clearly breached women's human rights and imposed a sexual double standard (because men were not liable). They also led to a large number of women being named and marked (for life) by the state's labelling of them as 'prostitutes'. Queensland had its own contagious diseases acts and these were not repealed until 1971. Until the mid-1940s, 'known prostitutes' (and perhaps just women seen as 'promiscuous') were regularly incarcerated in the Brisbane 'lock hospital' attached to the Boggo Road jail. Evidence to the Fitzgerald Inquiry in the mid 1980s suggests that even after this period, police were involved in 'rounding up' and escorting to the Health department sex workers who failed to attend STD screenings.

In the present day, the testing of sex workers for STDs remains compulsory in legal brothels although, as the CMC has recently claimed, the process is now 'indirect' (CMC 2004:59). However, as Metzenrath has argued (1999:25):

any sort of compulsory testing of sex workers (is) both unreasonable and unjustified. Compulsory testing serves no purpose other than to stigmatise sex workers continually for the work they do and represents a denial of basic civil liberties.

It is unreasonable and unjustified because all the literature agrees that Australian sex workers now have a very low incidence of STDs (Donovan and Harcourt 1996; Harcourt, Egger and Donovan 2005) and may indeed enjoy better sexual health than the rest of the community (Metzenrath 1999:28). This has largely been the result of very successful safe sex campaigns aimed at sex workers and based on peer education principles (Metzenrath 1999) although other factors, such as law reform, the public funding of sex worker advocacy groups and improvements in the quality and accessibility of sexual health services may also have been important (Donovan and Harcourt 1996:63). Whatever the reasons, this Australia-wide trend demonstrates that sex workers are both willing and able to manage their own sexual health. The literature also suggests that there is no actual public health advantage associated with the compulsory testing of sex workers for STDs. For example, Harcourt et al (2005:125) have recently reported lower rates of gonorrhoea in sex workers in Sydney (where STD testing is not legally required) than in Victoria (where brothels are licensed and the same requirements are in force as in Queensland).

So why are workers in legal brothels in Queensland subject to compulsory STD screening? According to the CMC (2004:58) this practise is in the interests of 'ensuring a healthy society' although statements like this clearly cannot be scientifically justified especially as there is also a legal requirement in Queensland that commercial sex must always be conducted with a prophylactic in place. All the literature suggests that almost 100% of sexual transactions in legal brothels are conducted according to safe sex principles (ie the application of barrier methods for preventing the transmission of infection). A similar level of safe sex practise is not even attempted in the rest of the population! It is, however, part of the 'common sense' of Queensland political culture that prostitutes *need* to be subjected to regular health testing. The laws in this regard are never questioned (except by sex worker advocates, often from interstate) and, indeed, are often used to re-assure the Queensland public when amendments to prostitution laws are being proposed and debated in the parliament. So politicians will use mandatory testing as a way of facilitating public support for measures designed to better 'govern' the prostitution industry. It is notable as well that there are no campaigns in Queensland (or the rest of Australia) for other workers regarded as vulnerable to infection, and to spreading infection, to be subjected to compulsory health testing. For example, surgeons, dentists, and nurses are not required to undertake any direct or indirect form of health screening (see Metzenrath 1999:29). In medical situations the rule is not to assume the absence of infection in any situation and to ensure barriers (such as sterilisation and protective equipment) are always in place. Medical workers will also, of course, have access to voluntary testing and treatment if required. So why are the same procedures not regarded as suitable for sex workers? The answer to this question would seem to lie in cultural understandings of what it means to be a prostitute and thus in the imposition of pathological stereotypes on women currently supporting themselves via sex work. Our culture regards prostitutes in two main ways - as sad victims or as 'bad' women who are wilfully promiscuous and thus a danger both to themselves and the community (see Sullivan 1997). These sorts of punitive and misogynist stereotypes regularly compromise the safety of women working in prostitution and are probably one of the main reasons why the occupation of being a sex worker is so dangerous. Licensed, legal prostitution does not automatically wipe out these stereotypes. If the regulatory framework is not sensitive to their presence, and actively involved in undermining them, then we can expect they will continue to have significant and detrimental effects on the lives of sex workers. I would suggest one way these stereotypes are presently being re-created is via compulsory health testing.<sup>91</sup>

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<sup>91</sup> See also Loff et al (2003) for how health programs can lead to the mistreatment of sex workers in other areas of the world.

The requirement on workers in licensed brothels – that they be screened for STDs every six weeks – is demeaning and discriminatory.

Private workers in Queensland are not subject to the same disadvantages as brothel workers. They earn more than brothel workers (CMC 2004:83) – mainly because they retain the full fee paid by a client – and have more control over their working hours and conditions. They are also not subject to compulsory health testing. However, private workers are more vulnerable to violence mainly because they must work alone if they are not to be liable for arrest and prosecution. Like sex workers in licensed brothels, private workers – and their clients – are legally required to use a prophylactic in any commercial sex transaction. The advertising of their services is also subject to surveillance by the PLA. In the last few years, private workers have been a particular object of police and PLA activity. Scarlet Alliance (the national sex worker rights body) has recently commented on the “broad scale police harassment and criminal prosecutions of private workers” whose advertising did not exactly conform to (new) requirements established by the PLA; the prohibited advertisements contained the word ‘services’. Consequently, some private workers were “dragged to the police station in their sex work lingerie and charged with a criminal offence” (Scarlet Alliance 2006 Submission to the CJC on the interim report on the provision of out-call services in Queensland). This sort of action is clearly part of a broader campaign by the police and PLA to bring private workers more directly under state control. The overall aim of the law is to eliminate illegal prostitution and ‘organised crime’. Illegal brothels and escort agencies – and private workers who do not work alone – are seen as prime targets in this campaign. Consequently a lot of current policing has been focussed on the entrapment of private workers by police(men) posing as clients and requesting two workers or requesting the provision of sexual services without a prophylactic. Workers who agree to either of these proposals are liable to arrest. The police and CMC claim that this sort of activity is necessary to combat ‘organised crime’. However, it is notable that many of the cases that have come to court involve just two sex workers working together or a second person supporting and/or protecting the safety of a worker. It is also worth remembering that, in the Queensland context, organised crime in the prostitution industry has been largely carried out by police. So any new regulatory regime – and especially one that aims to combat organised crime – should be aiming to increase the separation between sex workers, sex businesses and the police. The current laws clearly allow for some separation (via the PLA) but a great of police involvement continues in relation to private workers (and also, amazingly, in relation to the operation of licensed brothels.<sup>92</sup> It would appear that even the

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<sup>92</sup> Sections 59-61 in the *Prostitution Act 1999* allows police to enter a licensed brothel at any time it is open for business. The CMC has recently reported that police do, in practise, visit licensed brothels (CMC 2004:100)

stringent probity requirements of the licensing procedure are not sufficient to eliminate the claimed 'need' for police surveillance of legal brothels). Historically, it is evident that tougher prostitution laws have provided the grounds of possibility for police corruption and organised crime associated with the prostitution industry (Allen 1984). But this is rarely considered in the Queensland context.

A proposal to amend the Prostitution Act presently before the Queensland parliament, will clearly increase police powers over private workers. The bill proposes a raft of relatively unproblematic reforms designed to stream-line and improve the system of legal/licensed brothels. However, it also includes measures designed to increase the PLAs power over advertising by private workers (basically requiring them to 'register' with the PLA) and to outlaw the 'offer' of commercial sex without a prophylactic. As indicated above, the practise of actually providing commercial sex without a prophylactic is already illegal; penalising the 'offer' is clearly likely to be popular with Queensland politicians and the Queensland public (for the cultural reasons discussed above). However, it is obviously a measure designed to increase police powers in relation to private workers; police can ring private workers who advertise publicly and attempt to obtain compliance with a request for the provision of commercial sexual services without a prophylactic. While police are exempt from arrest in this area, private workers will not be so fortunate.<sup>93</sup>

The final group of Queensland sex workers that I want to briefly address in this paper are street workers. It is widely acknowledged in the literature that street workers are more disadvantaged, more likely to be drug addicted, and more vulnerable to violence than any other group of sex workers. In Brisbane at least three street workers have been murdered in recent years. The new regulatory regime for prostitution has not really addressed this issue, except by further increasing the penalties associated with public soliciting for the purposes of prostitution – a measure which is designed to deter all street work and encourage legal employment in the sex industry. The CMC (2004: 81) has recently reported that the incidence of street prostitution has been 'significantly impacted' by high levels of prosecution, 'current policing strategies' (which are said to target male clients but to support workers to leave the industry) and by the use of new 'move-on' powers designed generally to address people causing a public nuisance. This level of police activity is partly evident in annual crime statistics released by the Queensland police service (cited in CMC 2004: 79); it is notable that arrests for public soliciting doubled between 2001/2 and 2002/3 and

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<sup>93</sup> And a sex worker may reasonably decide, on good scientific grounds, that for example the provision of oral sex without a prophylactic is not a huge risk to their health. My point here is simply that penalizing the offer to provide commercial sex without a prophylactic is both unnecessary (it has not been introduced in other Australian jurisdictions) and may undermine the relative autonomy of sex workers.

are now almost four times higher than before the introduction of the 1999 *Prostitution Act*.

## ***Conclusion***

The introduction of a new regulatory regime for prostitution has delivered some advantages to some women working in the sex industry in Queensland. Before the 1999 Act, sex workers could only work legally as private workers and many complained about the daily dangers inherent in working alone. As a result of the 1999 Act, the space for legal sex work opened slightly; workers could now also choose to operate from legal/licensed brothels. However, as indicated above, there remain significant problems with employment in legal brothels; working conditions are poor and prostitutes are subject to unnecessary and intrusive health screenings. Private workers retain more autonomy but – as they are still required to work on their own – continue to be vulnerable to violence. Private workers are also a major target for new police and PLA strategies designed to eliminate illegal prostitution. Street workers remain extremely vulnerable to violence, arrest and very hefty fines. In general, then it cannot be claimed that the new regulatory regime has delivered any major advantages to women working in the sex industry.

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## *Aung San Suu Kyi: leading the peaceful battle for democracy in Burma*

**Holly Kluver**

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Aung San Suu Kyi (ASSK) is a powerful political figure and an advocate for a democratic Burma. She is leading the campaign for democracy and human rights and seeking to uproot the military junta which has illegitimately held power since the 1990 elections<sup>94</sup>. ASSK's democratic beliefs offer the Burmese people an alternative to the oppressive and tyrannical military rule. Burma has a troubled political history from British occupation to the nationalist movement for independence. After liberation from the British, Burma was democratically governed for only a short time before a military coup instilled a harsh and autocratic regime with no tolerance for dissidents. The military junta still violently suppresses anti-government actions and continues to disregard human rights. Despite the lack of claim to power, the junta retains its grasp over the country and permeates into all aspects of society. ASSK continually resists these acts of oppression and represents the ideals for a democratic Burma. Whilst she is not without fault and it is arguable her methods of non-engagement have left the political situation of Burma in a protracted crisis, she has greatly contributed to the people of Burma and her actions deserve merit and respect.

Prior to WWII, Burma was a British colony. After losing the first and second Anglo-Burmese wars, Burma ceded territory to the British and was formally annexed to Britain in 1886<sup>95</sup>. From 1942, the Japanese occupied Burma and

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<sup>94</sup> Nick Knight, *Understanding Australia's Neighbours: An Introduction to East & Southeast Asia*, (Cambridge: Cambridge University Press, 2004), p.175.

<sup>95</sup> See Appendix One

resisted British control with the assistance of the Thirty Comrades, the Japanese-trained but Burmese-lead resistance group. In 1944, Aung San and his fellow Thirty Comrades established the Anti-Fascist People's Freedom League (AFPFL) and resisted both Japanese and British control and fought for independence<sup>96</sup>. With the Japanese defeated in WWII, the British reasserted their control over Burma but the AFPFL continued to resist foreign occupation and Burma gained independence in 1948<sup>97</sup>. The leader of this resistance movement, Aung San, the father of ASSK, was assassinated in 1947 and is considered Burma's national hero for liberating the country from British rule<sup>98</sup>.

In the period from 1948-62, Burma was democratically governed. The political situation drastically changed in 1962 when a military coup lead by General Ne Win seized power and the State Law and Order Restoration Council (SLORC) ruled Burma<sup>99</sup>. The SLORC renamed the country Myanmar and imposed a harsh regime based on martial law curtailing freedoms for civil society<sup>100</sup>.

In 1988, the democracy movement emerged lead by charismatic figure, ASSK<sup>101</sup>. In that same year, thousands of people in Rangoon rebelled against military rule in a non-violent pro-democracy demonstration. The military showed no tolerance for this dissent and bloodily suppressed demonstrators resulting in thousands of people killed or injured<sup>102</sup>.

In 1990, the SLORC allowed elections to take place in Burma. The opposition party, the National League for Democracy (NLD) lead by ASSK won by a landslide securing over 80% of the seats<sup>103</sup>. The SLORC did not expect these results and refused to allow parliament to convene. Despite the lack of legitimate claim to power, the SLORC refused to recognise the results of the election and placed ASSK under house arrest and imprisoned many NLD party members.

ASSK was placed under house arrest by the military and spent six years in isolation. During this time of house arrest, or 'protective custody' as deemed by the military, ASSK was awarded the Nobel Peace Prize<sup>104</sup>. This award gave

<sup>96</sup> Aat Vervoorn, *Re-orient: Change in Asian Societies*, (Melbourne: Oxford University Press, 1998), pp.4-5.

<sup>97</sup> "History of Southeast Asia: Myanmar", *ASEAN Focus Group*, ([http://www.aseanfocus.com/publications/history\\_myanmar.html](http://www.aseanfocus.com/publications/history_myanmar.html)).

<sup>98</sup> Ibid.

<sup>99</sup> Colin Mackerras (ed), *Eastern Asia: An Introductory History*, (Frenchs Forest: Longman, 2000), p.253.

<sup>100</sup> Vervoorn, *Re-orient: Change in Asian Societies*, p.47.

<sup>101</sup> "Aung San Suu Kyi: The Prisoner of Rangoon", *Cutting Edge*, SBS TV, 28 August 2003

<sup>102</sup> Knight, *Understanding Australia's Neighbours: An Introduction to East & Southeast Asia*, p.175.

<sup>103</sup> Ibid.

<sup>104</sup> Mackerras (ed), *Eastern Asia: An Introductory History*, p.253.

international recognition to the efforts of ASSK in attempting to secure democracy in Burma. Furthermore, it is arguable this award has conferred some level of protection as although ASSK remains under house arrest, the military have not opted to eliminate their most threatening political opponent<sup>105</sup>.

ASSK has been in and out of house arrest since 1989 yet still has resounding support from the people of Burma as well on an international scale. Her principles for a democratic Burma, and the fact the military junta still refuses to acknowledge the results of the 1990 elections, have drawn the attention of the worldwide community. During ASSK's house arrest in 2003, the Dalai Llama, the US government and the EU all called for her release<sup>106</sup>.

Since the regime has been in power, the military have largely ignored international criticism despite the imposition of severe sanctions<sup>107</sup>. The EU remains committed to sanctions and demands the release of pro-democracy leaders<sup>108</sup>. ASSK endorses the sanctions as foreign aid and investment does not reach the Burmese people rather maintains the current autocratic regime<sup>109</sup>. The EU sanctions<sup>110</sup> noticeably include a travel ban which compliments ASSK's anti-tourism campaign which began in the mid-1990s. The military authorities held 1996 as the year of tourism and opened Burma's doors to the world<sup>111</sup>. Consequently, thousands of peasants were forcibly removed from their homes virtually overnight and the International Labour Organisation (ILO) estimates over three million people were forced into slave labour to build the infrastructure necessary to accommodate foreign tourists<sup>112</sup>. Revenue from tourism maintains the regime and now is not the right time for tourists to visit Burma. ASSK says, "I shall welcome tourists and investors when we are free<sup>113</sup>." Whilst international efforts have used economic and political manoeuvres to destabilise the military

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<sup>105</sup> Clare Murphy, "The Nobel: Dynamite or damp squib?", *BBC News Online*, 8 October 2004 ([http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle\\_east/3724734.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3724734.stm))

<sup>106</sup> "Aung San Suu Kyi: The Prisoner of Rangoon", *Cutting Edge*, SBS TV, 28 August 2003

<sup>107</sup> Aung Zaw, "Military Maneuvers: Burma's leaders speak of democracy while ruthlessly suppressing it", *Time International (Asia Edition)*, vol. 163, i23 (June 2004) p.48.

<sup>108</sup> European Information Service, "EU/Burma: EU And Asia Seek Progress On Human Rights", *European Report*, 2 April 2005, p.514.

<sup>109</sup> Victor, Barbara, *The Lady: Aung San Suu Kyi, Nobel Laureate and Burma's Prisoner* (Boston: Faber & Faber, 1998) p.220.

<sup>110</sup> European Information Service, "EU/Burma: EU And Asia Seek Progress On Human Rights", p.514.

<sup>111</sup> "Aung San Suu Kyi: The Prisoner of Rangoon", *Cutting Edge*, SBS TV, 28 August 2003

<sup>112</sup> "Aung San Suu Kyi: The Prisoner of Rangoon", *Cutting Edge*, SBS TV, 28 August 2003

<sup>113</sup> John Pilger, "With an eye to its vast Asian market, Europe promotes human rights when the price is right. In Burma, crimes against humanity are allowed to continue without challenge", *New Statesman*, vol.134, i4724, (January 2005), p.18

regime, fifteen years of sanctions has no visible effect on the ability of the military to maintain power<sup>114</sup>.

Burma has been a pariah state for many years, alienated from the international community, until securing membership to ASEAN in 1997<sup>115</sup>. This regional forum comprised of Asian states has traditionally avoided becoming involved in internal domestic disputes. However, the treatment of ASSK by the Burmese military has spurred a change in attitude from member states of ASEAN. In 2003, most unexpectedly, Malaysian Prime Minister Mahathir Mohamad called for the release of ASSK and toyed with the concept of expelling Burma from ASEAN despite being instrumental in convincing the other members to ASEAN to accept Burma for membership<sup>116</sup>. An expulsion has significant political and economic ramifications and it is evident ASSK has a profound impact on other nation's leaders. The Malaysian parliament is set to pass a motion calling for her release and for the implementation of promised political reforms in Burma or face losing its chairmanship next year<sup>117</sup>. In April 2005, the EU again called for the release of ASSK before Burma takes on the role of rotating chairmanship of ASEAN in late 2006<sup>118</sup>. It is quite clear ASSK has significant backing both from regional actors, ASEAN and the EU, as well as US support. ASSK's democratic ideals permeate Burmese society and resonate beyond Burma's borders, evidenced by the high level of support for ASSK and continued calls for her release.

ASSK may be considered Burma's most popular political figure however is she the destined leader of a democratic Burma? Or is she just a phenomenon who is inadequate to represent the 'true culture' of Burma? These questions will be answered considering the cultural history of Burma, the attributes ASSK has as a leader and the possibility of leadership within the current confines of military principles which preclude women, and more specifically ASSK, from becoming the leader of Burma.

There are no real cultural impediments to a woman ruling Burma. Women experience a relatively equal position in the household and economy and have inheritance rights and the right of divorce<sup>119</sup>. Although in Buddhist terms, women are considered inferior there are still examples throughout Burmese

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<sup>114</sup> European Information Service, "EU/Burma: EU And Asia Seek Progress On Human Rights", p.514.

<sup>115</sup> Andrew Perrin, "A Purge in Burma: By sacking Prime Minister Khin Nyunt, the junta abandons even the pretence of a more liberal future", *Time International (Asia Edition)*, vol.164, i18 (November 2004), p.39.

<sup>116</sup> Andrew Perrin, "Burma Feels The Heat", *Time International*, vol.162, i4 (August 2003), p.21.

<sup>117</sup> Ibid.

<sup>118</sup> European Information Service, "EU/Burma: EU And Asia Seek Progress On Human Rights", p.514.

<sup>119</sup> Michael Aris(ed), *Freedom from Fear: and other writings* (New York: Penguin Books, 1991), p.268.



history which demonstrate women have held positions of power. In the 15<sup>th</sup> century, Shin Saw Bu succeeded the throne in the Pegu Kingdom and in the 19<sup>th</sup> century, during the Konbaung dynasty, Queen Supayalat, queen of Burma's last king, exercised significant influence over her husband and was involved with state matters<sup>120</sup>. During the colonial period, women were active in politics although this role diminished in the 1947 election when only three women won seats and four women replaced the seats held by their assassinated husbands<sup>121</sup>.

In recent times, women have become revolutionary leaders in Asia; liberating their countries from tyrannical rule<sup>122</sup>. ASSK highlights her leadership of the democratic movement by using her father's name, Aung San. The name 'Aung San' personifies the concepts of struggle and liberation and has been elevated to heroic status. Being the daughter of a national hero certainly assists with recognition and leadership status. However, ASSK has contributed to Burma in her own right. The magnetic aura which draws and holds the attention of her supporters and an unwavering commitment to democracy are key components of a revolutionary leader.

ASSK's democratic principles and leadership ability may be attributed to the benefit of Western schooling and travelling widely. She was educated at Oxford University, travelled to New York to work for the United Nations, has lived in Bhutan and travelled around the world to countries such as the US, Japan and India<sup>123</sup>. A western education and experience in world affairs has enabled ASSK to critically comment on the harsh military rule in Burma and offer an alternative solution<sup>124</sup>. Her appreciation for the rule of law and human rights stems from her experiences in the West and she has incorporated these principles into her vision for Burma's future.

It is arguable ASSK is not the most suited person to lead a democratic Burma. ASSK has spent a significant period of her life overseas as opposed to living in Burma. Her extensive travel experience means she has spent less time living in her own country experiencing life as the rest of the people of Burma subjected to military rule. In addition, Burma is a conglomerate of different ethnicities meaning it is nearly impossible for one person to adequately represent all of Burma. These are weak arguments which undermine ASSK's ability to rule a democratic Burma. Due credit should be given to both her Western education and extensive travel as these experiences enabled her to criticise the military

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<sup>120</sup> Ibid.

<sup>121</sup> Aris(ed), *Freedom from Fear: and other writings*, p.269.

<sup>122</sup> See Appendix Two

<sup>123</sup> Aris(ed), *Freedom from Fear: and other writings*, p.271.

<sup>124</sup> Ibid.

regime and begin the non-violent resistance against autocratic rule. Furthermore, ethnic differences are not a hindrance to democracy. ASSK says,

“The law treats everyone equally irrespective of who or what they are. If different groups are treated differently, this shows that law and order are absent<sup>125</sup>”.

Considering this quote, ASSK has an appreciation for the rule of law which best operates in a democratic environment. ASSK has sacrificed her personal life and her freedom for the democratic cause and as a powerful orator and charismatic leader; she would be an ideal candidate to represent a democratic Burma.

The military junta is one the world’s longest lasting dictatorships and has proven to be very difficult to displace<sup>126</sup>. The military maintains this power by refusing to tolerate anti-government actions and ruthlessly exercises violence against any dissidents. In addition, the military has implemented draft principles to ensure it maintains a political stronghold<sup>127</sup>. These draft principles require the military to appoint the majority of the members of parliament and provides any future presidential candidate must have a record of active service in the armed forces<sup>128</sup>. In effect, these draft principles prevent women from being presidential candidates as the Burmese military does not recruit women. Furthermore, a presidential candidate cannot be married to a foreigner nor have rights of citizenship to any other country<sup>129</sup>. This is directly targeted at ASSK and is an attempt by the military junta to prevent her becoming president of Burma.

It is arguable ASSK is unable to exert any influence over the regime due to its unrelenting control over Burmese society. The military occupy the entirety of government positions, forcibly silence any pro-democracy actions and have manipulated the education system in their favour<sup>130</sup>. There is an intellectual-drain as professionals have fled the country to seek better economic conditions and opportunities not available in Burma. The junta has the capacity to restructure and engineer society to ensure there is no alteration to the current power structure. However, the junta undermine the influence of civil society. The 1990 election results indicate a mass following for the NLD and ASSK believes there is more solidarity now than ever before<sup>131</sup>. ASSK explains change may not

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<sup>125</sup> “Burma: Dealing with the Devil”, *Dateline*, SBS TV, 11 February 2004.

<sup>126</sup> Ardeth Maung Thawngmung, “Burma: a gentler authoritarianism? (The Day After)”, *Foreign Policy*, 1139 (November/December 2003), p.39.

<sup>127</sup> Ibid.

<sup>128</sup> Tate, Alison, “Cold August in Burma: Political action and political symbolism”, *Arena Magazine*, No.36 (August-September 1998), pp. 33

<sup>129</sup> Ibid.

<sup>130</sup> Ardeth Maung Thawngmung, “Burma: a gentler authoritarianism? (The Day After)”, p.39.

<sup>131</sup> “Aung San Suu Kyi: The Prisoner of Rangoon”, *Cutting Edge*, SBSTV, 28 August 2003.

always be visible<sup>132</sup> and continued commitment to the democratic cause may be causing hidden cracks in the political framework.

The NLD, lead by ASSK, and the military authorities are in a political quagmire with neither party willing to negotiate. ASSK strongly maintains her principle of non-engagement with the military yet this policy may also be her greatest downfall. An unwillingness to negotiate locks all parties into a protracted stalemate with no chance of a successful outcome. ASSK has two options; either to maintain her attitude towards non-engagement or adopt the role of a practical politician and seek a compromise<sup>133</sup>. Other opposition groups, the various ethnic-nationality parties, have opted to negotiate with the military rulers<sup>134</sup>. This approach is more realistic than a policy of non-engagement as change will only occur when parties communicate and negotiate. ASSK's policy of non-engagement has not resulted in a shift in the balance of power. Although international efforts<sup>135</sup> have assisted in facilitating some dialogue between the NLD and the military authorities, without compromise, the political situation will remain unchanged.

Another contentious issue between the NLD and the military junta is the drafting of Burma's new constitution<sup>136</sup>. In 2003, the newly appointed Prime Minister General Khin Nyunt<sup>137</sup> announced the recommencement of the National Convention to draft a new constitution for Burma as part of the process towards democracy<sup>138</sup>. The NLD was one of the parties which was to be included in the drafting process although just a few days prior to the National Convention re-opening, the NLD withdrew its involvement as the military authorities failed to assure the NLD genuine debate would be permitted<sup>139</sup>. Despite this being a

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<sup>132</sup> Ibid.

<sup>133</sup> Amit Baruah, "Junta leaders, Suu Kyi in regular contact", *The Hindu (New Delhi)*, 19 February 2001 (<http://www.burmalibrary.org/reg.burma/archives/200102/msg00054.html>).

<sup>134</sup> "Burma: Dealing with the Devil", *Dateline*, SBS TV, 11 February 2004.

<sup>135</sup> The U.N. Secretary-General's special envoy, Mr. Razali Ismail, assisted in the communication process between Aung San Suu Kyi and the military junta. Baruah, "Junta leaders, Suu Kyi in regular contact".

<sup>136</sup> Burma has had two previous constitutions, one prior to independence and the second in 1974 under General Ne Win's regime. "History of Southeast Asia: Myanmar".

<sup>137</sup> PM General Khin Nyunt was sacked in late 2004 which was seen by the West as a setback to reform in Burma as Khin Nyunt was considered 'more pragmatic and less xenophobic than the country's paramount leader, General Than Shwe'. Perrin, "A Purge in Burma: By sacking Prime Minister Khin Nyunt, the junta abandons even the pretence of a more liberal future", p.39.

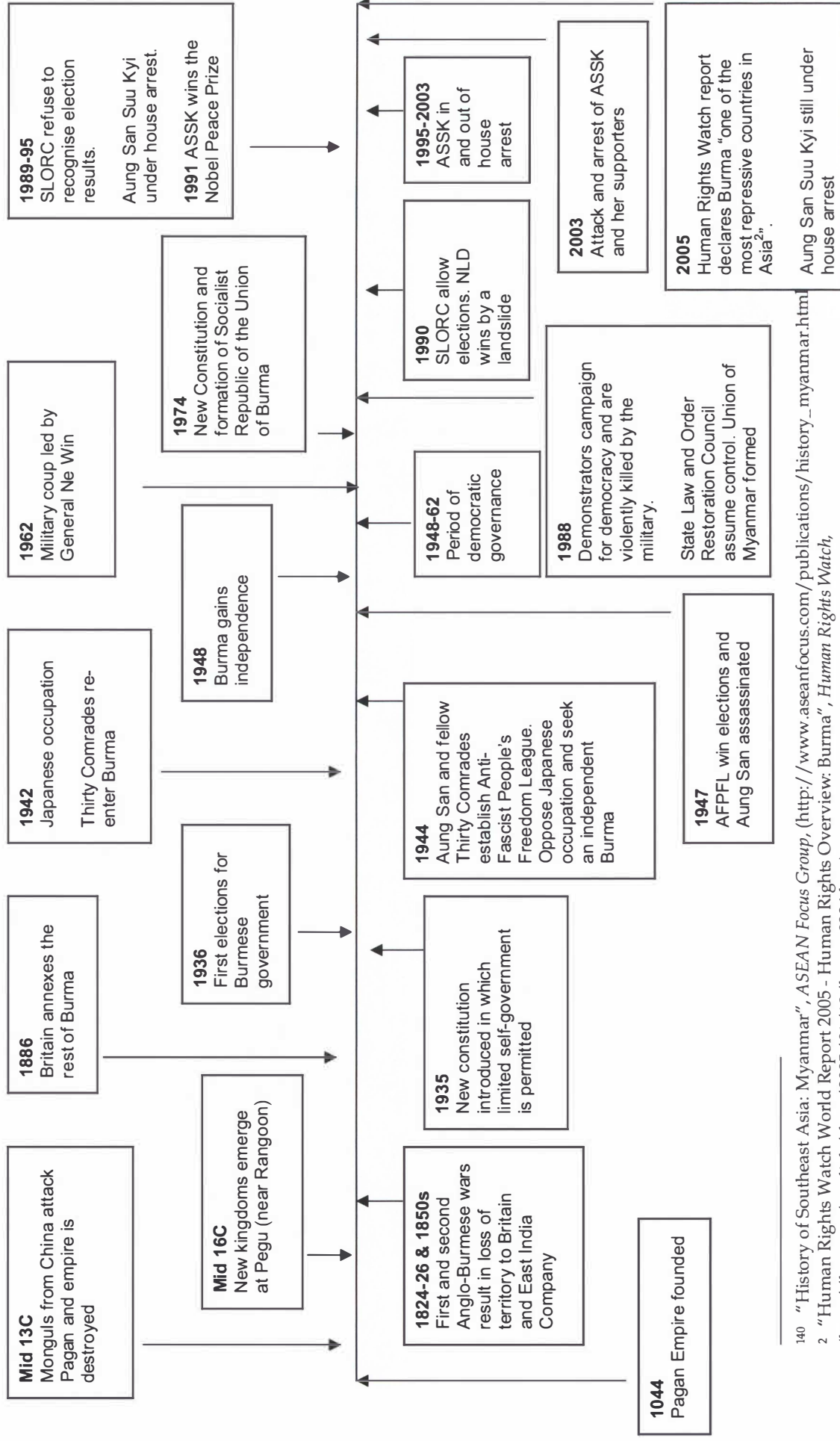
<sup>138</sup> Zaw, "Military Maneuvers: Burma's leaders speak of democracy while ruthlessly suppressing it", p.48.

<sup>139</sup> Ashley South, "Political transition in Myanmar: a new model for democratization", *Contemporary Southeast Asia*, vol.26, i2 (August 2004), p.235.

legitimate concern, the NLD did not have an alternative plan once again leaving the situation at a political stalemate.

ASSK's campaign for democracy is a continuing battle spanning more than a decade. She has chosen to sacrifice her freedom and personal life to secure a better future for her country. As a revolutionary leader, ASSK emanates the leadership characteristics of her father in promoting the democratic cause. Her education and travel experience has enabled her to condemn the military junta and give the people of Burma an alternative to the harsh military rule. The junta's refusal to relinquish power is a distinctive obstacle and despite sixteen years since the 1990 election in which the NLD were victorious, ASSK has failed to uproot the military regime. The policy of non-engagement has not altered the status quo although her perseverance and determination has gained widespread international support and condemnation for the regime. ASSK is a magnetic public figure who has the ability to unite all people of Burma, regardless of ethnicity. She promotes a non-violent revolution in which the ideals of democracy will hopefully, one day, come to fruition.

## Appendix One - Timeline of Burma's History<sup>140</sup>



<sup>140</sup> "History of Southeast Asia: Myanmar", *ASEAN Focus Group*, ([http://www.aseanfocus.com/publications/history\\_myanmar.html](http://www.aseanfocus.com/publications/history_myanmar.html))

<sup>2</sup> "Human Rights Watch World Report 2005 - Human Rights Overview: Burma", *Human Rights Watch*, (<http://hrw.org/english/docs/2005/01/13/burma9826.htm>)



## Appendix Two

### Female leaders of revolutions in Asia

Country	Female Leader	Male Martyr	Relationship
Bangladesh	Begum Khaleda Zia	Ziaur Rahman (assassinated)	Widow
	Sheikh Hasina Wajed	Sheikh Mujibur Rahman (assassinated)	Daughter
Burma	Aung San Suu Kyi	Aung San (assassinated)	Daughter
Indonesia	Megawati Sukarnoputri	Sukarno (deposed by Suharto; died under house arrest)	Daughter
Malaysia	Wan Azizah Wan Ismail	Anwar Ibrahim (imprisoned)	Wife
Pakistan	Benazir Bhutto	Zulfikar Ali Bhutto (executed)	Daughter
Philippines	Corazon C. Aquino	Benigno S. Aquino, Jr. (assassinated)	Widow

All female leaders in this table are daughters, wives or widows of male martyrs<sup>141</sup>.

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<sup>141</sup> Mark R. Thompson, "Female leadership of democratic transitions in Asia", *Pacific Affairs*, vol.75, no.4 (Winter 2002), pp. 535-558.

## Appendix Three - Quotes by Aung San Suu Kyi

### Choices

"My choice had always been made, you know, my country first. But I think people should not be made to choose between their private lives and their political beliefs<sup>142</sup>".

"I don't look at this as a sacrifice. It's a choice. If you choose to do something then you shouldn't say it's a sacrifice. Because nobody forced you to do it<sup>143</sup>".

### Power

"My father said that people who claim that they have taken over power for love of their people and love of their country will earn no respect. They would gain some respect if they just said outright that it was for love of power<sup>144</sup>".

### Beliefs

"If ideas and beliefs are to be denied validity outside the geographical region and cultural boundaries of their origin, Buddhism would be confined to north India, Christianity to a narrow tract in the Middle East and Islam to Arabia<sup>145</sup>".

### Law

"The law treats everyone equally irrespective of who or what they are. If different groups are treated differently, this shows that law and order are absent<sup>146</sup>".

### Violence

"The NLD will never take up arms. After all, if we take an overview of world history, we see that many military regimes have called it a day even if there was not already some form of armed resistance<sup>147</sup>".

"True strength doesn't need violence<sup>148</sup>".

### Freedom

"The struggle for democracy and human rights in Burma is a struggle for life and dignity. It is a struggle that encompasses our political, social and economic aspirations. The people of my country want the two freedoms that spell security: freedom from want and freedom from fear<sup>149</sup>".

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<sup>142</sup> Daw Aung San Suu Kyi's pages (<http://www.dassk.org/index.php>).

<sup>143</sup> Ibid.

<sup>144</sup> Daw Aung San Suu Kyi's pages (<http://www.dassk.org/index.php>).

<sup>145</sup> Aat Vervoorn, *Re-orient: Change in Asian Societies*, (Melbourne: Oxford University Press, 1998), p.56.

<sup>146</sup> "Burma: Dealing with the Devil", *Dateline*, SBS TV, 11 February 2004.

<sup>147</sup> Daw Aung San Suu Kyi's pages (<http://www.dassk.org/index.php>).

<sup>148</sup> "Burma: Dealing with the Devil", *Dateline*, SBS TV, 11 February 2004.

<sup>149</sup> Daw Aung San Suu Kyi's pages (<http://www.dassk.org/index.php>).

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## *Around the world with a peaceful heart*

**Louise Stevanovic**

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*Falun Gong (Falun Dafa) is an ancient exercise and meditation practice that was made public in China in 1992 by the founder, Li Hongzhi. Falun Gong is similar, in some ways, to yoga and tai chi and has been widely promoted for its benefits to health and well-being. Falun Gong also emphasises the importance of 'cultivation' which means improving one's heart and mind by following the principles of 'Truthfulness, Compassion and Tolerance'.*

*The Chinese Communist Party (CCP) initially supported the practice. After seven years of unprecedented growth in China, and an estimated 100 million practitioners, the CCP grew nervous of Falun Gong's overwhelming popularity. China's former president and leader of the CCP, Jiang Zemin, decided to ban the practice in July 1999 and personally initiated the suppression, which continues today. The CCP has politicised Falun Gong, but Jane Dai denies that the practice is political. "When people get involved in politics, they demand things," she says. "But we don't demand anything. All we want is to be able to practice Falun Gong in public parks and read Falun Gong books in our homes. These are the most basic human rights, and this is not getting involved in politics."*

*Following is an account by Louise Stevanovic of Jane Dai's experience as a Falun Gong practitioner and her fight to stop the persecution of Falun Gong.*

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Little Fadu Chen has traveled to more countries in the six years of her life than most of us would hope to cover in our entire lifetime. Fadu has accompanied her mother, Jane Dai, to forty-four countries around the world. However, they both wish they had not needed to make a single trip, because their purpose has not been a pleasant one. Each trip has been to tell the world what happened to Fadu's father, Chengyong Chen.

Chen was a Falun Gong practitioner, someone who tried to live each day according to the principles he believed in: truthfulness, compassion and tolerance. For this he was brutally tortured to death by the Chinese Communist Party and his body dumped in a field.

Jane found out about her husband's death from a report on the Internet. She clearly remembers the day, July 26, 2001, two years after the Chinese Communist Party began a vicious crackdown on Falun Gong. "I went into shock and began to tremble uncontrollably as soon as I read the news", recalls Jane. "The pain was beyond description. I locked myself in my room and did not want to see anyone. My hair turned white overnight."

After three months of grieving in private, Jane realised that she had to do something to restore justice. She wanted to go back to China to collect her husband's ashes and see that they were interred with appropriate honour and



dignity. When the Chinese Consulate General refused to give her a visa, Jane began a six-month campaign of petitioning politicians, contacting human rights organisations, and telling her story all around Australia to prompt the Australian government to act on her behalf.

### *Jane's story*

Jane grew up in China and decided to move overseas after her university studies. She graduated with a degree in business economics and moved to Australia in 1987 to do further study. After the June 4, 1989 Tiananmen Square massacre, Chinese students were allowed to stay in Australia, so Jane stayed, and later became an Australian citizen. After ten years in Australia, she decided to travel around the world – not for pleasure, but to try and find a deeper meaning in life. She was searching for meaning and looking for answers. Her travels took her to Jerusalem, Canada and the United States, but her savings ran out before her search ended.

In 1997 she decided to move back to Guangzhou – and it was here, back in her hometown, that her search finally ended. One day, while visiting a relative, she came across the book *Zhuan Falun* [the main text of Falun Gong]. “It took me three days to read the book”, she remembers. “I was totally engrossed in it – everything I had been searching for was contained in this book.” Jane recalls how she used to feel inferior because of her black hair and yellow skin, and because she was Chinese with an Australian passport. But after she read *Zhuan Falun*, for the first time she felt proud to be from China.

Not long afterwards, Jane met Chen, who had also started practising Falun Gong, and they got married the same year. She was struck by Chen’s kindness and compassion, and referred to him as the ‘love of my life’.

Chen had started to practice Falun Gong after seeing the incredible affect it had on his father, Chaoneng. Chaoneng had uremia, and in the opinion of both western and eastern medical professionals, he was on death row. He had tried many types of qigong and paid numerous qigong masters to help him, but none of it made much difference. He was on the verge of giving up when a neighbour gave him a copy of *Zhuan Falun*. He read the book and started doing the exercises and living according to the principles of the practice. To his astonishment, his subsequent medical examinations showed that he was normal and healthy.

Both Chen and Chaoneng worked in a government-owned paper mill with more than 10,000 employees (Guangzhou Paper Manufacturing Cooperation). After Chaoneng’s amazing recovery, many of the employees started to practice Falun Gong. “This is typical of how Falun Gong spread so rapidly in China”, recalls Jane. “It was usually by word of mouth, based on the tremendous healing benefits”.

By 1999, the Chinese government estimated that there were 100 million Falun Gong practitioners in China, including many people in the Chinese government, Communist Party and the army. The knowledge that so many millions of people were involved in a spiritual practice that was not controlled by the Chinese government scared the then-leader of China, Jiang Zemin. He saw it as a personal threat, even though the practice was non-political, totally peaceful, and by all accounts, extremely beneficial for health and well-being. Jiang Zemin personally initiated the crackdown on Falun Gong in July 1999.

### *Beginning of the crackdown*

The Chinese Communist Party started harassing Jane's husband in 1999, when the government-owned paper mill forced all employees to stop working for the entire day so that they could watch propaganda videos slandering Falun Gong. This was (and still is) a common tactic used to demonise the practice. "The government controls all the media in China", explained Jane. "We only heard propaganda on the radio, television and the newspapers, demonizing Falun Gong. After a while, many people began to believe it."

In January 2000, Chen was arrested in Beijing after writing an appeal letter and was detained for 15 days. Jane was pregnant at the time and, as the horror stories of torture, mutilation, rape and forced abortion of Falun Gong practitioners began to surface, she decided to return to Australia by herself, fearful of the safety of her unborn child. Fadu was born in Sydney in April 2000 and was only four months old when Jane heard that Chen had been arrested again.

She returned to China with Fadu, anxious to do what she could to help Chen. Chen was released shortly after Jane arrived back in China. She later found out that her phone had been tapped and because Jane held an Australian passport and was considered a 'foreigner', the authorities had released her husband to avoid international attention. "He was forced to watch propaganda for 24 hours a day, seven days a week and if he fell asleep they would beat him and pour water over him", Jane said.

After his first arrest, Chen had been fired from his job. He had worked there for ten years, but the government policy towards Falun Gong practitioners – "ruin their reputations, bankrupt them financially and destroy them physically"<sup>150</sup> – meant that many hardworking employees were fired because of their spiritual beliefs. Chen left home to avoid further persecution, knowing that the Chinese authorities would often raid the homes of practitioners during the night, and arrest them. He was arrested again in Tiananmen Square in December 2000 and was tortured and electrocuted so badly that he was close to death. The authorities released him, expecting that he would die. He managed to make it

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<sup>150</sup> *Nine Commentaries on the Communist Party*, Part 5, 'On the Collusion of Jiang Zemin and the Chinese Communist Party to Persecute Falun Gong', published by *The Epoch Times*.

back to Guanzhou where Jane was staying. Four days later he was kidnapped again for the fourth time and Jane lost contact with him.

Jane's visa expired after six months, so she had no choice but to return to Australia, still with no word from her husband. She was stopped at the airport in Guangzhou and her passport was confiscated, and returned just before she boarded the plane. By then Jane realised that she was on a blacklist and would probably never be able to return to China. "If Fadu and I hadn't held Australian passports, that would have been the end for both of us", she recalls.

In July 2001, after months of concern for her husband, Jane saw his name in an internet news report: Chen's decomposed body had been found in an abandoned hut in Guangzhou.

Jane was in deep shock for three months, trying to come to terms with what had happened. She knew there was nothing she could do for Chen, but she realised she needed to do what she could to help others, who might otherwise have the same fate.

In January 2002, after months of petitioning politicians, and raising awareness in every possible way, Jane was a guest on a popular radio talk show in Melbourne. The host promised that his team would be asking serious questions about the matter. Around the same time Jane contacted the Australian Consulate in Guangzhou directly. These two approaches eventually resulted in her husband's remains being brought to Australia in March 2002, and he was interred at a moving ceremony in Canberra. Although Chen had finally had a decent funeral, it was small consolation for Jane and Fadu.

### *Crackdown destroys the family*

The family tragedies didn't end with the death of Chen. The Chinese authorities had asked Jane's sister-in-law (who is also a Falun Gong practitioner and had already been detained three times) to identify Chen's body when it was initially found. This was a trap – as soon as the sister-in-law arrived at the police station, she was arrested and sent to a labour camp, where she was tortured both physically and mentally until she renounced Falun Gong. "This was even worse than the death of my husband," said Jane, who couldn't sleep at night after she heard what happened to her sister-in-law. "Chen died with a clear conscience," she explained, "but although my sister-in-law is alive, her spirit has died. The spiritual death of a person is worse than their physical death."

Chen's father Chaoneng, whose health had improved so dramatically from practising Falun Gong, became sick from grief after Chen's death. At the beginning of the crackdown the Communist Party threatened that if he continued to practise Falun Gong, they would confiscate his house and withdraw his pension. He begged them to let him continue practising. "If I

can't practise, I will die", he told them. He died two months after Chen's death, at the age of 68.

Jane's brother has been constantly monitored and is still living in fear. His home was ransacked at the beginning of the persecution, and his Falun Gong books and material were confiscated.

Jane knew she needed to continue to speak up. Her husband been murdered, her family torn apart, and many of her good friends in China had also been sent to labour camps because they practiced Falun Gong. Many of these friends had children, who were separated from their families and prevented from attending school or other educational facilities because of their parents' spiritual beliefs. "If I didn't speak up, who would?" she reflected. "They can torture, beat and kill our families, but they cannot kill our belief."

### *Trips and lawsuits*

Jane and Fadu's first trip overseas was in 2002, to the United Nations International Human Rights Conference in Geneva. Fadu was just two years old. After Geneva, Jane and Fadu continued travelling to every continent around the world urging people everywhere to help end the Chinese government's persecution of Falun Gong. While it is too late to help Chen, Jane believes that it is not too late to save the hundreds of thousands of other Falun Gong practitioners in China, who face a similar fate. The Chinese government's influence is far reaching around the world, and Falun Gong practitioners have been harassed and intimidated in many countries by Chinese agents or those acting on their behalf, including in Australia.

In October 2002 Jane took a further courageous step to seek justice for Falun Gong. She agreed to be a plaintiff in a lawsuit against the former leader of China, Jiang Zemin, who was directly responsible for the persecution. Jiang Zemin was charged with genocide and torture.

In 2003, Jane was a plaintiff in four more lawsuits against Jiang Zemin in Geneva, Belgium, Spain and Germany. The Belgium lawsuit was filed by renowned lawyer Georges-Henri Beauthier (best known for his role in bringing charges against former Chilean dictator Augusto Pinochet). This lawsuit was against Jiang Zemin and two of his senior aides. All were charged with genocide, torture and crimes against humanity.<sup>151</sup>

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<sup>151</sup> For full details of lawsuits, see <http://www.flgjustice.org>

*"Jiang's horrific form of genocide is a terror that does not just destroy life, but aims to destroy faith...It is a terror that must be brought to justice."*  
-Georges-Henri Beauthier (*Compassion*, Vol V, Spring 2004)

### ***Illegal organ harvesting from Falun Gong practitioners***

In May this year, Jane spoke in Auschwitz, Poland, at a forum entitled "Never again: Appeal to the world". The forum presented the latest and most disturbing allegations to date: widespread illegal organ harvesting from Falun Gong prisoners of conscience.

In March this year, two witnesses (neither of whom were Falun Gong practitioners) reported that Chinese hospitals were selling and transplanting the organs of imprisoned Falun Gong practitioners for huge profits and then cremating the bodies to destroy the evidence. An independent report released to the Canadian government in July concluded that these allegations were true. The report was the result of two months voluntary investigation by Canadian former Member of Parliament David Kilgour (former director of Asia and Pacific division of Canadian Foreign Affairs Ministry) and renowned Canadian human rights lawyer David Matas.

The Chinese government has openly admitted they use the organs of executed prisoners, and the Canadian report quoted conversations with staff in several hospitals in China who admitted they use the organs of imprisoned Falun Gong practitioners. Mr Matas and Mr Kilgour conducted interviews with witnesses in several countries, including Australia, and investigated government records and other evidence. They concluded that about 41,500 transplants in China could not be accounted for by donors or executed prisoners. They concluded that these transplants came from the bodies of Falun Gong practitioners, thousands of whom are being held in labour camps and detention centres across China.

The report states: "We believe that there has been, and continues today, to be large scale organ seizures from unwilling Falun Gong practitioners. We have concluded that the government of China and its agencies in numerous parts of the country, in particular hospitals but also detention centres and "people's courts", since 1999 have put to death a large but unknown number of Falun Gong prisoners of conscience. Their vital organs, including hearts, kidneys, livers and corneas, were virtually simultaneously sized involuntarily for sale at high prices, sometimes to foreigners, who normally face long waits for voluntary donations of such organs in their home countries."<sup>152</sup> Mr Matas

<sup>152</sup> *Report into allegations of organ harvesting of Falun Gong practitioners in China*, David Matas and David Kilgour, 6 July 2006. The report can be downloaded from <http://investigation.go.saveinter.net/>



concluded, "Our findings are shocking. To us, this is a form of evil we have yet to see on this planet."<sup>153</sup>

Jane said that choosing Auschwitz to expose this issue further was very significant. "In 1943 when one of the victims of Auschwitz escaped and told the western world his story, he was told that more evidence was needed before people would believe him" she said. "So many people died in Germany and Poland, while the western world waited for that evidence. I hope history doesn't repeat itself. At the end of a transplant operation, the hospital room is totally cleaned. The body of the 'donor' is cremated. What evidence are people waiting for? We have to act now to stop this continuing, we cannot just wait for evidence. I hope that everyone will ask themselves: 'What can I do to help the situation?' When the page of history is turned, our grand children will ask us: 'In the face of such inhumanity, what did you do?'"

At the end of August Jane travelled to Melbourne and Brisbane to join David Kilgour and Edward McMillan-Scott, vice president of the European Union. Mr Kilgour and Mr McMillan Scott visited Canberra, Sydney, Melbourne and Brisbane to speak to parliamentarians, lawyers and doctors to call for an international investigation to stop the illegal organ harvesting in China. The Chinese Consul in Melbourne sent an email to MPs asking them not to attend the Melbourne forum.

*"When I reflect on my husband's death, I ask myself why he didn't give up his belief in Falun Gong even at the very end. It is because the principles of Truthfulness, Compassion and Forbearance are rooted in our hearts and no external force can take them away. Although my husband has passed away, my daughter and I will continue travelling around the world telling all people that the principles of Truthfulness, Compassion and Forbearance cannot be destroyed. When we look back through history, we can see that Christianity was persecuted for 300 years, but it remains to this day. History shows that people's beliefs cannot be destroyed." -Jane Dai.*

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<sup>153</sup> Spoken at a press conference in Canada on July 6 when the report was released. Quoted in the Sydney Morning Herald, *China kills for organs, says report*, July 8, 2006

## Endless Flight

### Melody Kemp

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*Melody Kemp, a member of the Women's International League for Peace and Freedom (WILPF), has lived and worked in Asia for almost 20 years, during which time she has worked on labour and women's rights issues. Melody currently lives in Vientiane where she is working on the labour struggles in Burma and trying to find funds to update her book on women and workplace health. She says about her time in Burma, "These people are so dignified, brave and concerned for each other. It's humbling to be here."*

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In 2005 women from more than 150 countries were nominated for a people's Nobel Prize. Among the nominations were Dr Cynthia Maung the Karen doctor who works on the Thai Burma border; Naw Zipporah Sein of the Karen Women's Organisation; Naw Paw Lu Lu who runs a safe house for Burmese refugees in Kanchanaburi Province in Thailand; and Charm Tong from the Shan Women's Action Network (SWAN).

That so many Burmese women were nominated is indicative of the swirl of conflict and horrors that have engulfed Burmese women for the past 60 years. For the Shan and Karen, the war which has attempted to maintain hold on traditional lands and lives has exacted a huge toll. Many brave women are active combatants, fighting in thick jungles rife with malaria and dengue, and of course facing the daily, hourly threat to their lives.

For the past two weeks I have been in Thailand working with ethnic Burmans in Bangkok, and now am about to leave Chiang Mai where I have worked with Shan refugees. Shan women toil in the hot sun below me in the hotel court yard breaking up concrete so that foreign guests like me can swim in a renovated pool. It is the hot season and the temperature out there must be 40 Celsius, and yet they are happy as they earn 100 Baht per day (AUD3.50) They told us that unlike other jobs, here they get paid on time. (Note that the official minimum wage in Thailand is BHT181 per day). The Shan men earn BHT150. While motorcycling around Chiang Mai, one sees muffled women carrying bricks, bags of cement, or hammering at concrete guttering in the heat of the day. Such is the life of a refugee or migrant worker.

Last week the Thai newspapers reported that the State Peace and Development Council (SPDC) (the military junta that rules Burma) had commenced its dry season offensive deep into Karen and Shan lands, forcing up to 200,000 more refugees over the border and adding to the 1.4 million Displaced Persons already in Thailand. There were reports of atrocities and torture of women and children. Women had been set on fire, stakes driven

into their vaginas, children skewered on bayonets. Crops ready to be harvested have been burned and looted and livestock killed and burned, so starvation is widespread. Now it is likely that the National Party for Democracy (NPD) of Aung San Suu Kyi will be outlawed as the SDPC, having learned well from the West, is labeling it an 'above ground terrorist organisation'. Yesterday's reports indicate that many party members have been forced to resign. The Association of South East Asian Nations' (ASEAN) intervention has failed miserably, and most Western voices, including that of Alexander Downer, have been pathetically inadequate in the face of such brutal and on-going violence. While in Australia, I realised that the press are largely ignoring Burma in favour of football stories or the like. It is one of our own region's most gruesome and long standing conflicts and now it is likely that Aug San Suu Kyi herself may be at risk.

With some financial support from the Medical Association for Prevention of War (MAPW) I was able to send antibiotics to Dr Cynthia's clinic early this week, to treat the thousands who pour over the bridge into Mae Sot, with amputations caused by land mines, burns and bullet wounds, as well as malaria, post abortion infections, and starvation. The AUD 400 I received bought a decent pile (50 packets) of an expensive variety of antibiotic. By the time some patients are brought in by the brave paramedics who risk cross border patrols to collect those who have fallen victims to the daily battles, most are in a grave condition.

SWAN have reported the systematic use of sexual violence against women. Over the past three years SWAN have documented the rape of women, many of whom are under 18 years of age. Of those they have interviewed, 65% were pack raped, 58% by officers, and 26% were detailed for concubinage. The survivors reported that friends and neighbours had been killed or tortured after rape and died as a consequence.

Last year SWAN launched a report called Catwalk to the Barracks which exposed the official conscription of women into sexual servitude to the Burmese Army. It goes on to document numerous types of abuse against Burmese women, even after ceasefires have been agreed. Its cover shows girls who have been forced to 'model' on a bizarre catwalk parade for the Burmese army. Even the daughters of SDPC officials are not safe from the licence to rape given to the Burmese army. The 11 year old daughter of an official was raped and murdered by a passing patrol.

One of the participants in my training course this week told me of clusters of 20 separate birth deformities in groups of Shan women that had found their way to the crisis center in Chiang Mai. That type of cluster is associated with chemical warfare or the intensive use of pesticides which are often dumped by chemical companies after their products are outlawed in the North. However to think that this cluster of defects was caused by agricultural

chemicals assumes that the farmers are rich enough to buy such goods and that agriculture is settled, none of which applies to Shan or Karen.

A few months ago, on the way to Australia, I read a report in the Thai news announcing that the SDPC was establishing a series of dams on the Salween River in order to sell hydro power to Thailand. In the same report, the Thai state electricity authority (which was saved from privatisation by massive public anger) emphatically denied that it needed additional power, asserting that it had more than it needed. The Salween river flows through Karen heartlands, and the damming of its waters would rob the Karen of their traditional lands and push more over the border. No international outcry greeted the announcement, despite government motives being clear. The SDPC have ruthlessly logged the forests in the Karen and Shan states so that land degradation is dire. In this part of the world, most women are farmers, so the impact on women is one that should be of concern to both women's and environmental organisations.

In the midst of all of this, refugee women are trying to educate their children and maintain some form of normalcy.

For those in the refugee camps, life is miserable. They are not allowed out of the camps to seek work; they have no access to telephones or other ways of contacting family back in Burma. On leaving, life is tenuous and hard. Most of those I worked with had not seen their families for many years. My colleague from the Seafarers Union of Burma has not seen his wife and children since 1994. He fears that contacting them would put their lives in danger as the paranoid government of Burma has spies and wire taps monitoring the families of dissidents. One young Shan worker's parents had died before he could see them, and he was unable to return to his village to perform the rites and ceremonies that would guarantee the peaceful transition of their souls.

All of this reminds me of earlier times. I remember being in Perth during the Balkan war. The generous concerned women in Perth were sending sanitary packages to Bosnian women who had been raped, being quite unaware that East Timorese women immediately to their north were suffering the same fate and had been for longer. Similarly it seems that Australian women know little of the horrible lives endured by the Burmese people despite the nation being part of our region. Many visit Chiang Mai to marvel at markets, relax and visit splendid and ancient Wats, unaware that their rooms are cleaned by refugee women, the gardens tended by disenfranchised and traumatised men. Tourists solicit sex from Shan men and women, who willingly surrender their bodies so they can remit money back to Burma... and besides, starvation is worse.





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### *Magistrates Work Experience Program*

Each year, WATL offers their members the opportunity to participate in the Magistrates Work Experience Program. In 2006 the standard of applications was highly competitive with the following students being selected to participate in the Work Experience Program:

- Neha Chhatbar
- Binny DeSaram
- Tristan Fitzgerald
- Breanna Hamilton
- Melanie Hyde
- Anna Kloeden

The participants spent one day a week for 10 weeks with a Magistrate assisting with administrative and research tasks and sitting in on court sessions. WATL would like to thank the following Magistrates for offering their time, to support the Magistrates Work Experience Program in 2006:

- Ms L.M. Bradford-Morgan
- Mr. A.G. Dean
- Judge M.P. Irwin
- Ms C. G. Roney
- Ms A. C. Thacker
- Ms B. F. Tynan

A requirement of the Work Experience Program is that participants submit an essay that focuses on an issue that arose as part of their experience. The Editors would like to thank Clare Cappa, from the University of Queensland Law School, for adjudicating the essays. On the following pages are the essays judged as the top three.

## *The Queensland Justice System and Domestic Violence: Time for something special?*

**Breanna Hamilton**

I have had glasses thrown at me. I have been kicked in the abdomen when I was visibly pregnant. I have been kicked off the bed and hit while lying on the floor...I have been whipped, kicked and thrown, picked up again and thrown down again. I have been punched and kicked in the head, chest, face and abdomen more times than I can count...I have suffered physical and emotional battering and spiritual rape...Each night I dread the final blow that will kill me and leave my children motherless.<sup>154</sup>

The preceding passage is a chilling account of the reality that many women face in their everyday lives. These women live in constant fear for their own lives and those of their children. This fear is so pervasive that many will never seek help – even in the face of life-threatening violence. They struggle to cope with these severe physical, emotional and spiritual injuries, whilst simultaneously acting to ‘hide’ them from the outside world. This has been the case for decades, perhaps even centuries, and to a large extent, this is still the case today. Although improvements have been made in the way our society reacts and responds to domestic violence, there are still large gaps that undermine the effectiveness and credibility of the system. The mechanisms currently in place for dealing with domestic violence in Queensland are only one, small fraction of what could, and should be done to solve this problem. This article will examine the development of the current system in Queensland and highlight its inherent weaknesses. It will then proceed to examine the possibility of establishing a specialist domestic violence court, and demonstrate how such a move could remedy many of these weaknesses. Finally, the feasibility of such a court being established will briefly be considered.

### **The current system in Queensland**

Domestic violence was first recognised in Australia in the 1970s.<sup>155</sup> The waves of feminist social reform that rolled through this decade had at their very core the notion of ‘equality’ – in the community, workplace, and home. The ‘social, familial, financial and religious’<sup>156</sup> ties that previously ‘bound’ women to their

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<sup>154</sup> Del Martin, ‘Battered Wives’ in *Domestic Violence Law: A comprehensive overview of cases and sources*. Nancy KD Lemon (ed) (1996), 69.

<sup>155</sup> Colin James, (2006). ‘Media, Men and Violence in Australian Divorce’ 31 *Alternative Law Journal* 6, 8.

<sup>156</sup> Ibid.

husbands were relaxed. Wives were not penalised in the divorce courts for 'walking out' on their husbands.<sup>157</sup> It is thought that this liberalisation of family values played a part in the increase in domestic violence. Similarly, the 'women's refuge movement' was created and surged into the 1980s. It is often credited as the 'impetus for contemporary domestic violence responses.'<sup>158</sup> Both federal and state governments came to acknowledge domestic violence as a real issue within the community. They provided funding for refuges and programs and began developing 'blueprints for action.'<sup>159</sup> Following report findings, most states introduced civil actions as an option for future protection of victims.<sup>160</sup>

In its infancy, Queensland's response to domestic violence largely paralleled that of the other Australian states. A report was commissioned in 1988, including 'substantial original research.'<sup>161</sup> The *Domestic Violence (Family Protection) Act 1989* was introduced as a result, and operated primarily to provide 'domestic violence protection orders' (DVOs).<sup>162</sup> This Act has since been heavily amended by the *Domestic Violence Legislation Amendment Act 2002*.<sup>163</sup> It extended the categories of people who are offered protection under the Act, bringing Queensland into line with the other states and territories.<sup>164</sup> It was intended that the Queensland Criminal Code 1899 support the above legislation.

### **Problems with the system – policing, victim participation and social perceptions**

As can be seen, Queensland's early response to domestic violence was satisfactory. The government's report contained innovative research, and civil protection orders were introduced within a similar time frame as the other states. This legislation has been helpful in the fight against domestic violence. However, it seems that Queensland began to fall behind, being one of the last states to extend the categories of people protected by DVOs, and it now seems that we are also struggling to keep up with combating other problems that are evident within our system. These problems include issues with police enforcement, victim participation and lingering social perceptions.

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<sup>157</sup> Ibid.

<sup>158</sup> Dr Lesley Laing, (2000). 'Progress, trends and challenges in Australian responses to domestic violence' (Issues Paper No 1, Australian Domestic & Family Violence Clearinghouse, 2000), 2.

<sup>159</sup> Ibid 3.

<sup>160</sup> Heather Douglas and Lee Godden, (2003). 'Intimate Partner Violence: Transforming Harm into a Crime' 10 *Murdoch University E-Law Journal*, 2.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Renata Alexander. *Domestic Violence in Australia*. (2002), 125.

<sup>164</sup> Sally Kift, (2002). 'More in the family now' *Proctor*. May 20, 20.

The current system relies very heavily on police enforcement in order to be effective - 'often mistakenly', as noted by Stewart.<sup>165</sup> Research conducted by the Crime and Misconduct Commission in 2005<sup>166</sup> found that the 'problem of inadequate policing is indeed chronic and endemic.'<sup>167</sup> It seems that many members of the police force still perceive 'domestics' to be a 'private' issue between spouses, and are generally reluctant to interfere. They view partner violence as beyond the reach of the law.<sup>168</sup> Douglas and Godden provide some convincing evidence of this problem.<sup>169</sup> It is the role of police officers to file applications for a DVO when there is sufficient evidence of domestic violence to meet the 'balance of probabilities' standard of proof.<sup>170</sup> They also have an obligation to investigate where they reasonably suspect that a criminal act has occurred.<sup>171</sup> Douglas and Godden found that in only 1% of the files relating to applications for DVOs was an investigation ever conducted, and criminal charges were only laid in 0.4% of cases.<sup>172</sup> These key players are failing to fulfill their duty of 'criminalising' domestic violence. Furthermore, police officers are generally the first people on the scene of a potential domestic dispute and therefore have a large amount of discretion as to whether and how the situation proceeds.<sup>173</sup> Their conduct determines in a large part the victim's first impression of how the justice system will support her. They are an important subculture of the audience in the context of intimate partner violence.<sup>174</sup> Somewhat disturbingly, attending officers will often ask the victim if they wish to make a formal complaint, whilst in the presence of the perpetrator.<sup>175</sup> In this way, writers suggest that police are acting as 'filters', by expressly or implicitly discouraging victims from taking action.<sup>176</sup>

Perhaps one of the most concerning dilemmas facing the system is lack of victim participation. As mentioned, improvements have been made to existing court facilities to make the victim feel more safe and comfortable.<sup>177</sup> However, in many ways this seems akin to a tokenistic gesture. Many victims

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<sup>165</sup> Julie Stewart. 'Specialist Domestic/Family Violence courts within the Australian Context' (Issues Paper No 10, Australian Domestic & Family Violence Clearinghouse, 2005), 3.

<sup>166</sup> Crime and Misconduct Commission Queensland. 2005. *Report Summary: Policing Domestic Violence in Queensland*. Crime and Misconduct Commission Queensland, Brisbane. March: 1-4.

<sup>167</sup> Stewart, above n12, 3.

<sup>168</sup> Douglas & Godden, above n7, 6.

<sup>169</sup> Ibid 2.

<sup>170</sup> Queensland Police Service Operational Procedures Manual, paragraph 9.6.1.

<sup>171</sup> Police Powers and Responsibilities Act 2000 (Qld) and Queensland Police Service Operational Procedures Manual, paragraph 9.3.1, s71 Domestic Violence Act (Qld).

<sup>172</sup> Douglas & Godden, above n7, 2.

<sup>173</sup> Carolyn Hoyle. *Negotiating Domestic Violence: Police Criminal Justice and Victims* (2000), 147.

<sup>174</sup> William Felstiner, Richard Abel & Austin Sarat. 'The Emergence and Transformation of Disputes: Naming Blaming and Claiming' (1980-1981). 15 *Law and Society Review* 631, 644.

<sup>175</sup> Douglas & Godden, above n7, 8.

<sup>176</sup> Heather Douglas, (2003-2004). 'Crime in the Intimate Sphere: Prosecutions of Intimate Partner Violence' 7(2) *Newcastle Law Review* 79, 92.

<sup>177</sup> Judge Marshall Irwin, Chief Magistrate of Queensland, (2005) 'Response to Domestic and Family Violence: New Directions' *Address to Domestic Violence Court Assistance Network Conference*. Cairns, 11 November 2005.

will not engage with the system to begin with, or withdraw their complaints prior to the court hearing. A basic lack of knowledge of the procedures involved will deter many.<sup>178</sup> The Federal Government's Partnerships Against Domestic Violence<sup>179</sup> found that, overall, women accessing the legal system after experiencing domestic violence found it to be 'complicated, intimidating, costly, difficult to access, time consuming and variable in its effectiveness'. It is disturbing that those who the system is designed to protect have the least faith in it, especially when the notion of empowerment is considered to be central to work with victims of domestic violence.<sup>180</sup> A study in the United States listed public trust and confidence as a measure of court performance.<sup>181</sup> If this is correct, the performance of courts dealing with domestic violence leaves much to be desired.

Although ground has been made in raising awareness of the issue of domestic violence, there are lingering social perceptions that label it as a 'private' issue that should be dealt with in the 'intimate sphere'. As Evans writes, 'perspectives of domestic violence in the current Australian context are still too narrowly conceived.'<sup>182</sup> These views, *inter alia*, help to explain why groups still struggle to have assaults occasioned through domestic violence prosecuted as a 'crime'. As noted by Justice Gillen of the Supreme Court of Ireland, 'a failure to bring these perpetrators within the rule of the law not only serves to undermine public confidence in the justice system...but perpetuates, in the eyes of the community, a parallel social norm which gathers legitimacy from the failure to question it'.<sup>183</sup>

### Specialist Domestic Violence Court – A potential solution

One potential solution for the problems raised above is the establishment of a specialist domestic violence court. This option was suggested by the federal government's Partnerships Against Domestic Violence<sup>184</sup> initiative and has been given credence in Queensland by Judge Marshall Irwin (Chief Magistrate, 2005).<sup>185</sup> As defined by Moore, "specialist court' is an apt

<sup>178</sup> Douglas & Godden, above n7, 4.

<sup>179</sup> Federal Government, Office for Women. *Partnerships Against Domestic Violence Summary Findings from Phase 1 for Policy Makers*, 3.

<sup>180</sup> Laing, above n5, 9.

<sup>181</sup> National Center for State Courts and the Bureau of Justice Assistance, United States Department of Justice. (1990). 'Trial Court Performance Standards with Commentary' Virginia: National Center for State Courts cited in Australian Law Reform Commission (1998). 'The Model Judiciary – Fitting in with Modern Government', speech delivered by the President of the Australian Law Reform Commission at the Third Asia-Pacific Courts Conference, Shanghai, 6-8 October 1998, 5.

<sup>182</sup> Susan Evans, (2005). 'Beyond gender: Class, poverty and domestic violence' 58(2) *Australian Social Work*. 36, 37.

<sup>183</sup> Justice Gillen, Supreme Court of Northern Ireland, (2005), 'Domestic Violence – In What Direction?' Paper presented to the 50<sup>th</sup> Anniversary Commonwealth Law Conference, London, September 2005.

<sup>184</sup> Partnerships Against Domestic Violence, above n25, 7.

<sup>185</sup> Judge Marshall Irwin, above n24.



description of a court with jurisdiction limited to hearing and determining matters in a confined area of the law or a limited field of human activity.<sup>186</sup> These courts began to develop in the United States in the late 1980s in response to the perceived 'failure' of the traditional court system to deal with particular defendants.<sup>187</sup> It has been posited that 'therapeutic jurisprudence' is the underlying approach adopted in these specialist courts.<sup>188</sup> This means that normal procedural rules and the adversarial nature of the court are relaxed, with the focus being on 'rehabilitating' the participants, often through diversionary programs. They also decrease the time and cost that litigation in the normal courts usually entails. In an era when litigation is becoming more complex and time-consuming, specialist courts are becoming quite popular. Some commentators have even gone so far as to propose specialist courts for commercial matters, such as tax and competition law.<sup>189</sup> There are now several hundred specialist domestic violence courts in the United States.<sup>190</sup> Various specialist domestic violence court models are established or are being trialed through pilot programs in Australia, in the ACT,<sup>191</sup> South Australia,<sup>192</sup> Western Australia,<sup>193</sup> Victoria<sup>194</sup> and New South Wales.<sup>195</sup> Note that Queensland is absent from this list, although there is one stand-alone project being run at the Gold Coast.<sup>196</sup> Submissions have been made that the geographical ambit of this project be extended, to no avail.

In order to function effectively, the features of a specialist domestic violence court will need to be carefully designed. The court should be implemented through legislation (similar to the *Drug Court Act 2000*), in order to provide formal foundations and stability. One critical point to be made is that the court must emphasize a victim-centered approach.<sup>197</sup> The notion of therapeutic jurisprudence, though suitable in other specialist courts, is not applicable in domestic violence cases, as the perpetrator is not operating under an addiction or physical/mental health problem. Though the court would be seeking to reform the perpetrator's behavior, this goal is secondary to that of restoring justice to the victim. In this sense, a 'hybrid approach' of

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<sup>186</sup> Justice Michael Moore. 'The role of specialist courts – An Australian Perspective' (2000/2001) *Lawasia Journal* 139, 139.

<sup>187</sup> Magistrate Hillary Hannam. 'Specialist Courts in the United States and their Relevance to Australian Justice' (2005) 17 *Judicial Officers' Bulletin* 66, 66.

<sup>188</sup> Ibid; DB Rottman, 'Does effective therapeutic jurisprudence require specialized courts (and do specialized courts imply specialist judges)?' (2002) 37 *Court Review* 22, 23.

<sup>189</sup> Robert Baxt, 'Do We Need Specialist Courts to Hear Commercial Matters and Company Law Matters in Particular? Or Will Any Division of the Federal Court Do?' (1997) 15 *Companies and Securities Law Journal* 122, 123.

<sup>190</sup> Stewart, above n12, 20.

<sup>191</sup> ACT Family Violence Intervention Program.

<sup>192</sup> Central Violence Intervention Program, Adelaide; Northern Violence Intervention Program, Elizabeth.

<sup>193</sup> Joondalup Family Violence Court; Geraldton Regional Domestic Violence Project.

<sup>194</sup> Family Violence Court pilots in Heidelberg and Ballarat.

<sup>195</sup> Domestic Violence Intervention Court Model pilots in Campbelltown and Wagga Wagga.

<sup>196</sup> Gold Coast Domestic Violence Integrated Response.

<sup>197</sup> Stewart, above n12, 34.

restorative and retributive justice is desirable.<sup>198</sup> Hopefully, this will encourage a higher level of victim cooperation. A study conducted on a specialist domestic violence court in Canada found that cases are seven times more likely to proceed when victims 'co-operate'<sup>199</sup>, so this should be a primary goal in the handling of domestic violence cases.

Another central feature is the high level of integration required between services. A fragmented approach will not be effective. Douglas and Hodden, citing Eastaer note that 'the lack of a holistic, integrated response is a significant barrier to effective implementation of the criminal law.'<sup>200</sup> Feminist and other community groups have fought hard to see the criminal law invoked against perpetrators on a consistent basis, and a specialist court may represent another step forward in this regard. In relation to the program currently operating in the ACT, Detective Superintendent Chris Lines states that 'the consistency of the group lies in its experience, commitment and *fundamental acceptance of interagency cooperation*.'<sup>201</sup> Pilot programs in New South Wales also aim to 'increase collaboration between legal and welfare agencies.'<sup>202</sup> Magistrates, prosecutors, defence lawyers, court workers, the police force and community organisations will experience a greater sense of cohesion working within a specialist court, where all strive for best practice and each is accountable to the other.<sup>203</sup>

Flowing on from this idea of integration is the possibility of making the domestic violence court a 'one-stop shop' for all domestic and family violence-related matters.<sup>204</sup> Such matters would include applications for protection orders; breaches of such orders; bail applications and criminal offences involving domestic and family violence; associated criminal compensation applications and civil damages claims for personal injury arising from domestic and family violence.<sup>205</sup> Calls have also been made to have specialist domestic violence courts deal with some family law matters, such as residence and contact orders.<sup>206</sup> The court would also be able to refer perpetrators to intervention programs so that the underlying causes can be addressed, as opposed to just the outcomes.<sup>207</sup>

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<sup>198</sup> Julie Stubbs. 'Restorative Justice, Domestic Violence and Family Violence' (Issues Paper No 9, Australian Domestic & Family Violence Clearinghouse, 2004), 18.

<sup>199</sup> Myrna Dawson & Ronit Dinovitzer 'Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court' (2001) 18(3) *Justice Quarterly* 593, 610-619.

<sup>200</sup> Douglas and Hodden, above n7, 5.

<sup>201</sup> Chris Lines. 'System Change in bite-sized chunks: Domestic Violence revisited in the ACT' (2003) 78 *Platypus Magazine* 32, 33.

<sup>202</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 October 2004, p11949 (Premier Bob Carr).

<sup>203</sup> Stewart, above n12, 9.

<sup>204</sup> Judge Marshall Irwin, above n24.

<sup>205</sup> Ibid.

<sup>206</sup> Stewart, above n12, 24 and 34.

<sup>207</sup> Judge Marshall Irwin, above n24.

Finally, perhaps one of the most important features of a specialist domestic violence court would be the specialist knowledge of its staff. This knowledge is cited by Stewart as one of the elements that ‘makes a difference’ in the domestic violence court.<sup>208</sup> All key personnel will undergo specific training, so they are in a better position to respond in a manner that will ensure the best outcome for the victim and the community. Magistrates or judges will preside exclusively, or at least part-time over domestic violence matters.<sup>209</sup> Specialist victim advocates should also be provided, along with defendants’ legal representatives who are ‘sympathetic to the aims of the court.’<sup>210</sup> ‘Accredited competency standards’ and continual training should be utilized regularly in order to monitor staff performance.<sup>211</sup>

A domestic violence court with the above-mentioned features would be better equipped to combat the many problems than a conventional magistrate’s court. As noted by Stewart, there is ‘commonality in the anticipated outcomes of specialist domestic violence courts, due largely to their victim focus.’<sup>212</sup> Increased victim participation, quality of service delivery and accountability of courts to the community are just some of the benefits proffered by specialist court advocates.<sup>213</sup> Additionally, more proactive policing and therefore a higher level of safety for victims and their children are also anticipated.<sup>214</sup> Such a court can also achieve more consistency in orders, and has the time, resources and expertise to tailor an order to the case at hand. Most importantly, the establishment of a separate domestic violence court will raise the level of social awareness and have a deterrence effect – sending a clear message to present and potential perpetrators that such behavior will not be tolerated in Queensland. It also provides an opportunity for much-needed research on the area.

However, specialist domestic violence courts do not come without their criticisms. Some feminist groups oppose such a development, as they believe it ‘softens’ the community’s response.<sup>215</sup> However, as stated, the criminal law would be applied in the specialist court, and applied more often than it is currently. And the focus will be on the victim – not on rehabilitating the perpetrator. Sir Laurence Street, a former Chief Justice of New South Wales has suggested that ‘every time a new dispute situation is recognised there seems to be a tendency to create a specialist court to deal with it.’<sup>216</sup> He warns against fragmentation within the justice system that may undermine the

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<sup>208</sup> Stewart, above n12, 8.

<sup>209</sup> Ibid 9.

<sup>210</sup> Ibid.

<sup>211</sup> Federal Government, Office for Women, above n25, 6.

<sup>212</sup> Stewart, above n12, 8.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Stewart, above n12, 17.

<sup>216</sup> ‘Proliferation and fragmentation in the Australian court system’, extract from an address by Sir Laurence Street at the 22<sup>nd</sup> Annual Industrial Relations Conference, (1978) 52 *Australian Law Journal* 594, 595.

utility of the system as a whole. However, the fact remains that there are some sensitive social problems that require special knowledge and processes to be solved successfully. Domestic violence is one such area. In this case, reform to the ordinary Magistrate's courts will not be sufficient. It is the act itself of establishing a separate domestic violence court that will bring with it the most benefits. Finally, overlapping of jurisdiction and duplication are cited as potential problems.<sup>217</sup> Implementing the court through legislation would reduce the risk of jurisdictional conflict or duplication, and this can be amended as time proceeds.

## Resources required for the SDVC

Although a specialist court has the potential to vastly improve the current domestic violence situation in Queensland, this inevitably comes at a price. Specialist courts are expensive to implement, monitor and sustain in the long term.<sup>218</sup> Furthermore, as specialist courts are generally established in response to political or social problems, they are always 'vulnerable to abolition in the face of changing political or social values.'<sup>219</sup> They are by no means a guaranteed investment. Some critics already argue that DVOs alone consume 'thousands of man hours' per week and precious court time.<sup>220</sup> However, one has to take into account the costs that could be saved as a result. Access Economics assessed the cost of domestic violence to Australia in 2002-2003 at \$8.1 billion.<sup>221</sup> This is a staggering number. In terms of economic impact, studies in the US have found that battered women spend twice as much time in bed as normal women, and have much higher health expenses, for both physical and mental illnesses.<sup>222</sup> Domestic violence was also found to be one of the main causes of female alcoholism in that country.<sup>223</sup> The cost of treatment for children who had witnessed domestic violence was also included.<sup>224</sup> The cost to employers due to low employee productivity and high absenteeism and turnover was phenomenal.<sup>225</sup> Finally, the costs of law enforcement are of course extremely high. Furthermore, because domestic violence is often cyclical, these are not one-off costs. It is therefore easy to see how such a figure is reached. If implemented effectively, a domestic violence court could potentially give a small boost to the economy in smaller

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<sup>217</sup> Justice Michael Moore, above n33, 142.

<sup>218</sup> Ibid 69; Stewart, above n12, 17 and 18.

<sup>219</sup> Justice Michael Moore 'The Role of Specialist Courts – An Australian Perspective' (2000-2001). *LAWASIA Journal* 139, 141.

<sup>220</sup> Trevor Nyman. 'Apprehended Violence: Industry or Disease?' (1999) *Law Society Journal* 52, 53.

<sup>221</sup> Access Economics 'The Cost of Domestic Violence to the Australian Economy: Part 1' (2004)

*Partnerships Against Domestic Violence*, ACT.

<sup>222</sup> Joan Zorza. (1994). 'Women Battering: High Costs and the State of the Law' in 'Domestic Violence Law: A comprehensive overview of cases and sources' Nancy KD Lemon (ed) (1996), 48.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid 49.

communities, and Queensland overall. Furthermore, some funding could be expected from the federal government, as was provided in the ACT project.

## Conclusion

This essay has examined the way in which the justice system in Queensland tackles the problem of domestic violence. The problems inherent in this system were reviewed, including issues with policing, victim cooperation and social perceptions. A specialist domestic violence court was proposed and some of the necessary features discussed. Finally, the expense involved in establishing such a court was briefly examined, and justified. Queensland has made progress in its fight against domestic violence in the last three decades. However, it now seems that we are falling behind in our response to this endemic social problem. It is time for the government to consider seriously the establishment of an innovative pilot program for a specialist domestic violence court. To use the words of Justice Gillen of the Supreme Court of Northern Ireland,<sup>226</sup> ‘...if the rule of law is to be preserved and domestic violence effectively challenged, then we must recognise that no tradition is sacred, no convention indispensable and no precedent worth evaluation if it does not stand the test of the fundamentals of a civilised society generally expressed through the law’.

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<sup>226</sup> Justice Gillen, above n30, 198.



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## *Envisaging An End To Violence*

**Neha Chhatbar**

The disproportionately high rate of domestic violence within Indigenous communities in comparison with the non-Indigenous population is an issue of great concern. The Brisbane Murri Court, which is a sentencing court for Aborigines and Torres Strait Islanders, is potentially one effective means of addressing domestic violence in Indigenous communities. This is because the main objective of the Murri Court - which is to reduce the number of Indigenous people in prison - is likely to reduce the reoccurrence of domestic violence through facilitating the rehabilitation of offenders; reducing causes of domestic violence such as feelings of powerlessness and frustration amongst offenders, and by enhancing the authority of Elders. The latter allows the Indigenous concept of 'shaming' to take place and allows offenders to reconnect with their communities, both of which can discourage reoffending. Before examining the various ways in which the Murri Court can potentially reduce domestic violence within Indigenous communities, I will explain the nature of domestic violence affecting Indigenous communities.

The term 'family violence' is generally preferred to 'domestic violence' by Indigenous communities, because it better signifies Indigenous perspectives and experiences of violence. For instance, the term connotes the trans-generational pain of Indigenous people, where former victims of family violence later become perpetrators of violence. The term 'family violence' encompasses numerous types of violence in addition to what is commonly considered as domestic violence, such as rape, child abuse, homicide, suicide, self-injury, inter-group violence and one on one fighting between people of the same gender.<sup>227</sup> Family violence which spans generations is known as cyclic violence.<sup>228</sup> Family violence can be sexual, emotional, physical, economic or spiritual and occurs in the context of institutional violence (such as the former State policy of removing Indigenous children from their families).<sup>229</sup>

I will use the term 'domestic violence' rather than family violence as I wish to refer specifically to violence by men against their wives and de facto partners. I will, however, explain that domestic violence in Indigenous communities is different from domestic violence as understood in non-Indigenous communities. As follows from an understanding of the term 'family violence', domestic violence in Indigenous communities occurs in the context of other forms of violence. In addition, violence experienced by women in Indigenous communities is not only gendered, but also racialised, as it occurs

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<sup>227</sup> Paul Memmott, et al, *Violence in Indigenous Communities: Full Report* (2001) 1-2.

<sup>228</sup> *Ibid.*, 2.

<sup>229</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 157-158; Memmott, above n 1, 1.



in the context of Indigenous experiences of historical and present racism.<sup>230</sup> Another difference between domestic violence as experienced by Indigenous women compared with non-Indigenous women is a cultural one. An Indigenous woman identifies more strongly as a member of a wider kinship group or community, in comparison with the more Western perception of self-identity as an autonomous individual or member of a nuclear family.<sup>231</sup> This broader identification means that Indigenous women focus not only on their pain and suffering, but also seek a resolution to the pain and suffering of the men who perpetrate violence against them.<sup>232</sup>

The rates of domestic violence are significantly higher among Indigenous peoples than for non-Indigenous Australians.<sup>233</sup> A 2001 study in New South Wales reported that Indigenous females are 6.2 times more likely than non-Indigenous people to be a victim of a domestic violence related assault.<sup>234</sup> Although Indigenous women want to see an end to domestic violence, they do not want their husbands and de facto partners to be imprisoned for such violence.<sup>235</sup> This is because short-term imprisonment does not address the situational factors giving rise to domestic violence, such as alcohol abuse, a perception on the part of perpetrators that they have little control over their environment and a belief that violence is normal.<sup>236</sup> In fact, imprisonment of their men often compounds the violence experienced by Indigenous women.<sup>237</sup>

Imprisonment orders imposed in the Magistrates Court for domestic violence cases tend to be for less than one year. Such short-term imprisonment orders do not allow prisoners automatic access to rehabilitative courses, programs and counselling.<sup>238</sup> Consequently, the circumstances giving rise to domestic violence are not addressed and the violence continues once the men are released from custody. The Royal Commission into Aboriginal Deaths in Custody stated that prison “fails to facilitate the reintegration of offenders into their community and the society more generally.”<sup>239</sup> The Royal Commission also stated that “the evidence placed before this Commission indicates that the Aboriginal experience of imprisonment is itself ... directly

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<sup>230</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 3, 158-159.

<sup>231</sup> *Ibid.*, 158.

<sup>232</sup> *Ibid.*

<sup>233</sup> Memmott, above n 1, 6.

<sup>234</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 3, 222.

<sup>235</sup> Annette Hennessy and Carolyn Willie, ‘Sentencing Indigenous Offenders in Domestic and Family Violence Matters: A Queensland Experience’ (Paper presented at The Australian and New Zealand Society of Criminology 2006 Conference, Hobart, 7-9 February 2006) 2.

<sup>236</sup> Memmott, above n 1, 10, 19-20.

<sup>237</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 3, 160.

<sup>238</sup> Annette Hennessy, ‘Indigenous Sentencing Practices in Australia’ (Paper presented at International Society for Reform of the Criminal Law Conference: Justice For All – Victims, Defendants, Prisoners and Community, Brisbane, July 2006) 10.

<sup>239</sup> Commonwealth of Australia, Royal Commission On Aboriginal Deaths in Custody, *Final Report* (1991) vol 2, 25.1.3.

related to the level of Aboriginal imprisonment,"<sup>240</sup> as Indigenous men become institutionalized through their prison experiences and can consequently feel alienated from life outside prison.<sup>241</sup> Additionally, imprisonment can enhance existing feelings of powerlessness and low self-esteem amongst Indigenous men, as well as feelings of resentment and frustration against society, which in turn can lead to an expression of these negative emotions through violence against spouses and de facto partners.<sup>242</sup> Men who have been imprisoned can also feel strongly jealous if their partner has commenced a new relationship in their absence. Jealousy in such a circumstance is not unusual when it is considered that relationships are one of the few commodities available to many Indigenous people. Sexual jealousy experienced by men returning from prison thus leads to an increase in violence perpetrated against women.<sup>243</sup> For these numerous reasons, imprisonment is not a solution to domestic violence in Indigenous communities. Rather, imprisonment appears likely to increase cases of domestic violence.

In light of its main objective of reducing Indigenous imprisonment rates, the Murri Court in Queensland promises to be one means of addressing the issue of domestic violence in Indigenous communities. This is because alternative sentences to imprisonment encourage the rehabilitation of offenders and thus a reduction in recidivism. Before I examine in detail the ability of the Murri Court to reduce domestic violence, I will briefly explain what the Murri Court is and how it is set up.

The Murri Court is a recent innovation of the Brisbane Magistrates Court. It was opened on 6 August 2002 and this year received a South East Queensland NAIDOC Award for Excellence. Modeled on the Nunga Court in South Australia,<sup>244</sup> it was established in order to address disproportionately high imprisonment rates for Indigenous people, which had been revealed in the 1991 Royal Commission On Aboriginal Deaths in Custody.<sup>245</sup> According to the Australian Bureau of Statistics, Indigenous adults are 15 times more likely to be incarcerated than non-Indigenous adults.<sup>246</sup>

Offenders before the Brisbane Murri Court are Aboriginal or Torres Strait Islander person who have pleaded guilty to an offence which falls within the jurisdiction of the Magistrate Court of Queensland and who have a reasonable likelihood of receiving a prison term for their offence/s.<sup>247</sup> Although I refer

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<sup>240</sup> Ibid., 25.1.2.

<sup>241</sup> Ibid., 25.1.2-25.1.8.

<sup>242</sup> Memmott, above n 1, 10, 13.

<sup>243</sup> Ibid., 22.

<sup>244</sup> Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004)

277 *Trends and Issues in Crime and Criminal Justice* 2.

<sup>245</sup> Ibid., 1-2.

<sup>246</sup> Ibid., 1; Hennessy, above n 12, 1.

<sup>247</sup> Queensland Courts, *Magistrates Court Annual Report 2002-2003* (2003) 13

<<http://www.courts.qld.gov.au/publications/annual/mag2002-2003.pdf>> at 21 July 2006.

solely to the Brisbane Murri Court, Murri Courts for adults are also held in Rockhampton, Mt Isa and Townsville, and a Murri Court sits in the Childrens Court in Brisbane, Caboolture, Townsville and Rockhampton.<sup>248</sup>

The Murri Court provides a means of greater Indigenous involvement in the justice system, as was recommended by the Royal Commission into Aboriginal Deaths in Custody.<sup>249</sup> Depending on the case, legal counsel for the defendant can very much take the back seat, with the Elders playing a significant and vital role in the Murri Court by providing information as to the background and circumstances of the offender and thereby assisting the Magistrate to deliver an appropriate sentence. Note, however, that the Magistrate alone makes the sentencing decision, in order to avoid reprisal against the Elders.<sup>250</sup>

As the Murri Court is intended to be less intimidating for defendants, it is more informal than mainstream courts. Court 32 in the Brisbane Magistrates Court complex was specially designed for the Murri Court. The artwork of Indigenous offenders is fixed to the walls. A long round table is in the center of the room. Instead of sitting behind the bench, the Magistrate sits besides the Elders at this table, across from the defendant, a relative of the defendant (if desired by the defendant) and the defence and police prosecution.<sup>251</sup> The Magistrate does not robe and, along with the lawyers, uses plain English, rather than overly formal language which can appear foreign to Indigenous people.<sup>252</sup> These differences from mainstream courts are intended to ensure that Indigenous offenders before the court do not feel alienated by the court process.<sup>253</sup>

Ensuring that the sentencing hearing is not alienating for Indigenous offenders in turn increases the likelihood that Indigenous offenders will appear at court when required to do so. As a failure to appear in court can lead to the issue of arrest warrants and imprisonment, increasing the rate of attendance reduces the likelihood of imprisonment for Indigenous persons.<sup>254</sup> Similar Indigenous courts in South Australia have been shown to be

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<sup>248</sup> Department of Justice and Attorney General, *The Murri Court* (2006)

<[www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf](http://www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf)> at 20 July 2006.

<sup>249</sup> Department of Justice and Attorney-General, *Review of the Murri Court: Have Your Say* (2005)

<[www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf](http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf)> at 20 July 2006.

<sup>250</sup> Department of Justice and Attorney General, *The Murri Court* (2006)

<[www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf](http://www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf)> at 20 July 2006; Hennessy, above n 12, 10.

<sup>251</sup> Department of Justice and Attorney General, *The Murri Court* (2006)

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<sup>252</sup> Department of Justice and Attorney-General, *Review of the Murri Court: Have Your Say* (2005)

<[www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf](http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf)> at 20 July 2006; Commonwealth of Australia, Royal Commission On Aboriginal Deaths in Custody, *Final Report* (1991) vol 2, 22.4.21.

<sup>253</sup> Department of Justice and Attorney-General, *Review of the Murri Court: Have Your Say* (2005)

<[www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf](http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf)> at 20 July 2006.

<sup>254</sup> Queensland Courts, *Magistrates Court Annual Report 2002-2003* (2003) 12

<<http://www.courts.qld.gov.au/publications/annual/mag2002-2003.pdf>> at 21 July 2006.

successful in substantially increasing the rate of court attendance.<sup>255</sup> Increasing the likelihood of court attendance is one method of achieving the Murri Court's main objective of reducing incarceration rates for Indigenous people.

Another means by which the Murri Court reduces Indigenous imprisonment rates is by ordering alternative sentences to imprisonment wherever possible.<sup>256</sup> The less formal environment and the presence and advice of the elders allows freer communication between the defendant and Magistrate, thus enhancing the Magistrate's understanding of the defendant's circumstances and thereby allowing the Magistrate to order a more appropriate sentence than imprisonment. Alternative sentences often include conditions such as attendance on the Elders and/or Community Justice Groups and at drug, alcohol, psychological and violence treatment agencies.<sup>257</sup> Such sentences are much more likely to reduce recidivism by addressing some of the multiple causes of domestic violence, such as alcohol abuse, low self esteem, a feeling of perceived powerlessness over the environment and a belief that domestic violence is normal.<sup>258</sup>

Another aspect of the Murri Court which can discourage a reoccurrence of domestic violence is a reconnection of offenders with their communities. Reconnecting offenders to their communities enables social control to be exercised over offenders, as well as providing offenders with a support network which can discourage re-offending. The Murri Court facilitates the reconnection of offenders to their communities by providing opportunities for communication by offenders with Elders and Community Justice Groups in pre-trial sessions, during the court and - if it is a condition in the sentence - after a court hearing through attendance on the Elders and/or Community Justice Groups.

Deterioration in social control - due to deliberate historical cultural dispossession - is one underlying cause of violence in Indigenous communities.<sup>259</sup> Formalising the authority of Elders in Indigenous communities is an important means of ensuring that social control can be exercised over offenders. The Indigenous concept of 'shaming' is an emotionally powerful means of exercising this social control. The Murri Court can be effective in addressing domestic violence through the enhancement of respect for and the authority of Elders, which in turn facilitates the 'shaming' of offenders. According to Wright, "shaming is a very powerful process and holds the perpetrator accountable for the harm he or she has caused, as well as reinforcing traditional authority and

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<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Hennessy, above n 12, 10; Department of Justice and Attorney-General, *Review of the Murri Court: Have Your Say* (2005) <[www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf](http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf)> at 20 July 2006.

<sup>258</sup> Memmott, above n 1, 10, 19-20.

<sup>259</sup> Memmott, above n 1, 12.



encouraging respect for self, others and the community.”<sup>260</sup> Shaming is a way of bringing offenders to a realization of their wrongdoing and reduces the likelihood of a repetition of the offending behaviour.

The process of ‘shaming’ is facilitated by the Murri Court. Magistrate Annette Hennessy has said that “What cannot be easily explained is the power of the Murri Court on a spiritual or emotional level.”<sup>261</sup> On one occasion that I observed the Murri Court, two female defendants were being heard one after the other for separate charges. The general feelings expressed by the Elders and the Magistrate were a combination of severe condemnation of the behaviour of defendants, yet also of support and encouragement for their future potential.

During the observed hearing, one Elder in particular provided supportive and loving encouragement to the female defendants. I also noticed, however, that the Murri Court is certainly not a ‘softer’ option for Indigenous offenders, as is alleged by some.<sup>262</sup> The female defendants were harshly reprimanded by both the Elders and the Magistrate for their behaviour and reminded of its consequences for themselves, their family, the Indigenous community and the wider non-Indigenous community. This censure and ‘shaming’ was so effective that one defendant was openly sobbing from shame and remorse. Similar Indigenous courts in New South Wales (known as Circle Sentencing Courts<sup>263</sup>) have been effective in dealing with domestic violence offenders through the practice of shaming.<sup>264</sup> Shaming is thus another means by which the Murri Court is likely to be effective in reducing the reoccurrence of domestic violence.

The Murri Court is a means of addressing domestic violence in Indigenous communities, as alternative sentences to imprisonment facilitate rehabilitation, while avoiding the negative consequences of imprisonment which can lead to further domestic violence. The Murri Court is also effective in addressing domestic violence in Indigenous communities because it allows Indigenous people a greater involvement in the justice system. The involvement of the Elders allows for the process of shaming to occur, which deters further re-offending. The involvement of the Indigenous community also allows for a reconnection of offenders with their communities, thereby providing Indigenous men with a support network. Although the Brisbane Murri Court is yet in its early years, it is hoped that in the long-term the court

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<sup>260</sup> Helena Wright, ‘Hand in Hand to a Safer Future: Indigenous Family Violence and Community Justice Groups’ (2004) 26 *Indigenous Law Bulletin*, 17, 18.

<sup>261</sup> Hennessy, above n 12, 10.

<sup>262</sup> Department of Justice and Attorney-General, *Review of the Murri Court: Have Your Say* (2005) <[www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf](http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf)> at 20 July 2006.

<sup>263</sup> Marchetti and Daly, above n 18, 3.

<sup>264</sup> Australian Broadcasting Company, *Inside the Circle* (2005)

<<http://www.abc.net.au/4corners/content/2005/s1476779.htm>> at 25 July 2006.



can proudly claim that it has had an effect in reducing domestic violence in Indigenous communities.

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## *Alcohol: The Forgotten Drug that requires urgent treatment*

**Tristan Fitzgerald**

In an era of unprecedented hope and prosperity, there is nothing more tragic than to see people destroy themselves from within. Many in society are aware of the devastating effect that drugs can have on individuals and the community at large. Strained family relationships, severe mental illness and the tragic loss of life due to drug overdoses are just a few chilling reminders of the destructive impact that drugs have on Australian society. Arguably, however, of most concern to the wider community is the link between drugs and crime. Numerous studies have concluded that there is a strong association between illicit drugs and increased criminal activity.<sup>265</sup> It is hardly surprising to note that some studies have claimed that up to 29% of crime is attributable to offenders' use of illicit drugs such as cannabis and marijuana.<sup>266</sup> In order to combat the threat of drug-related crime, many community initiatives have been introduced. For example, specialist Drug Courts have been established to provide judicially supervised treatment for offenders with illicit drug addictions. Ironically, for all of society's efforts to reduce crime attributable to illicit drugs, it is a legal drug that may pose the greatest threat to law and order.

For decades, politicians, law enforcement agencies and crime experts have failed to confront the increasing problem of alcohol-related crime. On too many occasions, considerable resources have been poured into the 'war on illegal drugs' at the expense of tackling alcohol abuse and its impact on criminal activity. This essay will argue that the facilities of Drug Court should be available for alcohol addicts as well as illicit drug addicts. As a starting point, it will be asserted that Drug Courts both in Australia and overseas have shown promising results in reducing drug-related crime. Secondly, evidence will be furnished to argue that alcohol is a contributing factor in at least as many crimes as illicit drugs. Lastly, it will be contended that Drug Court offers the services required to successfully treat alcohol addictions. In order to substantiate the argument that alcohol addictions should be encompassed within the scope of Drug Court, it must first be proven that Drug Courts are effective in dealing with individuals who are dependant on illicit drugs such as heroin, cannabis and marijuana.

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<sup>265</sup> For e.g., Pat Mayhew, *Counting the Costs of Crime in Australia* (2003) Australian Institute of Criminology <<http://www.aic.gov.au/publications/tandi/tandi247t.html>> at 27 July 2006; Urbis Keys Young, *The Relationship between Drugs and Crime* (2004) Australian Government Attorney-General's Department <<http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/RWPE6CE989891EFC1C3CA25706D0021855F>> at 25 July 2006.

<sup>266</sup> Urbis Keys Young, *The Relationship between Drugs and Crime* (2004) Australian Government Attorney-General's Department, 35 <<http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/RWPE6CE989891EFC1C3CA25706D0021855F>> at 25 July 2006.

## Drug Court – courting a successful cure to drug addiction:

Before outlining the successes and failures of Drug Courts, the concept and processes of Drug Court will be examined. In Queensland, Drug Courts were first established in 2000. The purpose of these institutions is to divert drug dependant offenders into intensive community-based treatment programs.<sup>267</sup> In order to be eligible for an Intensive Drug Rehabilitation Order (IDRO), offenders must plead guilty to their charges and must also satisfy the Court that their drug dependency contributed to the commission of their offences.<sup>268</sup> Those who are admitted to Drug Court participate in a range of rehabilitation and life skills programs aimed at addressing their drug dependency and preparing participants for re-integration into the community upon release. Throughout the course of the program, the offender's treatment is monitored by a Magistrate along with representatives from the Director of Public Prosecutions, the Department of Corrective Services, the Department of Health and Legal Aid. A distinctive aspect of the Drug Court is the Magistrate's ability to provide rewards to participants for good behaviour as well as retaining the power to sanction participants for non-compliance. Once a participant successfully completes Stage Three of their IDRO, the person is deemed to have graduated from the treatment program. On the other hand, if the participant's breaches of their IDRO are serious enough to indicate, on the balance of probabilities, that they have no reasonable prospects of successfully complying with the IDRO, the Magistrate may terminate the IDRO and sentence them to a term of imprisonment.<sup>269</sup> The unique features of Drug Court have been credited with producing extremely promising results.

In the years following the introduction of Drugs Courts both in Australia and overseas, the successes of these institutions have far outweighed any drawbacks associated with these judicially supervised treatment programs. Firstly, many studies assessing the effectiveness of Drug Courts have concluded that Drug Court graduates have significantly reduced rates of re-offending compared with those who are released from prison or those who refuse to participate in Drug Court.<sup>270</sup> One study into South East Queensland's Drug Courts even suggests that some persons who do not even successfully complete their IDRO are less likely to re-offend than non-Drug Court participants.<sup>271</sup> Secondly, the cost of treating a Drug Court participant is often much less than simply imprisoning an offender. For example, a cost-benefit analysis conducted on New South Wales Drug Courts concluded that,

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<sup>267</sup> *Drug Court Act 2000* (Qld) s 3.

<sup>268</sup> *Drug Court Act 2000* (Qld) s 6.

<sup>269</sup> *Drug Court Act 2000* (Qld) s 34.

<sup>270</sup> For e.g., Toni Makkai and Keenan Veraar, *Final Report on the South East Queensland Drug Court* (2003) Australian Institute of Criminology, 40 <<http://www.aic.gov.au/publications/tbp/tbp006.html>> at 24 July 2006.

<sup>271</sup> *Ibid.*

for each drug possession or drug use offence, over \$19,000 was saved by processing offenders through Drug Court as opposed to imposing conventional sanctions.<sup>272</sup> Lastly, the integration of services provided by the various government departments involved is extremely beneficial in preparing Drug Court participants for their unconditional release into the community. One of the greatest benefits of Drug Court is that it provides offenders with a range of life skills programs that address many of the issues underlying the offender's drug use.<sup>273</sup> For example, offenders who have attained minimal educational qualifications are presented with the opportunity to complete TAFE courses in order to improve their employment prospects. Overall, these encouraging results would seem to support the view that drug treatment, rather than increased incarceration, is the most effective method of reducing both drug use and crime rates.

However, despite these promising results, some academics have argued that the low graduation rate from Australian Drug Courts indicates the Court's inability to effectively treat offenders.<sup>274</sup> In response to this criticism, one must accept that Australian Drug Courts have significant areas for improvement. For example, increased supervision and urine testing of participants during Phase One and more effective identification of individuals likely to succeed are some of the areas that need to be addressed in order to increase graduation rates. Nevertheless, it must be remembered that Drug Courts in Australia are only in their infancy. It would be unrealistic to expect that attempts to rehabilitate chronic drug addicts with extensive criminal histories will produce instant results. By way of comparison, the 15-year old United States Drug Court system had to endure a similar period of experimentation and mixed results. However, retention rates in US Drug Courts presently average 68% which is much higher than for most voluntary treatment clinics.<sup>275</sup>

Ultimately, it would be imprudent to ignore the numerous initial successes of Drug Court by focusing exclusively on deficiencies regarding the implementation of the Drug Court program. However, for all these encouraging successes, the clear benefits of Drug Court are not being fully utilised to treat alcohol addictions.

### **Alcohol – Legally not a 'drug':**

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<sup>272</sup> Bronwyn Lind, Don Weatherburn, Shuling Chen, Marian Shanahan, Emily Lancsar, Marion Haas and Richard De Abreu Lourenco, *New South Wales Drug Court Evaluation: Cost Effectiveness* (2002) New South Wales Bureau of Crime Statistics and Research, 58

<<http://pandora.nla.gov.au/pan/25281/20020605/www.lawlink.nsw.gov.au/L15.pdf>> at 25 July 2006.

<sup>273</sup> Tony Makkai and Jason Payne, 'Drug Courts: Current Issues and Future Prospects' (Paper presented at the 17<sup>th</sup> Annual Australian Winter School on Alcohol and Other Drugs, Brisbane, 9 July 2004).

<sup>274</sup> David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15(2) *Current Issues in Criminal Justice* 136, 137, 140.

<sup>275</sup> United States Department of Justice, *Drug Courts: The Second Decade* (2006) 8

<<http://www.ncjrs.gov/pdffiles1/nij/211081.pdf>> at 25 July 2006.



In most Australian States, offenders suffering solely from an alcohol addiction are deemed not to have a 'drug dependency' for the purposes of the relevant State legislation.<sup>276</sup> As such, many alcoholics fail to qualify for Drug Court. This practice is extremely unfortunate, both for the alcoholics and for the victims of their crimes. Both Australian and international statistics highlight the clear causal connection between alcohol and increased criminal activity. One survey by the Western Australian Probation and Parole Service suggested that alcohol could be identified as a contributing factor in 53% of all offences committed.<sup>277</sup> Another Australian study concluded that 27% of all female prisoners were under the influence of alcohol at the time of committing their offence, more than any other illicit drug.<sup>278</sup> In Canada, a team of researchers concluded that between 15%-20% of offences in Canada were attributable to the effects of alcohol alone with a further 10%-20% attributable to the use of both illicit drugs and alcohol. Interestingly, offences attributable to illicit drugs alone were 10%-15%.<sup>279</sup> One report succinctly highlights that a significant amount of crime is attributable to the use of alcohol, 'almost certainly more' than all the illicit drugs combined.<sup>280</sup> While numerous arguments have been forwarded in support of restricting Drug Court to the treatment of illicit drugs, the weight of scientific evidence demands that alcohol addicts receive access to a Court supervised treatment program.

There is clearly a fundamental flaw in the arguments forwarded in support of the view that Drug Court should be restricted to illicit drug users. Firstly, a popular view amongst politicians and the wider community is that illicit drugs such as heroin involve a greater degree of dependence than alcohol. However, as one report points out, 'the degree of dependence is not strictly determined by the type of substance involved.'<sup>281</sup> In addition, alcohol is far more likely to be the permanent cause of diminished cognitive functions and increased aggression.<sup>282</sup> This fact probably explains the reason why alcohol is associated with a greater number of violent crimes than illicit drugs.<sup>283</sup> Secondly, some lawyers argue that since alcohol tends to be mainly associated with violent offences against the person, alcoholics would be disqualified

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<sup>276</sup> For e.g., *Drug Court Act 1998* (NSW) s 5.

<sup>277</sup> David Indermaur, *Prisoners' Experience with Alcohol* (1990) Australian Institute of Criminology, 1 <<http://www.aic.gov.au/publications/proceedings/01/Indermaur.pdf>> at 25 July 2006.

<sup>278</sup> Australian Institute of Health and Welfare, *Statistics on Drug Use in Australia* (2004), 83 <<http://www.aihw.gov.au/publications/phe/sdua04/sdua04.pdf>> at 25 July 2006.

<sup>279</sup> Alex Stevens, Mike Trace and Dave Bewley-Taylor, *Reducing Drug Related Crime: An Overview of the Global Evidence* (2005) Beckley Foundation Drug Policy Programme 3 <[http://www.internationaldrugpolicy.net/reports/BeckleyFoundation\\_Report\\_05.pdf](http://www.internationaldrugpolicy.net/reports/BeckleyFoundation_Report_05.pdf)> at 25 July 2006.

<sup>280</sup> Robert MacCoun, Beau Kilmer and Peter Reuter, 'Research on Drugs-Crimes Linkages: The Next Generation' (Paper presented at the Drugs and Crime Research Forum, Sydney 19 April 2001).

<sup>281</sup> David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15(2) *Current Issues in Criminal Justice* 136, 146.

<sup>282</sup> Alex Stevens, Mike Trace and Dave Bewley-Taylor, 'Reducing Drug Related Crime: An Overview of the Global Evidence', above n 14, 4.

<sup>283</sup> *Ibid.*

from Drug Court in many instances.<sup>284</sup> It is further submitted by many observers that Australian Drug Courts are primarily aimed at offenders with a long history of property offending.<sup>285</sup> However, while alcohol is more prevalent in relation to violent crime, alcohol is nevertheless a significant factor in property and other minor offending. One Australian study highlights that in 18% of cases, female prisoners were under the influence of alcohol when committing their property or other offence.<sup>286</sup> More importantly, however, many illicit drug addicts who commit property offences often have a long history of alcohol abuse and criminal activity before they begin to use drugs such as heroin.<sup>287</sup> If Drug Court were allowed to treat alcoholics at an early stage, it is possible that the percentage of people escalating their drug use and the rate of their offending would be reduced. Even more crucially, the early treatment of alcohol addiction may assist in preventing alcoholics from committing more violent crimes at a later stage in life. Overall, there are sound reasons supporting the inclusion of alcoholism within the definition of 'drug dependency.'

### **A broader Drug Court offers hope to alcoholics:**

Expanding the ambit of Drug Court to include alcohol addiction would offer untold benefits to alcoholics, law enforcement agencies and the wider community. Just as Drug Court is effective in treating those addicted to illicit drugs, the Drug Court's ability to provide a mix of services tailored to each individual's needs would be extremely beneficial in treating alcohol addictions. As Susan Hayes and John Carmody rightly state:

'Alcohol abuse is not an isolated aspect of [an offender's] life. Rather, it forms part of a pattern which includes self-awareness, self-esteem, daily living skills, personal values, future and present work and residential situation, health, family relationships, peer group influences, and possible relationship with a life-partner.'<sup>288</sup>

By adopting a holistic approach to drug treatment, Drug Court offers a means by which chronic alcohol addiction can be permanently cured. In addition, the delivery of many of the services offered by Drug Court would not need to be greatly altered to accommodate alcohol addiction. In fact, the 12 step program currently used to treat illicit drug dependency was initially developed by two Americans seeking to confront their alcoholism.

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<sup>284</sup> Gail Mason and Paul Wilson, *Alcohol and Crime* (1989) Australian Institute of Criminology 2 <<http://www.aic.gov.au/publications/tandi/ti18.pdf>> at 25 July 2006.

<sup>285</sup> Toni Makkai and Keenan Veraar, *Final Report on the South East Queensland Drug Court* (2003) Australian Institute of Criminology, 7 <<http://www.aic.gov.au/publications/tbp/tbp006.html>> at 24 July 2006.

<sup>286</sup> Australian Institute of Health and Welfare, *Statistics on Drug Use in Australia*, above n 13.

<sup>287</sup> Wayne Hall, 'Methadone Maintenance Treatment as a Crime Control Measure' (1996) 29 *Crime and Justice Bulletin* 1.

<sup>288</sup> Susan Hayes and John Carmody, 'Helping Those Imprisoned for Alcohol Related Crime' (Paper Presented at the Australian Institute of Criminology Conference Proceedings, Canberra, 6 April 1989).

Ultimately, alcoholics should not be denied access to Drug Court simply because alcohol is a legal drug. In the eyes of science, alcohol can be just as potent a drug as heroin or ecstasy. Similarly, in the eyes of the law, alcohol addiction should receive the same concern and resources as illicit drugs.

### **A Final Thought:**

To illustrate the potentially devastating effects of alcohol addiction, imagine this scenario. Richard, abandoned by his parents soon after birth, is forced to commit crimes just so that he could go to a children's home in order to avoid being molested by his abusive relatives. Over the years, he develops a chronic alcohol addiction. With minimal employment prospects due to his lack of education, Richard accumulates an extensive criminal record comprised mainly of minor property offences. Unfortunately, Richard never receives any sustained treatment for his alcohol addiction. One early morning after becoming heavily intoxicated, Richard breaks into a friend's house and brutally rapes his friend's wife. As a result of her horrific experience, the wife understandably suffers enormous and continuing distress. Whilst Richard is held in custody and the traumatised victim receives medical attention, the respective families wait impatiently inside the confines of the local police station. Unable to contain her frustration any longer, the victim's mother breaks the frosty tension by angrily declaring to the police officer on duty "My daughter would never have been raped if the police did their job and locked up drunken lunatics. Surely you could have done something to protect my innocent daughter?" The offender's uncle indignantly snaps back "Leave my nephew alone! A blind person could have seen that poor Richard was in desperate need of help. Why didn't the Court offer him a treatment program? They do it for cocaine users." Both sets of families stare coldly at the police officer, waiting for a reply. Eventually, the policeman looks up from his desk and quietly mumbles "There is nothing we could do...it is not illegal to drink alcohol after all." All family members sigh in despair and return to pondering their loved one's fate. Perhaps the most tragic element of this scenario is that it is based on a true story. The case of *R v Shillingsworth*<sup>289</sup> sits quietly amongst the myriad of New South Wales Criminal Court of Appeal Cases, condemned to be read only by lawyers searching for yet another sentencing precedent on alcoholic offenders.

The tragic case of *R v Shillingsworth* begs the question: how many more dreams must be shattered and how many more case notes must be written before the policeman's answer is recognised as being completely inadequate? Undoubtedly, many will voice the opinion that Drug Court should not be burdened with treating people solely addicted to alcohol. Politicians will proclaim that alcohol must be treated differently from other drugs and that Drug Court already costs too much. Drug Court skeptics will declare that

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<sup>289</sup> [2003] NSWCCA 272 (Unreported, Meagher JA, Scully J and Smart J, 26 September 2003).

alcohol addiction cannot be adequately treated by Drug Court. However, for the thousands of despairing alcoholics and their associated victims around Australia, only one sound will be heard – the early closing of the local Drug Court's doors at 3pm each day.

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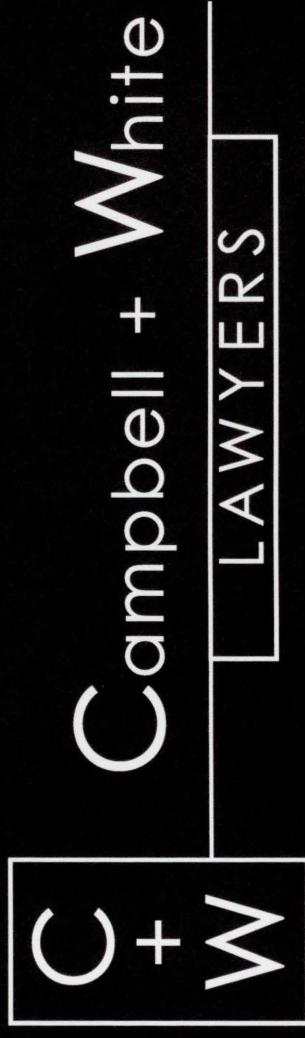
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