ADVANCING THE HUMAN RIGHTS OF WOMEN:

USING INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION

Edited by

Andrew Byrnes • Jane Connors • Lum Bik

Papers and statements from the Asia/South Pacific Regional Judicial Colloquium Hong Kong, 20–22 May 1996

Commonwealth Secretariat

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THE COMMONWEALTH SECRETARIAT

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PREFACE

This volume contains the revised version of papers presented at the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights held at The University of Hong Kong from 20-22 May 1996. The seminar was organised by the Gender and Youth Affairs Division of the Commonwealth Secretariat, together with the Commonwealth Magistrates' and Judges' Association, in collaboration with the Centre for Comparative and Public Law of the Faculty of Law, The University of Hong Kong. This Colloquium followed the colloquia held at Victoria Falls, Zimbabwe in 1994 and Beijing, China in September 1995.

We would like to thank the contributors who were particularly patient in responding to our request for further information during the editing of the papers, as well as all those who were involved in the organisation of the colloquium itself. In addition to the staff of the Commonwealth Secretariat and Ms Vivienne Chin, Secretary General of the CMJA, we would like to acknowledge the staff of the Faculty of Law (in particular Ms Sally Yu), Mr George Edwards (Associate Director of the Centre for Comparative and Public Law), Mr Scott Wilkens (Henry Luce Scholar with the Centre), and a number of students of the Faculty who assisted with the arrangements. We would also like to acknowledge the assistance of Scott Wilkens and Ms Victoria Medd, who assisted with the preparation of the compilation of cases and materials distributed at the Colloquium, and Ms Kirstine Adams for her assistance at the final stages of editing.

The smooth organisation of the conference would not have been possible without the support of the former Attorney General of Hong Kong, Mr Jeremy Mathews, the former Chief Justice Sir T L Yang, the Solicitor General, Mr Daniel Fung, the Judiciary Administrator, Ms Alice Tai, and Ms Susie Ho, as well as the officers of the Home Affairs Branch of the Hong Kong Government. We would like to express our gratitude to them.

For the avoidance of doubt, the positions referred to are those held by the participants in the colloquium as of May 1996.

Andrew Byrnes
Jane Connors
Lum Bik

Hong Kong and New York
September 1997

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ABBREVIATIONS

AC	Appeal Cases
AIDS	Acquired Immune Deficiency Syndrome
AIR	All India Reporter
All ER	All England Law Reports
All Nig LR	All Nigeria Law Reports
ALR	Australian Law Reports
CEDAW	Committee on the Elimination of Discrimination against Women
CLESA	Children and Law in Eastern and Southern Africa Network
CLR	Commonwealth Law Reports (Australia)
Cri LJ	Criminal Law Journal (India)
D&R	Decisions and Reports, European Commission of Human Rights
DLR (4th)	Dominion Law Reports, 4th Series (Canada)
EHRR	European Human Rights Reports
EOC	CCH Australian and New Zealand Equal Opportunity Law and Practice
EXCOM	Executive Committee of the High Commissioner for Refugees' Programme
FGM	female genital mutilation
FLC	CCH Australian Family Law Cases
HIV	human immunodeficiency virus
HKPLR	Hong Kong Public Law Reports
HLC	Clark's House of Lords Cases
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICDC	International Child Development Centre
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IHRR	International Human Rights Reports
ILA	International Law Association
ILLR	International Labour Law Reports
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IWRAW	International Women's Rights Action Watch
L Ed 2d	Lawyers' Edition, United States Supreme Court Reports, Second Series
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
MAJLIS	Majlis, a legal and cultural resource centre in India

NGO	Non-governmental organisation
NZAR	New Zealand Administrative Reports
NZBORR	New Zealand Bill of Rights Reports
NZCLD	New Zealand Current Law Digest
NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
OAU	Organization of African Unity
PAUTS	Pan American Union Treaty Series
PNGLR	Papau New Guinea Law Reports
QB	Law Reports, Queen's Bench Division
RADIC	African Journal of International and Comparative Law
SA	South African Law Reports
SCC	Supreme Court Cases (India)
SCJ	Supreme Court Journal (India)
SCR	Supreme Court Reports (India)
SILR	Solomon Islands Law Reports
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
US	United States Supreme Court Reports

FOREWORD

The majority of Commonwealth countries are parties to general international and regional human rights standards, and to the specific international norms on the human rights of women and the girl-child. Judges are well placed to provide leadership in advancing gender interests, and to translate the commitments of governments into reality by referring to these international standards. These human rights standards can inform decision-making in litigation at all levels whether or not they have been incorporated into domestic legislation.

Commonwealth and international meetings have emphasised that the human rights of women are an inalienable, integral and indivisible part of universal human rights. The Harare Declaration (1991) identifies human rights as one of the priorities for Commonwealth Action, and urges all member countries to work towards the promotion of fundamental Commonwealth values which include the promotion of equal rights and opportunities for all citizens regardless of gender. The 1995 Commonwealth Plan of Action on Gender and Development identifies the promotion of women's human rights as one of the fifteen critical areas for action by governments and advocates the elimination of violence against women, protection of the girl-child and outlawing of all forms of trafficking in women and children. Commonwealth Heads of Government at their meeting in Auckland in 1995, pledged that all governments should ratify and implement the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention), the Convention on the Rights of the Child, and the Declaration on the Elimination of Violence against Women. At their 1993 and 1996 meetings, Ministers Responsible for Women's Affairs requested the Commonwealth Secretariat to provide training programmes to sensitise government officials and legal professionals to the value of using the Women's Convention as a major human rights instrument in the development of jurisprudence, new constitutions and strengthening democratic institutions. The Beijing Platform for Action called for universal ratification of the Convention by the year 2000 and the elimination of violence against women.

Since 1994, the Gender and Youth Affairs Division, in collaboration with the Legal and Constitutional Affairs Division, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Foundation, has organised four judicial colloquia focusing specifically on the promotion of the human rights of women and the girl-child through the judiciary. The first colloquium, for the African region, was held in Zimbabwe in 1994. It was followed by another colloquium at the NGO Forum during the United Nations Fourth World Conference on Women in Beijing in 1995. The third colloquium, for the Asia/South Pacific region, was held in Hong Kong in 1996. The fourth and last in the series was held in the Caribbean region in Guyana in 1997. These

colloquia were attended by female and male Chief Justices, judges of the Supreme Courts, Courts of Appeal, High Courts and District Courts; judicial officers; lawyers; academics; researchers; representatives of UN agencies and regional organisations; and NGOs. The African colloquium issued the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women*. It was endorsed by the Commonwealth Magistrates' and Judges' Association, and reaffirmed by judges at subsequent colloquia. The Asia and South Pacific Judicial Colloquium issued the *Hong Kong Conclusions*. The Caribbean Colloquium adopted the *Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child* and also set up a Commonwealth Reference Group comprising of Chief Justices and senior judges from the four regions of Africa, Asia, Caribbean and the South Pacific to follow-up the implementation of the *Georgetown Recommendations*.

Other work of the Gender and Youth Affairs Division has focused on producing resource and training materials for use by member countries in eradicating violence against women, promoting the increased use of CEDAW as well as facilitating member governments as they prepare their national reports on CEDAW. The following manuals have been published: *Confronting Violence — A Manual for Commonwealth Action; Violence against Women — Curriculum Materials for Legal Studies; Guidelines for Police Training on Violence against Women and Child Sexual Abuse; A Commonwealth Annotated Bibliography on Violence against Women;* and *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women.* Two regional studies on the commercial sexual exploitation of the girl-child in Asia and Africa have been completed. The case law collection which demonstrates how international human rights norms relevant to the human rights of women have been used in national courts; a resource book on actions taken by Commonwealth Countries to combat Violence against Women, and a handbook on good practices for the implementation of the Convention on the Elimination of All Forms of Discrimination against Women by Commonwealth countries are being finalised for publication.

This publication presents the statements made and papers submitted for the Asia/South Pacific regional judicial colloquium, as well as the texts of the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* and the *Hong Kong Conclusions* which were adopted at the colloquium. It is hoped that it will contribute to the wider recognition and application of international and regional human rights norms relevant to the human rights of women and the girl-child by the judiciary.

Eleni Stamiris
Director, Gender and Youth Affairs Division

Victoria Falls Declaration of Principles for Promoting the Human Rights of Women

Zimbabwe, 19–20 August 1994

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights — inherent in men and women — and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.
2. All too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. Civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.
3. Universal human rights, are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family — the site of much of women's experience of violations — are usually perceived to be outside the reach of human rights. Although the state does not usually directly violate women's rights in the private sphere, it often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.
4. Many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity and therefore sometimes fail to provide protection for the gender specific interests of women. There is an urgent need for the formulation of further specific rights for women, particularly in the economic and social field. It is vital for women to be centrally involved in decision making at all levels.
5. Discrimination against women can be direct or indirect. Indirect discrimination requires particular scrutiny by the judiciary. There is a need to ensure not only formal, but also substantive equality for women and, for that purpose, affirmative action may be adopted if necessary.
6. Although international human rights are inherent in all humankind, very often such rights are perceived to be owned, only or largely,

by men. Participants emphasised that the human rights of women are as valuable as the human rights of men.

7. International human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly the known discrimination guarantee should be construed purposively and with a special measure of generosity.
8. It is essential to promote a culture of respect for internationally and regionally stated human rights norms and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.
9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination against Women before the Fourth United Nations World Conference on Women to be held in Beijing in 1995. Those governments which have ratified the Convention with reservations, should examine the content of those reservations, with a view to their withdrawal.
10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform with the international and regional human rights standards.
11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.
12. The speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination against Women should be encouraged.
13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence against Women, adopted by the UN General Assembly in December 1993. Violence against women is a form of discrimination and violation of human rights as stated in the Declaration.
14. All Commonwealth governments should offer appropriate assistance to the United Nations special rapporteur on violence against women.
15. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions

and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women.

16. New gender sensitised initiatives in legal education, provision of material for libraries, programmes of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.
17. There is a need to translate the international human rights instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and governments should therefore undertake or support that task.
18. Governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.
19. Non-governmental organisations play an important role in the dissemination of information about women's human rights and making women aware of those rights. Governments should therefore acknowledge and support the work of non-governmental organisations in promoting the human rights of women.
20. Non-governmental organisations should be enabled to provide amicus curae briefs and other legal advice, assistance and representation to women in cases involving human rights issues. Free legal aid and advice should be provided to women at state cost for enforcement of their human rights.
21. Public interest litigation and other means of access to justice to litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of the human rights of women before the courts for redress.
22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.
23. Closer links and cooperation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.
24. Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

The Conclusions of the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights

Hong Kong, 20–22 May 1996

Having regard to the central place of the Victoria Falls Declaration in the recognition and enforcement of the human rights of women, the participants in the Hong Kong Colloquium of judges, lawyers and law academics from the Commonwealth countries of the Asia/South Pacific region, reaffirmed the principles of the Victoria Falls Declaration and expressed their commitment to uphold and implement those principles.

Recalling the Declaration on the Elimination of Violence against Women, the discussions at the Commonwealth Heads of Government Meeting in New Zealand in 1995, the Beijing Declaration and Platform for Action and the conclusions of the meeting of Commonwealth Law Ministers in April 1996, the participants expressed their deep concern at the large-scale violence against women and the girl-child which is taking place in various forms in most countries of the Commonwealth. Violence against women is a manifestation of historical unequal power relations between women and men which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated. All Commonwealth Governments should condemn violence against women and girls as a violation of fundamental human rights, including the right to personal security and the right to be free from discrimination on the basis of sex. No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law.

The participants expressed particular concern at the many forms of violence against women in the family. This violence is widespread, but frequently goes unnoticed and unrestrained because of oppressive social, cultural or religious traditions and values. These factors have led to the subordination of women and continue to dominate social attitudes because of lack of awareness of basic human rights of women, as well as their economic dependence on men. It is incumbent on law enforcement agencies, the legal profession and the courts to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response.

Participants recognised the importance of custom, tradition, culture and religion as a part of individual and group identity. They recognised that these concepts were sometimes interpreted so as to be oppressive to

women. They stressed the need to preserve and enhance worthy customs, while at the same time discouraging those that have an adverse impact on women and girls.

Participants recognised that a majority of the world's refugees and internally displaced persons are women and children and that these persons are an especially vulnerable group who are frequently denied their basic human rights and subjected to violence and sexual exploitation. The importance of judicial sensitivity to gender specific violations of human rights in dealing with cases relating to physical or mental abuse and or claims to refugee status was underlined.

Recalling that the 1995 Meeting of Commonwealth Heads of Government at Auckland urged all Commonwealth Governments to ratify the Convention on the Elimination of All Forms of Discrimination against Women and underlining the importance of accession, ratification and implementation of this Convention and other human rights treaties to the advancement at the national level of the human rights of women and the girl child, the participants noted that it would be desirable if all States in the region became parties to and implemented the Convention.

The participants noted that many opportunities exist for judges and other judicial officers to draw on the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.

Participants noted that it was important that the judiciary reflect the population it serves. Accordingly, it encouraged the exploration of ways to ensure a gender balance in the judicial system.

Participants identified a number of areas where there are clear violations of the human rights of women which might be addressed by the utilisation of international norms in domestic decision making. These included, in particular, discrimination in matters of nationality, citizenship, property and inheritance, which has serious implications for the exercise and enjoyment by women of other fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries.

Noting the complementarity between the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, participants drew attention to the special vulnerability of the girl-child to violations of human rights and

identified this as a matter requiring particular judicial attention. They noted that the principle of the best interests of the child could be used to promote the full enjoyment by the girl child of her rights.

Participants noted that litigation to advance the human rights of women was limited at both the national and international levels. They emphasised women's limited access to the judicial process to enforce their rights and they proposed the further development of a number of measures to increase women's access to justice, including legal literacy programmes and assisted legal advice and representation. Participants drew attention to the important role that the media could play in creating an awareness of the human rights of women. They suggested that consideration might also be given to encouragement of representative actions and relaxing traditional limitations on locus standi. They also supported the adoption of an optional complaints mechanism for the Convention on the Elimination of All Forms of Discrimination against Women.

Speech by the Hon Attorney General, Mr J F Mathews, CMG, JP at the Opening Ceremony of the Judicial Colloquium for Senior Judges in the Asia-South Pacific Region

Chief Justice, Ms Stamiris, Ms Chin, Professor Wesley-Smith, Distinguished Judges, Ladies and Gentlemen,

I am honoured to be invited to this opening ceremony of the Judicial Colloquium for Senior Judges in the Asia-South Pacific Region organised by the Commonwealth Secretariat. This is the third of a series of judicial colloquia for senior judges on the domestic application of international legal instruments which promote women's human rights in the Commonwealth. The first was held in 1994 in Zimbabwe,[1] the second was held last year at the Non-governmental Organisations Forum at the United Nations Fourth World Conference on Women in Beijing. We are delighted that Hong Kong should have been chosen as the venue for this meeting and on behalf of the people and Government of Hong Kong, I would like to offer you a warm welcome.

The Commonwealth's values

Respect for and the protection of human rights lie at the heart of the fundamental values of the Commonwealth. This is reflected, for example, in the 1991 Harare Conference which emphasises the protection and promotion of:

- Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- Equality for women, so that they may exercise their full and equal rights.[2]

The 1995 Beijing Declaration and Platform for Action establish a set of actions that are intended to lead to fundamental change in the protection and respect of women's rights. The Declaration confirms women's rights as human rights,[3] while the Platform of Action sets out concrete reassurances required at the national and international levels to protect and promote the human rights of women.

1 See Commonwealth Secretariat, *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994.

2 The overall theme of the Conference was "To Define, Promote and Improve the Human Rights Culture in the Commonwealth in the 1990s", see 18 *Commonwealth Law Bulletin* 771 for details.

3 Beijing Declaration and Platform for Action, *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995), at 4–8, para 14.

At the Commonwealth Law Ministers Meeting, which I had the pleasure of attending last month in Kuala Lumpur, special attention was given in the context of the discussion of Commonwealth fundamental values to the human rights of women. Ministers considered various measures, strategies and activities that could be introduced in the field of crime prevention and criminal justice to achieve the elimination of violence against women.

Hong Kong Bill of Rights Ordinance

Let me say something of the regime of Hong Kong in this vital area. Hong Kong is fully committed to the protection of human rights in general and women's rights in particular. The Hong Kong Bill of Rights Ordinance,[4] enacted in June 1991, gives effect in local law to the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.[5] Among other things, it prohibits discrimination on the grounds of sex by the Government and public authorities. In interpreting the provisions of the Bill of Rights Ordinance, Hong Kong courts in developing their jurisprudence have referred to and drawn upon international human rights jurisprudence.

Sex Discrimination Ordinance 1995

As a further step towards the protection of women's rights in domestic law in Hong Kong, the Sex Discrimination Ordinance was enacted in July 1995.[6] It outlaws discrimination on the grounds of sex, marital status and pregnancy in specified areas of activity. These include employment, education, provision of goods and services, and the disposal or management of premises. The Ordinance also outlaws sexual harassment.[7]

The Ordinance confers jurisdiction on the District Court to hear claims of unlawful sex discrimination and sexual harassment in the same way as other claims in tort. Persons may be permitted to address the court in the proceedings even though they are neither legally qualified nor parties to the proceedings, and the Chinese language may be used.[8]

In addition, the Sex Discrimination Ordinance provides for the establishment of an independent statutory body, the Equal Opportunities Commission, whose functions include the following:[9]

4 Hong Kong Bill of Rights Ordinance (Cap 383), reprinted in 1 HKPLR liv–lxviii.

5 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976. The United Kingdom signed on 16 September 1968 and ratified it on 20 May 1976, with territorial application including Hong Kong.

6 Sex Discrimination Ordinance (Cap 480).

7 For details, see Parts II, III and IV of the Ordinance.

8 Part VIII, *supra* note 6.

9 Part VII, section 64, *supra* note 6.

- working towards the elimination of sex discrimination and sexual harassment;
- promoting equality of opportunity between men and women;
- investigating, upon complaint, any act alleged to be unlawful by virtue of the Ordinance and endeavouring, by conciliation, to effect a settlement of the matter in dispute; and
- keeping under review the working of the Sex Discrimination Ordinance and, when it is so required by the Governor or otherwise thinks it necessary, submitting to the Governor proposals for amending the Ordinance.

The Commission will also develop codes of practice in the areas of activity regulated under the Ordinance. These codes will provide practical guidance for compliance with the Ordinance. The setting up of the Equal Opportunities Commission reflects Hong Kong's firm commitment to the enforcement of protected rights of citizens. I am pleased to tell you that today is the day the Commission comes into being. This is the day the newly appointed Chairperson of the Commission starts work.

We are also currently carrying out detailed studies in human rights in other area, including an assessment of the community's views on for example, family status sexuality and age discrimination. We would expect to reach decisions on the way forward on these issues later this year.

Convention on the Elimination of All Forms of Discrimination against Women

On a separate but related and highly relevant point, the Hong Kong Government has announced its intention to invite the British Government to extend the Convention on the Elimination of All Forms of Discrimination against Women[10] to Hong Kong. As it is intended to remain in force after the transfer of sovereignty in 1997, the issue is being discussed with China, which as many of you know, is also a party to the Convention. I look forward to an early agreement with the Chinese Government to allow this important convention to be extended to Hong Kong.

[10] 1249 UNTS 13. The United Kingdom signed the Convention on 22 July 1981 and ratified it on 7 April 1986, but it did not extend the Convention to Hong Kong at that time. The People's Republic of China signed the Convention on 17 July 1980 and ratified it on 4 November 1980. [Eds] The Convention was subsequently extended to Hong Kong with effect from 14 October 1996.

Independence of the judiciary

The existence of a comprehensive system of laws is not sufficient without a strong and independent judiciary of which we in Hong Kong are most proud. The Sino-British Joint Declaration of 1984[11] and the Basic Law[12] — the mini-constitution of the future Hong Kong Special Administrative Region — which will come into effect upon the transfer of sovereignty on 1 July 1997 contain specific guarantees over the independence of the judiciary and the continuation of the judicial system practised in Hong Kong.

Guidance from international norms

With a comprehensive system of laws on the protection of human rights and women's rights administered by an independent and impartial judiciary, I am confident that Hong Kong has the necessary foundation for effective protection of women's rights. However, we are not complacent. The development and protection of rights rests, ultimately not on laws, declarations or treaties, important though they are, but on the unremitting efforts by us all to put these laws, declarations and treaties into practice. And in this rapidly expanding area of the law which touches us all, you, the judges, play a vital, indeed, fundamental part.

I wish you all a very successful colloquium.

[11] *China and United Kingdom of Great Britain and Northern Ireland: Joint Declaration on the Question of Hong Kong (with annexes)*, 1399 UNTS 36, reprinted in (1984) 23 ILM 1366.

[12] Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, reprinted in (1990) 29 ILM 1511.

Speech by Ms Eleni Stamiris, Director, Gender and Youth Affairs Division, Commonwealth Secretariat

It gives me great pleasure to welcome you to this judicial colloquium which is organised by the Gender and Youth Affairs Division of the Commonwealth Secretariat in collaboration with the Commonwealth Magistrates' and Judges' Association and the Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong. It is an unprecedented honour for us to have judges from eleven Commonwealth countries in Asia and the South Pacific meeting to deliberate on strategies for promoting the human rights of women through the domestic application of international and regional human rights instruments. I am equally pleased to welcome representatives of the International Women's Rights Action Watch Asia/Pacific, the United Nations Division for the Advancement of Women and the Office for Development Assistance's Pacific Regional Human Rights Education Resource Team. I wish to express sincere thanks to the Government and people of Hong Kong for agreeing to host this meeting. We are indebted to the Judiciary, and particularly acknowledge the support and generosity extended to us by the Chief Justice, the Honourable Sir Ti-Liang Yang who has graciously considered to open this Colloquium, the Attorney General and the Solicitor General, who will close the Colloquium. I also wish to recognise the support provided by the Dean and Faculty of Law, The University of Hong Kong. Their assistance has been critical in the organisation of this meeting and their generous hospitality accorded to participants is deeply appreciated. We also wish to thank the Commonwealth Foundation for providing funds for non-governmental organisations' participation at the Colloquium.

In planning this colloquium we had been guided by a vision of human rights which incorporates acceptance of equal and inalienable rights for all women and men. It is imperative that this vision also encompasses the principle that women's rights are an integral component of human rights. It was the recognition of this concept of women's rights which led to the prominence given to women's rights at the 1993 United Nations World Conference on Human Rights. This Colloquium is part of the Commonwealth Secretariat strategy to support respect for human rights which is one of the fundamental values of the Commonwealth as agreed in the Singapore Declaration (1971) and the Harare Declaration (1991).[1] This was reinforced by the Commonwealth Heads of Government at their meeting in Auckland in 1995 when they reaffirmed that women's rights were human rights and urged member governments to

[1] The overall theme of the Conference was "To Define, Promote and Improve the Human Rights Culture in the Commonwealth in the 1990s", see 18 *Commonwealth Law Bulletin* 771 for details.

adopt legislation and develop national strategies to promote the advancement of women. Heads of Government also urged ratification and implementation of the human rights covenants and other international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)[2] and the Declaration on the Elimination of Violence against Women.[3] This was reiterated by Law Ministers when they met in Kuala Lumpur in April 1996 and expressed support for the promotion of women's human rights and the elimination of violence against women.

The Gender and Youth Affairs Division in collaboration with the Legal and Constitutional Affairs Division has focused attention on the Women's Convention — now ratified or acceded to by over 35 Commonwealth member countries. Their first initiative was the production of an accession kit to encourage Commonwealth countries to accede to the Convention. Next, they encouraged effective reporting by Commonwealth countries by preparing a Manual for Reporting under the Convention. This manual, the second edition of which is now available, has been widely used and has even attracted recognition by the Committee on the Elimination of Discrimination against Women, the monitoring committee established under the terms of the Women's Convention. The Division's efforts to encourage effective reporting by Commonwealth countries also included the organisation of regional training workshops for government officials responsible for preparing the periodic reports required by the Convention.

This Colloquium is an attempt to broaden our approach by facilitating dialogue on the significance of domestic legislation in the implementation of international and regional laws. Although in many Commonwealth countries the domestic legal system allows for the observance of these laws, sometimes these international laws are not sufficiently well known, partly because until quite recently, the legal training of most lawyers did not include adequate instruction in international and regional human rights norms. In addition, judges and lawyers cannot easily get access to materials on these norms or obtain advice about international and regional human rights norms and jurisprudence.

However, some enlightened judges have sought to interpret fundamental rights and obligations against the background of international and regional human rights norms and jurisprudence. To encourage this trend, the Commonwealth Secretariat embarked on a series of judicial colloquia which have explored the domestic application of international human rights norms. The first colloquium was convened in Bangalore in 1988 by Justice P N Bhagwati, whom I am delighted to have with us for this meeting, as one of the Co-Chairpersons. The judges agreed on

[2] 1249 UNTS 13.

[3] GA Res 48/104, UN Doc A/48/49, at 217 (1994) reprinted in 1 IHRR 329.

the *Bangalore Principles*[4] which confirmed the relevance of international and regional human rights jurisprudence for domestic courts and encouraged resort to such jurisprudence where domestic law — whether constitutional, statutory or common law — is uncertain or incomplete.

Five other colloquia have been convened at which the *Bangalore Principles* have been affirmed. Although these colloquia were undoubtedly effective, they did not explore the domestic application of international human rights norms from a gender perspective. The Gender and Youth Affairs Division, therefore, considered it a priority to embark on a series of colloquia so that senior judges from Commonwealth countries could discuss how far the international and regional framework can be used to advance the position of women. The first colloquium was convened in Africa where most countries have an entrenched Bill of Rights and a number of benches have already interpreted the guarantee of non-discrimination on the basis of sex in the light of international norms. This colloquium was organised in Zimbabwe in August 1994 by the Gender and Youth Affairs Division in collaboration with the Commonwealth Magistrates' and Judges' Association. A significant outcome of the colloquium was the adoption of the *Victoria Falls Declaration of Principles on the Promotion of the Human Rights of Women.*[5] The *Declaration* affirms the universality of human rights which are equally relevant to women and men, and emphasises the role of an independent judiciary in integrating and applying national constitutions and laws in the light of this principle.[6]

The issue was brought to a wider audience when the Gender and Youth Affairs Division and the Commonwealth Magistrates' and Judges' Association organised a judicial colloquium at the Fourth World Conference on Women at Beijing in 1995, at which participants expressed their support for the *Victoria Falls Declaration.* Since then, this *Declaration* has been adopted by the Commonwealth Magistrates' and Judges' Association and endorsed by Commonwealth Law Ministers. I hope that after reviewing it you will also endorse it.

We are honoured to have as co-chairpersons two eminent judges — Justice P N Bhagwati, former Chief Justice of India, and Justice Dame Silvia Cartwright of the High Court of New Zealand. Justice Bhagwati will deliver an address on "Creating a Judicial Culture to promote Women's Human Rights" and Justice Silvia Cartwright will deliver an address on "The Relevance of International Standards to Domestic

[4] *The Bangalore Principles* (1988) in Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992) at 1.

[5] *The Victoria Falls Declaration on the Promotion of the Human Rights of Women* in Commonwealth Secretariat, *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women,* Victoria Falls, Zimbabwe, August 1994 (London, Commonwealth Secretariat, 1995) at 8.

[6] For details, see *Victoria Falls Declaration,* paras i and xi.

Litigation: the Case for New Zealand". We will also be privileged to be addressed by Justice Desirée Bernard of the Court of Appeal in Guyana; the Hon Sir John Muria, Chief Justice of the Solomon Islands; the Hon R B Lussick, Chief Justice of Republic of Kiribati; Justice Tracy Doherty of the Supreme Court of Papua New Guinea and Mrs Vusenga Helu, Magistrate of the Ministry of Justice of Tonga and Judge Hing-Chun Wong of Hong Kong. We will also be stimulated by papers from Professor Savitri Goonesekere of the University of Colombo, Ms Flavia Agnes of India, Ms Ranjit Jayanti, Focal Point for Women, Office of the United Nations High Commissioner for Refugees, Hong Kong and Dr Bart Rwezaura of The University of Hong Kong. Our able consultants are Ms Jane Connors, Senior Lecturer, School of Oriental and African Studies, University of London, and Mr Andrew Byrnes of The University of Hong Kong.

I have no doubt that the experience and expertise of our Co-Chairpersons and speakers will ensure that we have a successful meeting. I look forward to two days of thought-provoking discussions which will be a first step towards working together in the Commonwealth to promote the rights of women through the domestic application of international and regional human rights.

Speech by The Hon Sir T L Yang, the Chief Justice of Hong Kong at the Opening of the Judicial Colloquium on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights

Distinguished delegates, ladies and gentlemen:

It was in January that I first heard that the Commonwealth Secretariat wished to hold this judicial colloquium in Hong Kong. The choice of Hong Kong is an inspired and excellent one. We have always been conscious of our common law heritage. For that reason, Hong Kong has sent delegates regularly to the Commonwealth Law Conferences, and occasionally to judicial colloquia of this kind.

But we are now less than 14 months away from the historic change in Hong Kong's status — the change which will see sovereignty over Hong Kong pass from the United Kingdom to the People's Republic of China. This will therefore probably be the last judicial colloquium to be held under the auspices of the Commonwealth Secretariat in which Hong Kong has a formal part to play. The formal links between Hong Kong and members of the Commonwealth will naturally be severed in the future. But given our common law heritage and long-standing friendship, I very much hope that our ties with other Commonwealth jurisdictions will continue to flourish after the change of sovereignty. The Basic Law encourages the retention of these links.

The fundamental principles of human rights already form an integral part of the laws of jurisdictions from which the delegates to this colloquium come. They do so as a result of international conventions to which we are subject, and because such rights are provided for in our domestic legislation. It is the responsibility of the courts to apply those principles whenever they are said to have been infringed. But determining the precise scope of those principles can sometimes be a difficult exercise. So the courts may, where appropriate, have regard to internationally recognised human rights norms as aids to judicial interpretation. Not only does this process help with the case in hand, but it also helps to build up a body of domestic jurisprudence. Over the years, a repository of international, regional and national jurisprudence on human rights has been developed, and it is important that judges and lawyers are provided with up-to-date information about their jurisprudence. Judicial colloquia of the kind we are having today provide an excellent venue for the exchange of such information.

This year's colloquium will examine the ways in which internationally recognised standards of rights for women are reflected in domestic law.

The holding of this colloquium in Hong Kong, with its emphasis on women's rights, is most seasonable. Last year, we saw the enactment of the Sex Discrimination Ordinance[1] and Hong Kong's participation in the United Nations Fourth World Conference on Women.[2] 1996 is a year of action: the main provisions in the Sex Discrimination Ordinance will come into operation. The traditional role of women in Chinese society does not lie easily with modern ideas about feminism. It is therefore not without significance that this particular colloquium should be held in a territory in the very year in which the protection of women from discrimination will receive, for the first time in its history, statutory underpinning of a very major kind.

The enactment of the Sex Discrimination Ordinance,[3] which is modelled on the United Kingdom Sex Discrimination Act, is an important step in the promotion of women's rights. The Attorney General has already described the scope of the Ordinance and I do not propose to cover the same ground. I however wish to point out that the judiciary has an important role to play in the enforcement of the Ordinance. Proceedings under the Ordinance have to be brought in the District Court. To ensure that such proceedings are heard within a reasonable time, we will be setting up a special list in the District Court to hear such cases. Since sex discrimination legislation is a new area of law in Hong Kong, we intend to cultivate judicial expertise in this field. Towards this end, cases in this special list will be tried by designated judges. This special list will be in place upon the commencement of the Ordinance.

Only time will tell how relevant the provisions of the Ordinance will be to contemporary life in Hong Kong. Nonetheless, this colloquium is most timely as it provides an excellent opportunity for delegates to share their views as to whether their attempts to make our domestic laws reflect internationally recognised standards of rights for women have been successful. It is particularly relevant to our participating judges on the advent of the commencement of the Sex Discrimination Ordinance.

The Convention on the Elimination of All Forms of Discrimination against Women identifies internationally recognised standards of rights for women. I am conscious that the Convention is yet to be extended to Hong Kong and the matter is now being considered by the British and Chinese sides of the Sino-British Joint Liaison Group. My understanding is that it is not as if the Governments of the United Kingdom and the People's Republic of China have any doctrinal objection to the Conven-

1 Cap 480

2 Beijing Declaration and Platform for Action, *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995).

3 Sex Discrimination Act 1975, see 6 *Halsbury's Statutes* (4th edn) (1992 reissue) 756.

tion. Otherwise, they would not have become States parties to it, as both of them have.[4]

Finally, it is extraordinarily apposite that this colloquium begins today — 20 May 1996. The Equal Opportunities Commission, the principal body established by the Sex Discrimination Ordinance for monitoring and enforcing the provisions of the Ordinance, will formally come into being today. The omens play a significant role in traditional Chinese culture. I hope that today proves to be an auspicious one for the Commission and for the success of this important colloquium, which I am extremely honoured to open.

[4] 1249 UNTS 13. The United Kingdom signed the Convention on 22 July 1981 and ratified it on 7 April 1986 but did not extend to Hong Kong at that time. The People's Republic of China signed the Convention on 17 July 1980 and ratified it on 4 November 1980. [Eds] The Convention was subsequently extended to Hong Kong with effect from 14 October 1996.

CREATING A JUDICIAL CULTURE TO PROMOTE THE ENFORCEMENT OF WOMEN'S HUMAN RIGHTS

◆

Justice P N Bhagwati[*]
Former Chief Justice of India

I must congratulate the Gender and Youth Affairs Division of the Commonwealth Secretariat for organising this judicial colloquium for the senior judges of the Asia Pacific region for discussing the domestic application of international women's human rights norms. The first judicial colloquium on the subject of domestic application of international human rights norms was convened by me in Bangalore, India under the auspices of the Legal Division of the Commonwealth Secretariat, where predominantly South Asian and South-East Asian judges of the superior courts met in order to discuss this important topic.[1] That judicial colloquium evolved a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms and these principles have now come to be known as "the *Bangalore Principles*".[2] They have inspired a good number of judges in the Commonwealth to develop human rights jurisprudence in conformity with international human rights norms. Then came the judicial colloquium in Harare where Chief Justices and judges from Commonwealth Africa participated.[3] This was followed by a judicial colloquium in Banjul,[4] and then came a judicial colloquium in Abuja[5] where judges of the superior courts from West Africa participated. We had then judicial colloquia in Oxford[6] and in Bloemfontein, South

[*] Member of the UN Human Rights Committee; member of the ILO Committee of Experts on the Application of Conventions and Recommendations.

1 See *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore, 24-26 February 1988* (London, Commonwealth Secretariat, 1988).

2 For the text of the *Bangalore Principles*, see *id* at ix and Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992)[hereinafter *Conclusions*] at 1.

3 See Commonwealth Secretariat, *Developing Human Rights Jurisprudence, Volume 2: A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Harare, Nigeria, 19-22 April 1989* (London, Commonwealth Secretariat, 1989).

4 See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 3: A Third Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Banjul, The Gambia 7-9 November 1990* (London, Commonwealth Secretariat, 1991).

5 See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 4: Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Abuja, Nigeria, 9-11 December 1991* (London, Commonwealth Secretariat, 1992).

6 See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 5: Fifth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium at Balliol College, Oxford, 21-23 September 1992* (London, Commonwealth Secretariat and Interights, 1993).

Africa.[7] These judicial colloquia dealt generally with incorporation of human rights in domestic jurisprudence and there was no special emphasis on women's human rights.[8] As I shall presently point out, women's human rights stand in a distinct category by themselves and they merit special treatment. I was therefore very happy when Ms Eleni Stamiris, Director of the Gender and Youth Affairs Division of the Commonwealth Secretariat decided to hold judicial colloquia for women's human rights in different parts of the Commonwealth for the purpose of sensitising judges to the human rights of women so that, while adjudicating on cases coming before them which involve women's issues, they remain keenly aware of women's human rights and interpret and apply the law in conformity with such rights.

Before I deal with the specifics of human rights of women, let me make a few general observations so far as the role of the judiciary vis-à-vis human rights is concerned, as it has relevance equally in relation to women's human rights so far as identification, protection and preservation of such rights is concerned.

Human rights are as old as human society itself, for they derive from every person's need to realise his essential humanity. They are not ephemeral, not alterable with time and place and circumstances. They are not the product of philosophical whim or political fashion. They have their origin in the fact of the human condition; and because of this origin, they are fundamental and inalienable. More specifically, they are not conferred by constitutions, conventions or governments. These are the instruments, the testaments, of their recognition; they are important, sometimes essential, elements of the machinery for the protection and enforcement of human rights, but they do not give rise to human rights. Human rights were born not of humans, but with humans.

The judiciary has to administer justice according to law. But the law must be one which commands legitimacy with the people and legitimacy of the law would depend upon whether it accords with justice. The concept of justice has no universally accepted definition. It has meant different things to different people, in different societies, at different times. It is, therefore, necessary to have a standard of values, especially of justice, against which a law can be measured. Such a standard must necessarily be superior to the law itself and would, therefore, constitute the highest rank in the legal hierarchy. There was a time when the standard of divine law as revealed by God to man in some holy scriptures was widely applied and served to confer legitimacy upon laws enacted by rulers. But over the years, religion as a standard of values began to lose

[7] See Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 6: Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Judicial Colloquium in Bloemfontein, South Africa, 3-5 September 1993* (London, Commonwealth Secretariat, 1995).

[8] For the conclusions of the Colloquia up to and including the fifth colloquium held in Oxford, see *Conclusions*, *supra* note 2.

its vitality and significance. Morality, though undoubtedly important and certainly complementary, was also found unable to solve the complicated problems of modern society and to provide a standard against which to judge the laws enacted by rulers. Some other ground had to be found to support a standard against which to judge the rulers' laws and thus ground was provided by the concept of human rights which for the first time found its formulation conceptually in the United States Bill of Rights and was then developed as a universal concept in the Universal Declaration of Human Rights[9] and elaborated in the various international human rights instruments which followed the Universal Declaration. The great principles set out in these documents may be summarised as follows:

(1) *the principle of universal inherence:* every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone.
(2) *the principle of inalienability:* no human being can be deprived of any of those rights, by the act of any ruler or even by his own act.
(3) *the rule of law:* where rights conflict with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

Most of these human rights as formulated in the various international human rights instruments are rights against the State, representing the Western liberal philosophy which sees "rights" as the duty of the State not to interfere with the freedoms and liberties of the individual. These human rights are common to men and women but there is a large category of human rights inhering in women which are unfortunately not recognised as human rights, and are therefore neglected.

Consequently it is necessary to inject gender perspectives into the concept of human rights, for whatever violations of human rights women suffer are usually shaped by gender. The development of a gender perspective in the human rights context facilitates understanding of how the exercise and enjoyment of human rights by women is adversely influenced by social construction of the female and male roles in which women are always subjected to a subordinate position. It calls for reconstruction of relations between men and women so that they are not based on inequality, domination and exploitation of women.

The concepts of equality and non-discrimination lie at the heart of a gender-sensitive perspective. Now obviously there are some aspects of life that are common to women and men, and clearly women should be accorded equal opportunity in those areas. In many ways, however,

[9] GA Res 217A (III), adopted on 10 December 1948.

women and men lead different lives and the human situation is not always gender-neutral. But a relevant human rights regime must not only guarantee equality in areas that are common to both sexes, but must also promote social justice to women in areas of private and civil life. The human rights which reflect the realities of women's situation must, therefore, include autonomy within the family, reproductive rights and conditions suitable for healthy reproduction, and sufficient economic resources to sustain women and their families. It is lack of education, inequality in access to employment, economic dependence on the husband and his family and above all social attitudes which are responsible for denial of social justice to women.

I may also point out that women have a fundamental right to information, education and access to family planning and other reproductive health services, including AIDS prevention. Motherhood must result from a free and informed decision by each woman. Women have a right to their bodily integrity even against their husbands. The English courts have held that there can be rape of a wife by her husband as that would be a violation of her human rights.

It is also necessary for us to bear in mind that human rights of women cannot be allowed to be violated on the ground of cultural or religious values. Cultural relativism or misconceived religious dogmas cannot be an excuse for violations of human rights. This is something which has to be borne in mind by judges when women's issues come up for consideration.

There has been neglect of women's human rights in the mainstream of human rights. There are three reasons for this:

(1) mainstream human rights bodies have an overwhelmingly male membership;

(2) an underlying schism over the relative importance of civil and political rights versus economic, social and cultural rights. Despite the rhetoric about the indivisibility of human rights, traditional civil and political rights have received the bulk of attention within the mainstream human rights discourse. Human rights theorists from the West — particularly from the United States — see "rights" as the duty of governments not to interfere with the civil and political liberties of citizens. By contrast, many Third World countries argue for the primacy of economic and social rights, guarantees that create a positive obligation on State governments to meet basic human needs. Since many women's issues emanate from their position as the majority of the vulnerable sections of the society, the general neglect of economic and social rights means that women's concerns are further neglected.

(3) The mainstream's insistence on a division between public and private responsibility is also responsible for this situation. Traditional human rights theory primarily focuses on violations perpetrated by the State

against individuals, such as torture, arbitrary arrest, and wrongful imprisonment. Under this framework, mainstream theorists do not recognise wife assault and other forms of violence against women as human rights violations because such acts are perpetrated by private individuals and not by the State. Violence against women is the touchstone that illustrates the mainstream limited concept of human rights. The dichotomy between public and private responsibility when applied to the reality of woman's life leads to absurd distinctions. Rape by a police officer, for example, becomes a violation, while rape by a stranger, husband or acquaintance does not. The state should be held responsible for failing to protect the woman on the ground that the physical integrity of the woman is violated. Is it not a violation of the human rights of the woman?

There is need for revisioning of the concept of human rights. The most important of all human rights is the right to life set out in article 6 of the International Covenant of Civil and Political Rights,[10] which forms part of customary international law. The right is concerned with the arbitrary deprivation of life through public action, i.e. State action. But protection from arbitrary deprivation of life or liberty through public action, important as it is, does not address how being a woman is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. From conception to old age, womanhood is full of risks which are not attendant upon men: of abortion and infanticide because of the social and economic pressure to have sons in some cultures, of malnutrition because of social practice of giving husbands and sons food in priority, of less access to health care than men, of endemic violence against women in all States. There is overwhelming evidence of violence against women but this high level of documented evidence around the world is unaddressed by the international notion of the right to life, because this international norm is focused on "public actions" by the State. So also the right to be free from torture has failed to encompass domestic violence or violence in the family, sexual harassment in the work place or genital mutilation, again because the focus of international notion of freedom from subjection to torture is public action by the State. Further, human rights practice has failed to address adequately, as violations of human rights of women, acts of violence directed at women in situations of economic, civil or political turmoil or during international or internal conflicts. These are regarded as appropriate subjects of concerns of international humanitarian law and not of international human rights law.

[10] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

Violence against women is a violation of women's human rights, though, as I have earlier pointed out, it is not regarded as such by the human rights activists trained in the Western liberal thought. Some of the areas of violence may be set out as follows:

(1) Domestic violence and rape;
(2) Genital mutilation or traditional practices of female circumcision;
(3) Trafficking in women;
(4) Gender-based violence against women refugees and asylum-seekers;
(5) Violence associated with prostitution and with pornography;
(6) Violence in the work place, including sexual harassment; and
(7) Dowry deaths in India and some other countries.

These are the types of violence which need to be addressed by the judiciary. It is the duty of the State in all its departments, executive, legislature and judiciary, to take steps to prevent such violence, since it constitutes violation of women's human rights and to punish the guilty and direct payment of compensation to the women victims. Judicial sensitivity is most essential for protection and enforcement of women's human rights.

I may also point out that the language used in human rights instruments and court proceedings and judgments is unfortunately not gender-neutral. It is always male-oriented and is reflective of a world where the male is the only representative of the human species. One of the most regrettable uses, humiliating to women, is what we find in the interpretation statutes of many of the Commonwealth countries where "man" is defined as including "woman". It must be noted that language both defines and perpetuates reality. At present, the continuing use of male-defined language which is androcentric, stereotypical, discriminatory and exclusionary, maintains the current imbalance in power relations and contributes to a situation in which women are unable to exercise and enjoy their human rights. It painfully conditions all thinking about social problems and processes. It has the further effect of obscuring women, their experiences and their social value and contributing to the perpetuation of a society in which women are regarded as lesser beings. The use of sexist language must therefore be avoided and I would like to impress upon the judiciary always to use gender-neutral language. That will help to create a judicial culture of respect for women's human rights.

Many judges may not be aware that some of women's human rights are recognised in the Convention for the Elimination of All Forms of Discrimination against Women[11] but this Convention does not

[11] 1249 UNTS 13.

specifically prohibit gender-based violence or place any explicit responsibility on States parties to eliminate or at least to reduce it. However, there is an impressive body of jurisprudence, both international and national, concerning women's human rights. This jurisprudence is of practical relevance and value to judges and lawyers generally. Of course, where the language of the law is clear, then the judge must give effect to it but there are many cases where the domestic law — whether constitutional, statutory or common law — is ambiguous, uncertain or incomplete or capable of bearing an interpretation consistent with the international norms of women's human rights, and in such cases the *Bangalore Principles* require that national courts should have regard to these international norms and must mould and develop the law consistent with these norms. Judges have a creative function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must interpret these rules so as to reconcile them with the wider objectives of justice which are encapsulated in the international norms of women's human rights. So long as judges are sensitive to women's human rights and are prepared boldly to advance the law through a process of creative interpretation, women's human rights will be safe. Judges must remember that with changing human consciousness and renovation of social reconstruction of human relationships, the law cannot afford to stand still: it must move forward and satisfy the hopes and aspirations of women who constitute half the world's population. The Goddess of Justice is shown blind-folded in Anglo-Saxon jurisprudence, but I do not agree with this image. The Goddess of Justice, in my view, should keep her eyes wide open to see the injustice and inequality from which women suffer. If she does not, she will lose her credibility and the vulnerable sections of the community like women will lose faith in her capacity to give justice.

GENERAL HUMAN RIGHTS INSTRUMENTS AND THEIR RELEVANCE TO WOMEN

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*Jane Connors**

Introduction

The purpose of this paper is to examine the general human rights standards — frequently described as the "mainstream" human rights standards — and their relevance to women. At the outset, I would like to put the material I am about to discuss into some form of context and secondly, I would like to point to a number of problems which have been identified as presenting obstacles so far as the application of the general human rights standards to women is concerned. These obstacles, which are evident at the international level, will recur as themes in our discussion of the domestic application of the general standards of human rights for the benefit of women.

Since the beginning of this decade it has been increasingly recognised that the vision of human rights and the mechanisms that exist to concretise this vision, although framed as available to women and men on the basis of equality, have profited women less than men. In response to this recognition, many human and women's rights activists have worked to redefine the meaning of human rights to encompass the specific experiences of women. This work has been repaid by remarkable advances over the last few years:

- In June 1993, at the Vienna World Conference on Human Rights the international community openly acknowledged that the body of international law and mechanisms established to promote and protect human rights has not properly taken into account the concerns of over half the world's population. States formally recognised the human rights of women as "an inalienable integral and indivisible part of human rights" and expanded the international human rights agenda to include gender specific violations.[1]
- In December 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women.[2] This Declaration categorises gender-based violence

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1 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/CONF.157/24, at 33, para 18 (1993), 32 ILM 1661.

2 Declaration on the Elimination of Violence against Women, GA Res 48/104 (1994), 1 IHRR 329. The text of the Declaration is also reproduced in Jane Connors and Andrew Byrnes, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Commonwealth Secretariat and International Women's Rights Action Watch, 2nd ed 1996).

against women as an issue of human rights generally and one of sex discrimination and inequality in particular.

- In March 1994, the United Nations Commission on Human Rights agreed to appoint its first gender specific human rights mechanisms, the *Special Rapporteur on violence against women, its causes and consequences.*[3]
- In September 1994, the international community underscored the importance of the right to health, including reproductive choice for women, at the International Conference on Population and Development in Cairo.[4]
- In September 1995, the Beijing Declaration and Platform for Action, adopted at the United Nations Fourth World Conference on Women, confirmed women's rights as human rights and the human rights of women and the girl-child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms. The Platform underlined the human rights implications of violence against women, particularly in armed conflict and focused on violation of the human rights of women resulting in refugee flows and the vulnerability of refugee women to further violations of their human rights.[5]

Work to bridge more fully the acknowledged gap between women and the mainstream human rights framework has not stopped at these very visible advances, but has also included resolutions manifesting political commitment passed by the General Assembly, the Economic and Social Council, the Commission on the Status of Women and the Commission on Human Rights, and the revision of working methods by a number of key human rights treaty bodies. It also included the formulation, in 1995, of guidelines to incorporate a gender perspective into the international human rights system.[6]

The limitations of the existing international human right system

These developments are clearly pleasing. At the same time, they do raise my second preliminary inquiry: what are the factors which have seemed to prevent the international human rights system — framed as available without discrimination on the basis of sex, as we shall see — from

[3] CHR Res 1994/45, UN Doc E/CN.4/1994/132, at 140 (1994). In 1997 the mandate of the Special Rapporteur was renewed for a further three years: CHR Res 1997/44.

[4] *Report of the International Conference on Population and Development,* UN Doc A/CONF.171/13 (1994).

[5] Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women, Beijing, September 1995,* UN Doc A/CONF.177/20 (1995), 35 ILM 401.

[6] For a recent review of the steps taken towards integration of women's human rights into the human rights activities of the United Nations, see Anne Gallagher, "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System" (1997) 18 *Human Rights Quarterly* 283. See generally *The United Nations and the Advancement of Women 1945-1996,* The United Nations Blue Books Series, vol VI (New York, United Nations, rev ed 1996).

working effectively to improve the situation of women? These factors can be summarised as follows:

- The process by which human rights were conceptualised and defined did not involve significant participation by women. This may explain why the definition of substantive human rights rarely incorporates an element of gender. Indeed, core human rights are defined "gender neutrally" and so prevent an immediate recognition that equal treatment of persons in unequal situations will frequently operate to perpetuate rather than alleviate injustice.
- Many issues of central concern to women — underdevelopment, illiteracy, the adverse impact of structural adjustment programmes, gender segregation, systematic violence — have not been defined as human rights issues or made the subject of legally binding norms. Principal human rights bodies and procedures have thus failed to address these issues.
- International human rights law effectively excludes many actions occurring at the hands of non-state actors and those which take place in the private sphere — in particular, that most private of spheres — the family. This has served to exclude the numerous violations which are committed against women in their communities, their workplace and in their own families from the purview of international human rights.
- Both *de jure* and *de facto* discrimination against women and other violations of their rights — in areas such as family law, nationality, bodily integrity, freedom of expression and liberty of movement — are justified by governments on the basis of culture, religion and ethnicity. These justifications not only obscure violations against women, but inhibit firm responses from the international human rights framework.

While these factors are worthy of detailed examination, I mention them here merely to provide a backdrop to my discussion of how the general framework has responded to women's concerns. Necessarily, these factors are of relevance to a determination of whether the response of international bodies can be improved.

The guarantees of non-discrimination on the basis of sex

The principle of non-discrimination on the basis of sex (defined and applied with reference to men) is specifically included in the United Nations Charter[7] and the Universal Declaration of Human Rights.[8] It is

[7] Charter of the United Nations, adopted on 26 June 1945, entered into force 24 October 1945, articles 2, 3 and 55.

[8] See in particular article 2 of the Universal Declaration of Human Rights, GA Res 217A (III), adopted on 10 December 1948.

also guaranteed in the International Covenant on Civil and Political Rights (ICCPR)[9] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[10] which each contain in article 3, in almost identical terms, a special provision binding States parties to ensure the equal rights of men and women in the enjoyment of the rights enumerated in the instrument.[11]

Both covenants also include a general non-discrimination article, which includes "sex" among the prohibited heads of differential treatment.[12] The ICCPR, moreover, incorporates in article 26 a guarantee of equality and equal protection before the law which guarantees individuals equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[13] The non-discrimination norm is also found in the Convention on the Rights of the Child (the Children's Convention)[14] and is elaborated most fully in the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention).[15] Each of these instruments, and most particularly the Children's Convention and the Women's Convention, contain specific provisions relating to the human rights of women and/or the girl-child. Neither the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)[16] nor the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention)[17] contain any reference to the principle of non-discrimination on the basis of sex.

[9] 999 UNTS 171.

[10] 993 UNTS 3.

[11] Article 3 of the ICCPR [ICESCR] provides:

> "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights [all economic, social and cultural rights] set forth in the present Covenant."

[12] Article 2(1) of the ICCPR provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 2(2) of the ICESCR provides:

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[13] Article 26 of the ICCPR provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[14] Convention on the Rights of the Child, GA Res 44/25, UN Doc A/44/49 (1989), at 166, reprinted in 28 ILM 1448 (1989). Article 2(1) of the Convention provides:

> "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

[15] 1249 UNTS 13.

[16] 1465 UNTS 85.

[17] 660 UNTS 195.

The role of the human rights treaty bodies

Monitoring of the implementation by States parties of their obligations under each of the treaties is the work of expert committees which are usually provided for under the terms of the individual treaty.[18]

The monitoring of States parties' performance occurs in a number of ways. First, each treaty body is empowered to examine the reports that States parties are obliged to submit under the respective treaties. This examination initiates dialogue between the Committee and the State party and provides a forum for the elaboration of the meaning of substantive rights in the individual treaties. Following its discussion with the State party, each treaty body also formulates "concluding observations" relating to individual State reports, thus allowing it to make specific suggestions for improvement. Each is also empowered to formulate "general comments" or "general recommendations", which usually take the form of detailed explanations by the relevant treaty body of the content of a particular right established by the convention or of the impact of these rights in a particular context, thereby contributing to the development of an international jurisprudence of human rights.

Three of the treaty bodies – the Human Rights Committee, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture (CAT) — are able to receive and act upon allegations of violations made by individuals against State parties and/or by States parties against other States parties — provided the relevant State party has agreed to subject itself to such a procedure. It is hoped CEDAW will soon have such a procedure.[19]

The specific gender integration mandate of the United Nations is relatively recent, but a number of the treaty bodies have developed a significant jurisprudence relating to women. The Human Rights Committee, the oversight body of the ICCPR, has been advantaged by the existence of the First Optional Protocol to the Covenant,[20] which permits it to examine complaints from individuals alleging violation of human rights. Under the treaty, discrimination on the basis of sex is

[18] See generally the chapters on each of the treaty bodies in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992). A revised and updated edition of this volume is scheduled to appear in 1998. See also Michael O'Flaherty, *Human Rights and the UN Practice before the UN Treaty Bodies* (London, Sweet & Maxwell, 1996).

[19] On the development of an Optional Protocol, see generally Andrew Byrnes, "Slow and Steady wins the Race? The Development of An Optional Protocol to the Women's Convention", paper presented at *Panel on Compliance with the International Human Rights of Women,* American Society of International Law, 91st Annual Meeting, Washington, DC, 9-12 April 1997; Andrew Byrnes and Jane Connors, *ASIL Newsletter,* June-August 1996, 10; and Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination against Women?", 21(3) *Brooklyn Journal of International Law* 679 (1996); and Elizabeth Evatt, "The Right to Individual Petition: Assessing its Operation before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination" in *Proceedings of the 89th Annual Meeting of the American Society of International Law* (1995) 227. Latest information on the current draft and developments can be obtained from the website of the UN Division for the Advancement of Women: http://www.un.org/DPCSD/daw/.

[20] 999 UNTS 301.

prohibited and equality in the enjoyment of rights set forth in the convention is guaranteed. Non-discrimination or special provisions on the basis of sex is mentioned in articles other than articles 3 and 26, for example, relating to derogation of rights in times of public emergency (article 4), the death penalty (article 6), family (article 23), the rights of the child (article 24), public life (article 25) and as noted earlier, equality before the law and equal protection of the law (article 26).

Other articles to which a gender perspective may be especially important include the right to life (article 6), torture (article 7), slavery (article 8), liberty of movement and choice of residence (article 12) and recognition as a person before the law (article 16).

The Human Rights Committee[21] stands above the other treaty bodies, with the exception of the Committee on the Elimination of Discrimination against Women (CEDAW), in its willingness to deal with the concept of discrimination and to extend the prohibition of discrimination to other rights protected in the Covenant. It has formulated a general comment on the meaning of non-discrimination[22] and is currently working on expanding its very early and rather limited comment on article 3.[23] A number of its other general comments show a level of gender sensitivity, eg *General comment 19(39)* on marriage and the family adopted in 1990.[24] Gender discrimination has featured as an issue in a number of the complaints the Committee has resolved — on the whole to the advantage of women — under the Optional Protocol.[25] The Committee regularly questions States about the *de facto* and *de jure* position of women, and amended its reporting guidelines in 1995 to request States parties to provide gender-specific information in this respect.[26]

[21] For a comprehensive discussion of the Covenant and the jurisprudence and practice of the Committee up to 1993, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, N P Engel, 1993). See also Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, Clarendon Press, 1991). Torkel Opsahl, "The Human Rights Committee" in Philip Alston (ed), *The United Nations and Human Rights* (Oxford, Clarendon Press, 1992) 369 at 422-423.

[22] Human Rights Committee, *General comment 18(37)*(adopted in 1989), UN Doc HRI/GEN/1/Rev.2, at 26 (1996).

[23] *General comment 4(13)* (adopted in 1981), UN Doc HRI/GEN/1/Rev.2, at 4 (1996). See "Follow-up action on the Conclusions and Recommendations of the sixth meeting of persons chairing the treaty bodies", UN Doc HRI/MC/1996/2 (1996).

[24] *General comment 19(39)*, UN Doc HRI/GEN/1/Rev.2, at 28 (1996).

[25] *Aumeeruddy-Cziffra v Mauritius*, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)* (New York, United Nations, 1985), vol 1, at 67 [hereinafter *Selected Decisions, vol 1*], (1985) 67 ILR 285, 2 HRLJ 139; *Lovelace v Canada*, Communication No 24/1977, *Selected Decisions, vol 1*, at 83, 68 ILR 17, 2 HRLJ 158; *Zwaan de Vries v Netherlands*, Communication No 182/1984, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 (1990) [hereinafter *Selected Decisions, vol 2*], at 209; *Ato del Avellanal v Peru*, Communication No 202/1986, *Report of the Human Rights Committee in 1989*, UN Doc A/44/40, Annex X.C, at 411; *Broeks v Netherlands*, Communication No 172/1984, *Selected Decisions, vol 2*, at 196; *Vos v Netherlands*, Communication No 218/198, UN Doc A/44/40, Annex XI.G, at 232; *J A M B-R v Netherlands*, Communication No 477/1991, UN Doc A/49/40, Annex X.J, at 294, (1994) 1(3) IHRR 39.

[26] For the revised guidelines of the Committee, see Guidelines regarding the Form and Contents of Periodic Reports from States parties, UN Doc CCPR/C/20/Rev.2 (1995), and Guidelines regarding the Form and Contents of Initial Reports from States parties, UN Doc CCPR/C/5/Rev.2 (1995).

Nonetheless, there is a certain element of inconsistency in the Committee's approach. Many of its general comments – for, example, those dealing with torture and the right to bodily integrity,[27] the right to life,[28] and freedom of thought, conscience and religion[29] — fail to examine substantive rights through the lens of gender, and thereby preclude the elaboration of the meaning of substantive rights to provide States and domestic decision-makers (including judges) with guidance as to the measures required to ensure women equal opportunity in the enjoyment of rights. Moreover, where complaints under the Optional Protocol are concerned, the Committee is more comfortable with facially discriminatory provisions, which generally it will have no hesitation in finding to be a violation of the ICCPR. It is less willing to look behind complex or apparently neutral legislation, such as social security provisions which may involve indirect discrimination. However, the Committee is clearly committed to incorporating gender in its work and is taking serious steps to do so.

The Committee on Economic, Social and Cultural Rights (the Economic Committee) is charged with overseeing the implementation of the ICESCR.[30] As is the case with the ICCPR, the ICESCR contains a specific prohibition of sex-based discrimination (article 2) and extends this to all rights protected under the Covenant (article 3). Special provision relating to discrimination on the basis of sex also made in two other articles: right to equal remuneration (article 7) and in relation to marriage and the family (article 10). Other articles of particular relevance to women include the right to work (article 6), the right to social security (article 9), the right to health (article 12) and the right to education (article 13). Unlike the Human Rights Committee, the Economic Committee has no communications mechanism, although one has been under consideration in recent years.[31] However, in the same way as the Human Rights Committee, the Economic Committee regularly questions States parties on women's enjoyment of the rights in the Covenant, a task facilitated by its innovative methods and procedures, incorporating discussion days, soliciting information from different sources and non-

[27] *General comments 7(16)* and *9(16)* (both adopted in 1982), UN Doc HRI/GEN/1/Rev.2, at 7 and 9 respectively (1996). These general comments were, however, replaced in 1992 by *General comments 20(44)* and *21 (44)*, UN Doc HRI/GEN/1/Rev.2, at 30 and 33 respectively (1996). In the former of these the Committee, although not adopting a comprehensive gender analysis of the guarantee, made explicit that States parties were under an obligation to address the infliction of torture or cruel, inhuman or degrading treatment by private actors: *id* at 30, paras 2 and 13.

[28] *General comment 14(23)* (adopted in 1984), UN Doc HRI/GEN/1/Rev.2, at 18 (1996).

[29] *General comment 10(19)* (adopted in 1983), UN Doc HRI/GEN/1/Rev.2, at 11 (1996).

[30] On the work of the Committee, see generally Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, Clarendon Press, 1995).

[31] For the result of the latest discussions of the Committee on the issue and the recommended text of a draft protocol, see Committee on Economic, Social and Cultural Rights, "Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications concerning non-compliance with the International Covenant on Economic, Social and Cultural Rights", *Report on the Fourteenth and Fifteenth Sessions*, UN Doc E/1997/22, Annex IV.

governmental organisation participants, which allow it to gain a greater insight into problems affecting women in their enjoyment of rights. The concluding observations of the Economic Committee regularly make reference to discrimination against women in the enjoyment of economic, social and cultural rights and its revised reporting guidelines require some minimal coverage of women's interests. Its general comments suggest a serious attempt to introduce a gender perspective, through rigorous amplification of the meaning of each right from a gender perspective. The Committee's commitment to a gendered interpretation of its Covenant is manifested in its current work to elaborate a general comment on that theme. When completed, this comment, as well as the existing general comments of the Committee, will be instructive for national decision-makers.

The final treaty bodies I will consider — leaving CEDAW and the Committee on the Rights of the Child to others — are the Committee on the Elimination of Racial Discrimination and the Committee against Torture. The former, established to oversee the Racial Discrimination Convention, has done little to address discrimination against women. The Racial Discrimination Convention does not refer explicitly to women and there has been no reference either in the reporting system and through general comments to gender discrimination generally or the interplay of race and sex discrimination in particular.

Certainly, CERD has considered one communication from a woman under its optional communication procedure relating to race discrimination in *Yilmaz-Dogan v Netherlands*.[32] The complainant was a Turkish national living in the Netherlands whose employment had been terminated because of her pregnancy. She alleged that she had been subjected to racial discrimination since she claimed that her employer was of the view that foreign women (unlike Dutch women) did not give up work on having children, but rather continued to work and take extended sick leave. Her case was that had she been Dutch and not Turkish, she would not have been dismissed and that her dismissal constituted a violation of several articles of the Convention.[33] The Committee concluded that Ms Yilmaz-Dogan had not been afforded protection in respect of her right to work and directed the Netherlands to ascertain whether she was currently gainfully employed and, if not, to provide her with alterantive employment.

The Committee against Torture has yet to reveal an awareness of the gender dimensions of torture, despite increasing attention by other parts of the human rights system to the gendered aspects of torture, and

[32] Communication No 1/1984, UN Doc A/43/18, Annex IV (1988).

[33] These included article 5(a)(i), which obliges a State party to ensure that a person enjoys the right to gainful work and protection against unemployment without discrimination on the ground of race; and article 6, which requires a State party to ensure protection against racial discrimination, including the provision of legal remedies for discrimination.

[34] See Andrew Byrnes, "The Convention against Torture" in Kelly Askin and Dorean Koenig (eds), *Women's International Human Rights: A Reference Guide* (Transnational Publishers, forthcoming 1997).

academic criticism.[34] CAT, like CERD, was however, represented at the Glen Cove meeting of the human rights treaty bodies at which the human rights apsects of women's right to health were discussed.[35] The responsibility of all treaty bodies to reflect a gender approach in their interpretation of rights was stressed at this Roundtable and it may well be that the approach of the committees will be affected by the recommendations agreed at Glen Cove.

A comprehensive coverage of the general human rights standards and their relevance to women would entail a survey of the regional human rights systems — European,[36] Inter-American,[37] and African[38] — the first two of which have devoted significant attention to women, the last less so. Suffice it to say that each relies on the general norm of non-discrimination on the basis of sex rather than entrenching specific human rights for women. The European Convention on Human Rights and the American Convention on Human Rights, unlike the ICCPR, contain no freestanding guarantee of equality before the law or equal protection of the law; the African Charter on Human and Peoples' Rights contains guarantees similar to those of the ICCPR.[39] Litigation under the European and American Conventions is thus confined to claims of discrimination in the enjoyment of the substantive rights guaranteed by the two Conventions.[40] Despite this limitation, there have been a number of gender-based complaints from women brought before the Strasbourg organs under the European Convention.[41] Not all of these have been formulated as claims of discrimination and, even where they have been, not all of them have been decided on that basis, the Commission and the Court appearing to be of the view that if violation of a convention right is established as such, an added claim for discrimination simply gilds the lily and does not need to be determined.[42] There

35 *Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Reproductive and Sexual Health Rights*, Glen Cove, New York, December 1996.

36 See the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221. The European system is shortly to undergo major institutional reform: the amended text of the Convention and the protocols adopted to date are reproduced at 15 HRLJ 102.

37 See the American Convention on Human Rights 1969 ("Pact of San José, Costa Rica"), 1144 UNTS 123.

38 See the African Charter on Human and Peoples' Rights 1981, OAU Doc CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 58 (1982).

39 African Charter on Human and Peoples' Rights, articles 2 and 3.

40 Article 14 of the European Convention provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of the American Convention on Human Rights (and article 2 of the African Charter) are in similar terms.

41 See generally Maud Buquicchio de Boer, *Equality between the sexes and the European Convention on Human Rights: A Survey of Strasbourg Case Law*, Human rights files No 14 (Strasbourg, Council of Europe, 1995).

42 See D J Harris, M O'Boyle and C Warbrick, *The Law of the European Convention on Human Rights* (London, Butterworths, 1995) at 468-469.

have also been a number of cases brought before the Inter-American Commission and Court of Human Rights raising similar issues.[43]

It is impossible neatly to categorise the litigation, but suffice it to say that it has included complaints of disparate treatment of unmarried mothers vis-à-vis their children,[44] state failure to provide a remedy in the face of private violence,[45] sex discrimination in paternity rights,[46] differential treatment of the foreign husbands of female citizens,[47] claims of self-determination in reproductive choice,[48] discrimination in taxation,[49] and requirements regulating the adoption of a family name or the retention by a woman of her maiden name.[50] A number of cases which have been decided on the basis of substantive rights and not on the ground of discrimination have been important from the point of view of women's human rights; one of the most important of these held that restrictions on women's access to information about abortion services available abroad were an impermissible restriction on freedom of expression.[51] Of similar importance was the Court's judgment rejecting a challenge brought against the decisions of the English courts in which the applicants were found guilty of marital rape.[52] Two cases have also concerned rape in war and civil unrest, where rape was characterised as torture or cruel, inhuman or degrading treatment.[53]

The results of this litigation have been mixed, but like the matters that have come before the international bodies, the issues dealt with have been relatively easy analytically, raising in the main facial discrimination issues rather than indirect discrimination claims.

[43] See, eg, *Baby Boy case*, Inter-American Commission of Human Rights, case 2141 (United States of America), Resolution No 23/81, 6 March 1981, (1981) 2 HRLJ 110 (permissibility of abortions in the light of the right to life); *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No 4, 79 ILR 282, 5 HRLJ 161.

[44] *Marckx v Belgium*, European Court of Human Rights, Judgment of 13 June 1979, Series A, No 31, 2 EHRR 330.

[45] *X and Y v Netherlands*, European Court of Human Rights, Judgment of 26 March 1985, Series A, No 91, 81 ILR 91, 8 EHRR 235 (gap in national law which meant that criminal sanctions were not available against person who sexually assaulted mentally handicapped girl a violation of the Convention).

[46] *Rasmussen v Denmark*, European Court of Human Rights, Judgment of 28 November 1984, Series A, No 87, 7 EHRR 371.

[47] *Abdulaziz, Balkandali and Cabales v United Kingdom*, European Court of Human Rights, Judgment of 28 May 1985, Series A, No 94, 81 ILR 139, 7 EHRR 471.

[48] See, eg, *Paton v United Kingdom*, European Commission of Human Rights, Application No 8416/78, decision on admissibility of 13 May 1980, 19 D&R 224, 3 EHRR 408 (finding that national court's denial of alleged right of unmarried father of child to prevent mother from obtaining an abortion did not involve violation of the father's rights under the Convention). But see also *Brüggeman and Scheuten v Federal Republic of Germany*, European Commission of Human Rights, Application No 6959/75, Report of 12 July 1977, 10 D&R 100, 3 EHRR 244 (upholding restrictions on access to abortion).

[49] *Lindsay v United Kingdom*, European Commission of Human Rights, Application No 11089/84, decision on admissibility of 11 November 1986, 49 D&R 181, 9 EHRR 555.

[50] *Burghartz v Switzerland*, European Court of Human Rights, Judgment of 22 February 1994, Series A, No 180-B, 18 EHRR 101.

[51] *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland*, European Court of Human Rights, Judgment of 29 October 1992, Series A, No 246, 15 EHRR 244.

[52] *SW v United Kingdom*, *CR v United Kingdom*, European Court of Human Rights, Judgments of 22 November 1995, Series A, Nos 335-B and 335-C, 21 EHRR 363.

[53] *Cyprus v Turkey*, European Court of Human Rights, Applications No 6780/74 and 6950/75, 4 EHRR 482, 62 ILR 4, paras 358-74 (rape by soldiers constituted inhuman treatment); *Sükrin Aydin v Turkey*, European Commission of Human Rights, Application No 2317/94.

Relevance of the international practice to domestic advancement of women's human rights

There has been much exploration of the relevance to adjudication by domestic courts of the pronouncements of international bodies — whether in the form of treaty provisions or guarantees contained in other international instruments, binding judgments, non-binding views, general comments or recommendations and concluding observations. The series of judicial collloquia organised by the Commonwealth Secretariat on exactly this theme has contributed significantly to the discussion of the possibilities and problems of drawing on international jurisprudence to enhance the interpretation of national constitutions and laws and to develop the common law generally.[54] Many of the same issues arise in the context of utilizing international norms to advance women's human rights at the domestic level and, indeed, a number of the significant cases in which international standards have been drawn on have involved women's human rights.[55]

There is no doubt that, despite the orthodox doctrine that unincorporated treaties do not form part of domestic law that obtains in many Commonwealth countries, they can legitimately be drawn on to inform the process of domestic adjudication. Many Commonwealth courts have shown themselves open to these influences and it is to be hoped that others will follow suit, supported by the legal profession.

Conclusion

This brief review of the mainstream mechanisms indicates that this framework has very often responded positively to promote the interests of women. Nonetheless, the value of this framework in this regard is limited by the fact that it has been more able to address claims of women which involve allegations of violations identical to those men might suffer, as well as claims by women to rights, entitlements or privileges they would enjoy if they were men. Moreover, the framework is far more responsive to "public" rather than "private" violations of rights, such as rights to nationality and legal personality. In addition, the litigation has involved little complex gender analysis and continues to reflect an androcentric model of women's entitlements by virtue of human rights guarantees.

Recent years have seen significant progress in the approach of the mainstream procedures to issues of gender. Reflective of the fact, however, that public attention at the international level has focused predominantly on issues of gender-based violence, it is this issue that has

[54] See generally Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992).

[55] See Andrew Byrnes, "Human Rights Instruments Relating Specifically to Women, with particular emphasis on the Convention on the Elimination of All Forms of Discrimination against Women" in this volume, *infra*, p 39.

attracted the greatest response from these mechanisms. It is only now that a pro-active gender analysis of general norms has begun in earnest. Pro-active analysis, combined with gender mainstreaming, will ensure that the past approach of "just add women" is now being substituted by a reappraisal so as to achieve a qualitative change in the relevant institutions, laws and procedures.

HUMAN RIGHTS INSTRUMENTS RELATING SPECIFICALLY TO WOMEN, WITH PARTICULAR EMPHASIS ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

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*Andrew Byrnes**

Introduction

International concern with the position of women and the reflection of that concern in treaties regulating particular fields of social activity is no new phenomenon, going back in some instances to the end of the 19th century (or even earlier). The first half of the 20th century saw the adoption of treaties which address particular social problems such as trafficking in persons or which sought to regulate the participation by women in the labour force. Since the second world war a number of instruments have been adopted which address discrimination against women in public and private life and which seek to advance the equality of women and their full enjoyment of fundamental human rights and freedoms.

The purpose of this paper is to examine the ways in which international conventions which explicitly address gender issues can be drawn on in domestic litigation to help advance the human rights of women. The major focus of the discussion is the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention" or "the Women's Convention").

The first section of the paper gives a brief overview of international legislation relating to women. The second outlines the structure and content of the Convention, describes the monitoring system established under it, and highlights the output of the Convention system that may be of use in proceedings before national courts. The third section reviews the status of treaties in common law systems and their relevance to domestic litigation. The final section describes a number of domestic cases in which the Convention has been invoked by the parties or by national courts.

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International concern with issues particularly affecting women or with sex discrimination

The gender-specific international conventions that have been adopted over the years reflect a variety of stances with respect to the proper role of women in society and their entitlement to participate fully in all fields of social activity.[1] Times and attitudes have changed considerably since the early part of the century and these changes have been reflected in the adoption of new instruments and the revision or abandonment of older ones that are no longer felt to be appropriate to modern times. Nevertheless, international legislative activity is a slow process and takes place on many fronts — older conventions which reflect ideas that have had their day in the view of many members of the international community may coexist with instruments reflecting a more modern outlook: not all international legislators necessarily share the same views about the roles of women as other institutions, and the slow process of adoption and adhesion to international treaties can mean that conceptions that are a generation old continue to prevail by default. The nature of treaty regimes may lead to an overhang of older treaties, with some States being party to older treaties while others have moved on to be governed by more modern treaties.

A typology of gender-specific international conventions

One scholar, Natalie Kaufman Hevener, has developed a typology of international conventions and other instruments addressing gender-specific issues adopted in the period since 1945. She has classified these conventions into three categories (while recognising that some conventions may contain provisions from one or more of the categories): *protective* conventions, *corrective* conventions, and *non-discriminatory* conventions.[2] These categories are equally applicable to those treaties adopted before 1945.

Protective instruments are those "which reflect a societal conceptualization of women as a group which either should not or cannot engage in specified activities", the protection "normally [taking] the form of exclusionary provisions, articles which stipulate certain activities from which women are prohibited".[3] Conventions which prohibit or limit women's participation in night work or underground

[1] See the list of gender-specific treaties in Annex A.

[2] See generally Natalie Kaufman Hevener, *International Law and the Status of Women* (Boulder, Co, Westview, 1983)[hereinafter *International Law*]. For an earlier discussion, see Hevener, "International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women" (1978) 1 *Harvard Women's Law Journal* 131. See also Betty G Elder, "The Rights of Women: Their Status in International Law" (1986) 25 *Crime and Social Justice* 1, and Anne M Trebilcock, "Sex Discrimination" in Rudolf Bernhardt (gen ed), *Encyclopedia of public international law* (Max Planck Institute for Comparative Public Law and International Law), vol 8, at 476 (Amsterdam, North-Holland Pub Co, 1985).

[3] Hevener, *International Law*, *supra* note 2, at 4.

work are examples of this type of convention, as are provisions which limit women's participation in activities for reasons related to women's reproductive capabilities.[4]

Corrective instruments also "identif[y] women as a separate group which needs special treatment, but corrective provisions are significantly different from protective ones. The aim of the corrective provisions is to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area."[5] Conventions which address trafficking in women, those which seek to remedy the disadvantages which women historically faced in the realm of nationality upon marriage to a person of another nationality, and conventions which seek to ensure that women enter into marriage only with their free and full consent are the primary examples of this type of convention.[6]

Non-discriminatory instruments "reject a conceptualization of women as a separate group, and rather reflect one of men and women as entitled to equal treatment ... These provisions treat women in the same manner as men. When women are specifically referred to as a class, it is only with the aim of ending existing separation or special treatment".[7] Examples of such instruments or provisions are the Charter of the United Nations, the Universal Declaration of Human Rights, the equality provisions of the two International Covenants and ILO instruments on equal remuneration for equal work by men and women workers.[8]

As Hevener points out, some instruments may contain elements of different approaches,[9] thereby reflecting unresolved tensions about the position of women in society or the view that genuine equality for women can only be achieved by a combination of different approaches tailored to the context of specific problems. Hevener considers that the Women's Convention contains elements of all three approaches, though she notes that the Convention is overwhelmingly based on a model of non-discrimination.[10]

Areas of concern

The following are the principal subject areas that have been addressed by gender-specific international instruments adopted in the last 100 years:[11]

- *Trafficking conventions:* those conventions originally directed at the so-called "white slave trade" (although it may be noted that the earlier

4 *Id* at 6-9.
5 *Id* at 4.
6 *Id* at 9-12.
7 *Id* at 4.
8 *Id* at 12-18.
9 *Id* at 18-21.
10 *Id* at 28-45.
11 See the list of conventions at Annex A.

anti-slavery conventions also addressed violations of human rights of which women were victims). From the 19th century conventions onwards, there has been a fairly regular reenactment of prohibitions on or regulation of various aspects of trafficking in women, including prostitution and the exploitation of others within national boundaries as well as across them.

- *International labour conventions:* these conventions, adopted within the framework of the International Labour Organisation, have sought to regulate the working conditions of women workers specifically as a group; they include conventions relating to night work by women, underground work by women, maternity protection, equal remuneration, and non-discrimination in employment and occupation.
- *Conventions dealing with specific issues of civil and political rights and status:* these conventions, adopted after the second world war within the United Nations by the Commission on the Status of Women, address areas where women may face particular problems because of discriminatory national laws and corrective action needs to be taken to bring women's position substantively into a position similar to that of men; these include instruments relating to the nationality of married women, the political rights of women, and conventions relating to the minimum age for marriage and registration of marriage.
- *Comprehensive sex discrimination instruments:* these instruments call on States to eliminate discrimination against women across a broad range of areas, including both civil and political rights as well as economic, social and cultural rights. The main examples of this type of instrument are the Declaration on the Elimination of All Forms of Discrimination against Women 1967 and the Convention on the Elimination of All Forms of Discrimination against Women 1979.[12]
- *Instruments dealing with violence against women:* these instruments reflect the growing concern with violence against women at the international normative level; while issue-specific conventions, these conventions represent an important change in perspective in a number of respects. The most important instruments are the Declaration on the Elimination of Violence against Women[13] and the Inter-American Convention on Violence against Women.[14]

This paper focuses on the 1979 Women's Convention, since it is the most comprehensive international treaty dealing with gender equality issues, and incorporates many of the standards contained in the earlier, more focused conventions.

[12] 1249 UNTS 13, opened for signature 1 March 1980, entered into force 3 September 1981.

[13] Declaration on the Elimination of Violence Against Women, GA Res 48/104 (1994), 1 IHRR 329.

[14] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), opened for signature 9 June 1994, entered into force 5 March 1995, 33 ILM 1534.

The Convention on the Elimination of All Forms of Discrimination against Women

In the early 1970s the UN Commission on the Status of Women decided to embark on the elaboration of what was to become the Convention on the Elimination of All Forms of Discrimination against Women. The proponents of the Convention considered that the time had come for a comprehensive statement of women's entitlements to equality in a form that would be legally binding for States which became parties to a treaty which contained those guarantees. The Convention thus moved beyond the 1967 Declaration on the Elimination of Discrimination against Women, which had been a broad statement, in non-binding form, of women's rights to equality and non-discrimination in many areas of life.

The Convention on the Elimination of All Forms of Discrimination against Women was finally adopted in 1979 and entered into force some 16 years ago, in September 1981.[15] As of 14 July 1997 there were 160 States parties to the Convention.

The Convention contains guarantees of equality and freedom from discrimination by the State and by private actors in all areas of public and private life. To a large extent, it codifies the existing gender-specific and general human rights instruments containing guarantees of freedom from discrimination on the ground of sex, though it adds some significant new provisions.[16] It thus requires equality in the fields of civil and political rights, as well as in the enjoyment of economic, social and cultural rights.

The problem the Convention addresses is that of discrimination against women, rather than discrimination on the basis of sex. For the purposes of the Convention article 1 defines "discrimination" in the following terms (which draw on the similar definition in the Racial Discrimination Convention):

> "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

[15] Two recent book-length commentaries on the Convention are Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht, Martinus Nijhoff, 1993), and Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo, Japanese Association of International Women's Rights, 1995). For a detailed bibliography on the Convention and related matters, see Rebecca J Cook and Valerie L Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429. This bibliography is updated and made available on-line through the Internet by the Laskin Law Library at the University of Toronto: http://www.law.utoronto.ca/pubs/h_rghts.htm.

[16] The Convention's explicit application to discrimination in the field of private life as well as public life (as in the International Convention on the Elimination of All Forms of Racial Discrimination), its requirement in article 5 that States must eliminate traditional and stereotyped notions of the roles of the sexes, and article 14's explicit concern with rural women are innovative provisions.

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[17]

Both *direct* and *indirect* discrimination are covered by the Convention.

Under the Convention States parties assume different types of obligations with respect to the elimination of discrimination in a number of fields.[18] A number of provisions of the Convention require immediate steps to be taken to guarantee equality, while other provisions are of a more programmatic nature, under which States parties oblige themselves to take "all appropriate measures" or "all necessary measures" to eliminate particular types of discrimination.[19]

In addition to the substantive obligations accepted by States which become parties to the Convention, States also accept an obligation under article 18 of the Convention to submit regular reports on the steps they have taken to give effect to their obligations under the Convention. These reports are to be submitted within one year after the entry into force of the Convention for the State concerned and every four years thereafter. These reports are examined by the Committee on the Elimination of Discrimination against Women (CEDAW), a body established pursuant to article 17 of the Convention and consisting of 23 independent experts elected to serve in their personal capacity by the States parties to the Convention. The reporting procedure is the only monitoring or enforcement procedure established under the Convention which is obligatory for States parties,[20] though work is presently proceeding on an optional protocol to the Convention that may establish an individual complaints and an inquiry procedure.[21]

[17] The Human Rights Committee has interpreted the guarantees against discrimination contained in the International Covenant on Civil and Political Rights in similar terms: see *General comment 18 (37)* (adopted in 1989), UN Doc HRI/GEN/1/Rev. 2, at 26 (1996).

[18] Many States have entered reservations to the Convention limiting their obligations in quite fundamental ways (by general reservations) or in relation to specific articles.

[19] For a legal analysis of the different types of obligations under the Convention see Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?" (1996) 21(3) *Brooklyn Journal of International Law* 679 at 707-732; Rebecca J Cook, "State Accountability under the Convention on the Elimination of All Forms of Discrimination Against Women" in Rebecca J Cook (ed), *The Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994) 228.

[20] Though it should be mentioned that article 21 provides for reference of a dispute over the interpretation of the Convention to the International Court of Justice, a provision to which many States parties have entered reservations and which has never been used.

[21] See generally, Byrnes and Connors, *supra* note 19; Andrew Byrnes and Jane Connors, *American Society of International Law Newsletter*, June-August 1996, 10; and Elizabeth Evatt, "The Right to Individual Petition: Assessing its Operation before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination" in *Proceedings of the 89th Annual Meeting of the American Society of International Law* 227 (1995).

The Committee on the Elimination of Discrimination Against Women and its products

As of the end of March 1997, the Committee on the Elimination of Discrimination against Women had held 16 sessions since it began its work in 1982.[22] During those sessions the Committee has reviewed dozens of reports submitted by States parties to the Convention on the measures that they have taken to give effect to their obligations under the Convention. In addition, the Committee has carried out a considerable amount of other work, contributing to international conferences focusing on women as well as on other themes, and elaborating suggestions and general recommendations under the Convention.

Although the Convention was adopted in 1979 and there is a wealth of material concerning its application, most of this material is relatively little known and frequently difficult to access, even for those who are aware of its existence. In the work of the Committee four types of documentation are of particular importance:[23]

- the Convention itself
- the *General recommendations* of the Committee
- the Concluding observations of CEDAW on individual countries
- the reports of individual countries to the Committee (and the record of discussion of those reports between the Committee and government).

While the Convention itself may be reasonably well-known to many, the other output of the Committee and of the States parties to the Convention is not. Yet it is these documents that provide detailed content to the generally-worded provisions of the Convention (in the

[22] The reports of the Committee on the work of its sessions are contained in the report of the Committee to the General Assembly, issued as a supplement (generally Supplement No 38) to the Official Records of the General Assembly, and obtainable in the official languages of the United Nations from the Division for the Advancement of Women, United Nations, New York. Documents from the earlier sessions of the Committee are to be found in United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 1 (1982-1985)* (New York, United Nations, 1989), UN Sales No E.89.IV.4, and United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987)* (New York, United Nations, 1990), UN Sales No E.90.IV.4. For a review of the work of the Committee up to the Beijing Fourth World Conference on Women, see *Report of the Committee on the Elimination of Discrimination against Women (CEDAW) on the progress achieved in the implementation of the* Convention, UN Doc CEDAW/C/1995/7 (1995), reproduced as Document 115 in *The United Nations and the Advancement of Women 1945-1995*, The United Nations Blue Books Series, vol VI (New York, United Nations, 1995), at 511. Many recent documents of the Committee and information about the Committee and its members can be found on the website of the United Nations Division for the Advancement of Women: http://www.un.org/DPCSD/daw/cedaw.htm.

[23] While the present discussion is concerned primarily with the Women's Convention, the experience under the major UN human rights treaties has been similar and much can be learnt from examining the strategies employed under those treaties.

case of the *General recommendations*), show the relevance of the Convention's provisions to the situation in a particular country (the *Concluding observations* adopted following a country's report), and provide a source of comparative information about how other States parties (and one's own) have gone about implementing the Convention.

General recommendations

Under article 21 of the Convention CEDAW has the power to make "suggestions and general recommendations" to States parties. In recent years CEDAW has begun to use its power to make general recommendations to elaborate its understanding of particular articles of the Convention, or of how the Convention applies to thematic issues (such as violence against women). The use of this power in such a way is an important development in the work of CEDAW (which in this respect is following the lead of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights[24]). Formally, the *General recommendations* are not binding interpretations of the Convention, but are considered as particularly persuasive interpretations of it.[25] The more recent *General recommendations* of the Committee and its future ones are likely to provide useful material to support arguments based on the Convention in and out of court.

As of March 1997 the Committee had adopted 22 *General recommendations*.[26] While a number of the earlier *General recommendations* are useful, the Committee began in 1992 to adopt more detailed recommendations. The two most detailed *General recommendations* adopted to date are *General recommendation No 19* (1992) dealing with violence against women, and *General recommendation No 21* (1994) dealing with equality in marriage and the family.[27] Both these *General recommendations* set out in detail the Committee's understanding of the meaning of articles of the Convention and make detailed recommendations to States parties about the steps that need to be taken in order to fulfil their obligations under the treaty.

Although as a formal matter of international law these general recommendations are not binding on States parties, nevertheless they are considered as particularly persuasive interpretations of it; they have been invoked before courts and tribunals, though less frequently than the

[24] These are the two expert committees established under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, with functions similar to those of CEDAW.

[25] See Byrnes & Connors, *supra* note 19, at 766-767.

[26] At its January/February 1997 session the Committee completed its work on a draft of a 23rd *General recommendation* on articles 7 and 8 of the Convention (dealing with women's equal participation in public life), which was formally adopted at its July 1997 session.

[27] The text of these *General recommendations* appears in International Women's Rights Action Watch and the Commonwealth Secretariat, *Assessing the Status of Women* (2nd ed 1996), Appendix E, at 72 and 76.

General comments of the Human Rights Committee, which have been often invoked before courts, both in jurisdictions in which the ICCPR has been incorporated (such as Hong Kong[28] and Japan[29]) and in jurisdictions in which it has not (such as Australia).

Reports of States parties

Each State party to the Convention accepts an obligation to submit reports to the Committee on a regular basis. These provide a useful source of comparative information, both about what States consider to be the extent of their obligations under the Convention and about the various ways in which the Convention can be implemented. In relation to one's own country, the national report provides an authoritative (though not always satisfying) statement of the government's position on various issues. Often national reports will contain commitments by governments to undertake particular actions, commitments to which a government can frequently later be referred in order to ensure that promises made are in fact carried out.

The Committee's consideration of reports and its concluding observations

One of the major sources for elucidating the meaning of the Convention has been the questions put by members of the Committee to States parties and the views members have expressed on the extent to which the State has given effect to its obligations under the Convention.[30] Recently, however, the Committee has adopted the practice of adopting concluding observations, which express the collective view of the Committee on the extent to which the Convention has been implemented in a given country, rather than the views of individual members. The purpose of these concluding observations is to highlight the areas in which the Committee considers action is required as a matter of priority. Sometimes they will include the Committee's view that there is a violation of the Convention.

This material can prove useful on a comparative basis, but its most useful application tends to be in relation to the country about which the comments are made. These concluding observations can provide useful support for efforts to bring about compliance with the Convention, in a formal legal context (such as litigation) or in a more political context.

[28] See generally Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights" in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, Clarendon Press, 1997), chapter 9, and Johannes Chan, "The Influence of International and Comparative Jurisprudence on the Interpretation of the Hong Kong Bill of Rights", *McGill Law Journal* (forthcoming 1997).

[29] See generally Yuji Iwasawa, "The Domestic Impact of Acts of International Organizations Relating to Human Rights", paper presented at *Conference on The Future of the UN Human Rights Treaty System*, Research Centre for International Law, University of Cambridge, Cambridge, 21-23 March 1997, at pp 9-15.

[30] For an overview of the types of questions asked, see *Assessing the Status of Women*, *supra* note 27.

The relevance of the Convention and similar instruments to domestic litigation

The status of treaties generally in common law jurisdictions

The position in nearly all Commonwealth and common law countries is in formal terms fairly similar: unincorporated treaties may not generally be relied on before domestic courts directly to found a cause of action, but they may nevertheless have an indirect impact on the interpretation and application of law. The presumption that the legislature does not intend to legislate in a manner that is inconsistent with international law is well-accepted in common law jurisdictions, and has as its corollary a principle of statutory interpretation — of uncertain practical importance — that statutes should be interpreted in a manner which is consistent with international law.[31] International treaties law and customary international law are also recognised as relevant sources for the development of the common law. Examples of how unincorporated treaties have been used by courts include:

- as an aid to constitutional or statutory interpretation, either generally or in order to resolve an "ambiguity": eg, *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana) (consideration of various international instruments in deciding whether constitutional guarantee of equality included discrimination based on sex)
- a relevant consideration to be taken into account in the exercise of an administrative discretion by a decision-maker (and thus subject to judicial review): eg, *R v Director of Immigration, ex parte Simon Yin Xiang-jiang* (1994) 4 HKPLR 264 (HK CA) (existence of treaty obligation not to expel a stateless person except on grounds of national security or public morals should be taken into account by decision-maker considering whether to expel such a person on other grounds), citing *Tavita v Minister of Immigration* [1994] NZAR 116 (NZ CA)
- as giving rise to a *legitimate expectation* that the provisions of the treaty will be applied by a decision-maker unless a hearing is given to the person affected: *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 128 ALR 353 (High Court of Australia) (relevance of guarantees in the Children's Convention to decision to deport a parent)

[31] The issue can be complicated somewhat in relation to treaties. As a strictly logical proposition it might be maintained that in general a legislature can only be presumed to have legislated consistently with treaties which were in force for the State concerned (or at least in contemplation) at the time when the statute was passed.

- a factor that may be taken into consideration in the development of the common law, where the common law is unclear: *Rantzen v Mirror Newspapers* [1994] QB 670 (Eng CA) (guarantee of freedom of expression and its relation to applicable standard for review of jury awards in defamation cases)
- a factor that may be taken into account when identifying the demands of public policy: eg, *Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321 (Ont CA) (international treaties on non-discrimination, including the Women's Convention taken into account in determining whether a sexist, racist and classist charitable trust was against public policy).

The extent of utilisation of unincorporated treaties depends largely on the approach adopted by the judiciary: a judiciary which is prepared to be open to international influences and to draw on international jurisprudence has some scope for doing so in most common law systems. The task is probably easier where the judge is interpreting a constitutional or statutory Bill of Rights (in which there may be similar or identical guarantees to those contained in treaties by which the State is bound or which form part of customary international law). This is the case for the vast majority of Commonwealth countries which became independent after the second world war; many of these countries have constitutions which trace their parentage to the European Convention on Human Rights.[32] This makes reference to international jurisprudence under the European Convention (and the ICCPR) particularly easy to justify in formal terms, if any justification is needed. For those countries that have accepted the competence of the Human Rights Committee under the First Optional Protocol to the ICCPR to consider individual complaints, the relevance of international case law is even more immediate.[33]

In recent years a number of Commonwealth courts (especially those in Southern Africa) have energetically embraced international jurisprudence in the interpretation of national constitutional guarantees, including treaties to which the State concerned is not a party as well as those by which it is bound.[34]

[32] See the classic statement of Lord Wilberforce in *Minister of Home Affairs and Another v Fisher* [1980] AC 319 at 328-330 (Privy Council).

[33] See the views of Brennan J of the High Court of Australia in *Mabo v Queensland (No 2)* (1995) 175 CLR 1, at 42: "The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imposes."

[34] See, eg *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana); *State v Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, [1994] 1 LRC 343, 1995 (2) SA 182 (Supreme Court of Zimbabwe). See generally John Dugard, "The Role of Treaty-Based Human Rights Standards in Domestic Law: The Southern African Experience", paper presented at *Conference on The Future of the UN Human Rights Treaty System*, Research Centre for International Law, University of Cambridge, Cambridge, 21-23 March 1997.

There are, of course, a number of reasons why judges may wish to be cautious about drawing too enthusiastically on treaties which have not been incorporated as part of domestic law, even though they are binding on the State as a matter of international law. Justice Michael Kirby (now of the High Court of Australia) has identified a number of matters that may influence judges to take a less expansive approach to the use of treaty norms.[35] They include the fact that the ratification of a treaty is generally an executive act, which may or may not reflect the views of the populace or the Parliament; or, in federal states, concern that the federal government may use the power to ratify treaties (and associated legislative power to implement them) to expand federal power at the expense of the power of the States.[36] Other concerns are that the process of judicial development of the law may divert attention from the more open and democratic adoption of such norms by way of statutory or constitutional Bills of Rights, suspicion about the composition and competence of international bodies, and a concern that the drive towards international conformity not lead to a neglect of the relevant national and local social and historical context.[37]

Some examples of the invocation of the convention or similar instruments in domestic courts — does it make a difference?

The following section consists of brief references to cases in which reliance has been placed on or references made to the Women's Convention or other instruments which address gender-specific issues.

References to the Women's Convention

- *Aldridge v Booth* (1988) EOC ¶92-222, 80 ALR 1 (Fed Ct of Australia)
  The Federal Court dismissed a challenge to the constitutionality of the sexual harassment provisions of the federal Sex Discrimination Act, holding that article 11 of the Convention imposed a very clear

[35] See Michael Kirby, "The Role of International Standards in Australian Courts" in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia* (Sydney, Federation Press, 1995) 81. These concerns have a special relevance to the case of Australia, as is illustrated by the decision of the High Court in *Teoh* (holding that the ratification of the Convention on the Rights of the Child by Australia gave rise to a legitimate expectation that its principles would be adhered to by decision-makers in immigration decisions). This gave rise to considerable objections by the government, generating a joint statement by the Attorney-General and Minister for Foreign Affairs of the Labour government (10 May 1995), which was subsequently reiterated by the same Ministers in the coalition government that succeeded them: see Minister for Foreign Affairs and the Attorney General and Minister for Justice, *Joint Statement: The Effect of Treaties in Administrative Decision-Making*, 25 February 1997, *Commonwealth of Australia Gazette, Special Gazette*, 26 February 1997, No S 69 (stating that the ratification of a treaty should not be taken as giving rise to a legitimate expectation that would permit an administrative decision to be challenged).

[36] *Id* at 86-87.

[37] *Id* at 87-88.

obligation on Australia to eliminate sex discrimination in employment, and that sexual harassment was a form of sex discrimination within the meaning of the Convention. Accordingly, the provisions were constitutionally valid under the power to legislate "with respect to external affairs", which included the power to implement treaty obligations.

That the court's conclusion was correct in terms of the Convention can been seen from CEDAW's view as expressed in its *General recommendation No 19* (1992), paras 17-18, in which the Committee makes clear its view that sexual harassment is a violation of article 11 of the Convention and is a form of gender-specific violence.[38]

- *Ephrahim v Pastory* (1990) 87 ILR 106, [1990] LRC (Const) 757 (High Court of Tanzania)
  The High Court of Tanzania relied on the Convention (as well as the ICCPR and the African Charter on Human and Peoples' Rights) in holding that the guarantee of equality contained in the Bill of Rights overrode the customary law rules which prevented women from selling clan land, while permitting men to do so (subject to the condition that any other clan member could repurchase the land from a purchaser).

- *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana)
  The High Court and Court of Appeal of Botswana upheld a challenge to provisions of Botswana's nationality law, which did not permit a Botswana woman married to a non-Botswana national to pass on her citizenship to the children of the marriage. The Convention, along with other human rights instruments, has been relied on in a number of cases to interpret constitutional guarantees of equality.

- *Dhungana and another v Government of Nepal*, Supreme Court of Nepal, Writ No 3392 of 1993, 2 August 1995, unreported[39]
  A challenge was made to the Nepali law that provided that, while a son was entitled to a partition share of his father's property at birth, a daughter was only entitled to obtain a share when she reached the age of 35 and was still unmarried. Under Nepali law ratified treaties form part of the law of Nepal and an action was brought challenging

[38] See also *Victoria v Commonwealth* (1996) 138 ALR 129, in which a number of sections of federal legislation relating to equal remuneration of men and women workers and parental leave were held to be valid by the High Court of Australia, since they involved the implementation of obligations under ILO Conventions, the Women's Convention and the International Covenant on Economic, Social and Cultural Rights.

[39] I am grateful to Ms Sapana Pradhan, of Development Law Associates, Kathmandu, counsel in the case, for providing me with an English translation of the judgment.

this law on the ground that it violated both the guarantee of equality in the Constitution and article 15 of the Women's Convention. The court appeared to consider that there was a violation of these guarantees, but was reluctant to declare the law unconstitutional with immediate effect. The court eventually ordered the government to "introduce an appropriate Bill to Parliament within one year ... by making necessary consultations as to this matter with the recognised Women's Organisations, sociologists, the concerned social organisations and lawyers ... and by studying and considering also the legal provisions made in other countries in this regard."

- *Re Robert Southern and Department of Education, Employment and Training, Australian Administrative Appeals Tribunal,* No A92/87 AAT, No 8533, 17 February 1993, (1993) EOC ¶92-491
  In this case the Administrative Appeals Tribunal upheld a refusal to disclose documents containing complaints of sexual harassment, which would have permitted the respondent to identify the persons who had lodged those complaints. The Tribunal stated (at para 27) that:

  > "27. It is not only a matter of public interest and importance to maintain a workable sexual harassment complaints and elimination system, it is a fulfilment of the legal responsibilities of any agency under the Act. The Act itself is a fulfilment of Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women, as appears in s 3(a) of the Sex Discrimination Act. These are substantial public interest considerations. It is important, in my view, that complainants or potential complainants be assured of confidentiality when they invoke the mechanism established by their employing agency to complain of sexual harassment. They should be free to withdraw formal complaints without proceeding to a formal hearing (at which of course some of the matters alleged must be made known to the alleged offender) without fear that their identity or the substance of their complaint would be made public. It is in the public interest, not only that justified complaints be treated sensitively and in confidence, but also that other complaints, which may or may not be justified, may be withdrawn without fear of recrimination. To facilitate a different result would be to cause a substantial adverse effect on the management of personnel."

- Supreme Court of India, Writ Petition (Civil) No 684 of 1994, reproduced from Rani Jethmalani, "WARLAW's Petition in the Supreme Court of India at New Delhi (Civil Original Jurisdiction) Writ Petition (Civil) No 684 of 1994" in Rani Jethmalani (ed), *Kali's*

Yug: Empowerment, Law and Dowry Deaths (New Delhi, Har-Anand Publications, 1995) 107-119[40]
This action was a response to the declaration entered by India when it ratified the Women's Convention and the government's apparent failure to take steps to determine the views of the different communities on repealing discriminatory personal laws. When India ratified the Convention in 1993, it entered a declaration in these terms:

> "With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."

The petitioners sought an order from the court directing the government of India to show what steps it had taken to ascertain the views of the Hindu community on whether it was appropriate to repeal discriminatory personal laws with a view to ensuring equality for women. The case is still pending.

- *Vishaka and others v State of Rajasthan,* Supreme Court of India (1995)[41]
  This case arose out of an alleged gang rape and the failure of officials to investigate complaints of rape (the women who were raped were State employees). A writ was lodged with the Supreme Court requesting it to direct the State to form a Committee to frame guidelines for the prevention of sexual harassment and abuse of women. The terms proposed to the court by counsel for the petitioners were in part drawn directly from certain passages in CEDAW's *General recommendation 19* dealing with violence against women.

The difference it makes: the question of temporary special measures

- *Re Australian Journalists' Association* (1988) EOC ¶92-224 (Australian Conciliation and Arbitration Commission)
  The Commission refused to permit a change to the rules of the Australian Journalists' Association which was designed to ensure that there was at least one-third representation of women members on the Association's governing body. Boulton J found that the provision was discriminatory and did not fall within section 33 of the Sex

[40] I am grateful to Ms Rani Jethmalani of WARLAW, counsel in the case, for information about it.
[41] I am indebted to Mr Fali S Nariman, one of the counsel in the case, for information about the proceedings.

Discrimination Act, which permitted measures to be taken which are intended to ensure equality of opportunity. [42]

Boulton J held that women had the same opportunity formally to stand for election and that therefore the section did not apply. He did not consider article 4 of the Women's Convention (which s 33 was intended to reflect); otherwise, it is difficult to see how he could have come to any conclusion other than finding the proposed rule was a permissible temporary special measure and therefore not unlawful. The union subsequently applied for and was granted an exemption under the legislation. In its decision granting the exemption the Human Rights and Equal Opportunity Commission stated that it did not necessarily agree with the interpretation of Boulton J: *Re an application for an exemption by the Australian Journalists' Association* (1988) EOC ¶92-236, at p 77,209 (Australian Human Rights and Equal Opportunity Commission).

- *Re Municipal Officers' Association of Australia: Approval of Submission of Amalgamation to Ballot* (1991) EOC ¶92-344, (1991) 12 ILLR 57 (Australian Industrial Commission)
  In this case the Australian Industrial Commission considered a similar issue and, after referring to article 4 of the Convention and other international cases dealing with the concept of discrimination, took the view that a union rule providing that each union branch have to have at least one female vice-president was covered by s 33 of the Sex Discrimination Act.

Gender-specific instruments other than the Women's Convention

- *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (Supreme Court of New Zealand)
  In this case Cooke J considered a challenge to the setting of conditions distinguishing between the payment of removal allowances to married male and married female teachers, pursuant to a discretion to set such conditions conferred on the relevant Minister by the Education (Salaries and Staffing) Regulations 1957. In holding that the adoption of the distinction between male and female married teachers was beyond the power conferred by the enabling regulation (and was therefore invalid), the court referred to articles 2 and 23 of the Universal Declaration of Human Rights and article 10(1) of the Declaration on the Elimination of Discrimination against Women. The judge held that, although these instruments were not part of New Zealand domestic law, they represented desirable international

[42] Section 33 provides:
"Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act."

goals and it would be unsafe to conclude that the enabling regulation was intended to permit actions that would be inconsistent with those standards. ([1977] 1 NZLR at 542-543)

Others

- *The State v Kule* [1991] PNGLR 404 (National Court of Justice of Papua New Guinea)
  In this case Doherty J held that the custom of giving a daughter in compensation and reparation for murder to the family of the person murdered was not enforceable, since it was an institution or practice similar to slavery and therefore contrary to section 253 of the Constitution, which prohibited "slavery, and the slave trade in all their forms, and all similar institutions and practices". In reaching this conclusion the judge interpreted the word "slavery" in the Constitution by reference to the Slavery Convention[43] and its amending Protocol,[44] and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[45]

ANNEX A*

- International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment 1906, 2 Martens Nouveau Recueil, Ser 3, 861; 4 AJIL Supp 328
- Convention Concerning the Employment of Women Before and After Childbirth 1919, ILO 3, 38 UNTS 53
- Convention Concerning Employment of Women During the Night 1919, ILO 4, 38 UNTS 68
- International Convention for the Suppression of Traffic in Women and Children 1921, 9 LNTS 415; and Protocol 1947, 53 UNTS 39
- International Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 LNTS 431; and Protocol 1947, 53 UNTS 49
- Inter-American Convention on the Nationality of Women 1933, PAUTS 37, 28 AJIL Supp 61
- Convention Concerning Employment of Women During the Night (Revised 1934), ILO 41, 40 UNTS 33
- Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds 1935, ILO 45, 40 UNTS 63

[43] 60 LNTS 253 (1926).
[44] 182 UNTS 51 (1953).
[45] 266 UNTS 3 (1956).
* Originally prepared by Jane Connors and Victoria Medd, and revised by Lum Bik.

- Inter-American Convention on the Granting of Civil Rights to Women 1948, PAUTS 23
- Inter-American Convention on the Granting of Political Rights to Women 1948, PAUTS 3
- Convention Concerning Night Work of Women Employed in Industry (Revised 1948), ILO 89, 81 UNTS 147
- Convention Concerning Migration for Employment (Revised 1949), ILO 97, 120 UNTS 71
- Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others 1950, 96 UNTS 271 & Final Protocol 1950, 96 UNTS 316
- Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, ILO 100, 165 UNTS 303
- Convention Concerning Maternity Protection (Revised 1952), ILO 103, 214 UNTS 321
- Convention on the Political Rights of Women 1953, 193 UNTS 135
- Convention on the Nationality of Married Women 1957, 309 UNTS 65
- Convention Concerning Discrimination in Respect of Employment and Occupation 1958, ILO 111, 362 UNTS 31
- UNESCO Convention on Discrimination in Education 1960, 429 UNTS 93
- Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages 1962, 521 UNTS 231
- Migrant Workers (Supplementary Provisions) Convention 1975, ILO 143, 1120 UNTS 323
- Workers with Family Responsibilities Convention 1981, ILO 156, 1331 UNTS 295
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (Convention of Belém do Pará), 33 ILM 1534

ANNEX B
Some useful sources on the Convention on the Elimination of All Forms of Discrimination against Women

- Website of the United Nations Division for the Advancement of Women: http://www.un.org/DPCSD/daw/cedaw.htm
- Philip Alston, "The Purposes of Reporting", in United Nations/UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (New York, United Nations, 1991), 13-16
- Cecil Bernard, "The Preparation and Drafting of a National Report", in United Nations/UNITAR, *Manual on Human Rights*

Reporting under Six Major International Human Rights Instruments (New York, United Nations, 1991), 17-23

- Noreen Burrows, "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women", (1985) *Netherlands International Law Review* 419-457
- Rebecca Cook and Valerie Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429-1471 [This bibliography is updated and made available on-line through the Internet by the Bora Laskin Law Library at the University of Toronto: http://www.law.utoronto.ca/pubs/h_rghts.htm]
- Rebecca Cook (ed), *International Human Rights Law and Women's Human Rights* (Philadelphia, University of Pennsylvania Press, 1994)
- Zagorka Ilic, "The Convention on the Elimination of All Forms of Discrimination Against Women", in United Nations/UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (New York, United Nations, 1991), 153-176
- Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo, Japanese Association of International Women's Rights, 1995)
- Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht, Martinus Nijhoff, 1993)
- United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 1 (1982-1985)* (New York, United Nations, 1989), UN Sales No. E.89.IV.4
- United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987)* (New York, United Nations, 1990), UN Sales No. E.90.IV.4

THE RELEVANCE OF INTERNATIONAL STANDARDS TO DOMESTIC LITIGATION: THE CASE OF NEW ZEALAND

◆

The Hon Justice Silvia Cartwright DBE,
High Court of New Zealand[*]

Introduction

During the course of this paper, I will examine some aspects of the way in which New Zealand, a small developed country with a strong record of adherence to human rights principles in general and support for women's human rights in particular, has responded to the challenge of compliance with international standards. New Zealand has no written constitution, and international treaties ratified by it are not self-executing. It is proud of its record in women's issues: in 1893, it was the first nation in the world to give women the vote, and later this year will celebrate the 100th anniversary of the legislation which enabled women to practice law. It now has three women High Court judges, has had a woman Governor-General and some of its most senior politicians, short of Prime Minister, have been women. There remain nonetheless serious issues surrounding the status of women which from time to time require the formal resolution normally provided by a court system. I will touch on the manner in which some disputes have been approached, and comment on areas where I consider that New Zealand has failed to achieve full compliance with its international obligations.

I begin with the proposition that as human rights issues have real application and relevance for every citizen, they are the responsibility of domestic courts and authorities. The affirmation and implementation of human rights principles form the foundation of a just society. Such issues cannot be dismissed as of concern only to the international community and, as such, of academic interest only; they are vital to the peace and prosperity of every society. It has become increasingly apparent that the human rights issues which affect women in particular play a critical part in the quest to achieve a just and fair society. Women's place in every community is vital to the well-being of that society; without their work, both in the formal sector and in the family, most communities would not survive. It is now well recognised that enhancing women's status and enforcing their rights on an equal basis with men will do much to achieve the objectives of equality, development and peace adopted at the United Nations Fourth World Conference on Women held in Beijing in September 1995.[1]

[*] Member of the Committee on the Elimination of Discrimination against Women.

[1] *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995).

In 1993 the World Conference on Human Rights concluded that:

> "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.... The World Conference on Human Rights urges governments, institutions, inter-government and non-governmental organisations to intensify their efforts for the protection and promotion of human rights of women and the girl-child."[2]

During the World Conference on Human Rights two significant issues were stressed: firstly, the universality of human rights, described as "the common language of all humanity"[3] and secondly, the importance of including and emphasising the particular nature of women's human rights. It is worth emphasising that these concepts are of great importance to this colloquium. Not only must we speak a common language across our different cultures, languages and jurisdictions, but it is important that we focus on the issue of human rights for women.

Successive United Nations conferences and regional meetings have concluded that issues critical to the future well-being of the world's people, such as resource development coupled with protection of the environment, the pursuit of peace and the improvement of basic human rights such as health and education are all heavily dependent on an improvement in the status of women. This improvement is needed urgently in all nations, not just the developing nations and not just nations which are torn by years of war and civil disruption. For it is now well-known that although most nations promise equality of opportunity for women, few come close to delivering it and that failure has a huge impact on the ability of half the world's population to contribute fully to the economic and social, civil and political spheres of the community's activities. In all nations women earn less from paid employment than men; they have less likelihood of inheriting land and other assets than their brothers; they are more likely to be physically assaulted regularly by members of their own families; they are less likely to serve in governments in senior positions and they are likely to be the sole bread-winner for something approaching one third of the world's families. And now they are increasingly likely to be infected with the HIV or AIDS virus simply because they lack the information with which to protect

[2] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/CONF.157/24 (1993), at 33, para 18.

[3] Boutros Boutros-Ghali, Secretary-General of the United Nations, Opening Statement to the World Conference on Human Rights.

themselves, or the right to refuse intimate relationships whether with their own husbands or with the rapist.

These barriers to attainment of equality apply as much in New Zealand as they do in the poorest African, Asian or South American community. The barriers which women must overcome, if they are not to remain disproportionately represented amongst the world's poorest with all the resulting health problems and lack of community and political participation, are not to be found so much in a reform of the law as in a reform of attitudes, traditions and beliefs which nations have developed into an ethic which, upon examination, nonetheless has no ethical basis.

While judges and the courts have an important role to play in the protection of women's rights, in reality the opportunity does not arise frequently. It is in the making of policy, or in the work of tribunals and government agencies such as the police and the social welfare department that women's human rights will be implemented or frustrated. Few women would think first of the courts as a means of changing the structural factors which are the real barriers to achieving equality with men.

Like other countries without a written constitution to focus attention on these issues, New Zealand has not been accustomed to developing a jurisprudence based on rights. But at least since the 1960s there have been significant legislative developments directed towards an improvement of human rights, and some Acts have held out the glittering promise of equality for all.

The application of international human rights norms to women in New Zealand

New Zealand has ratified the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)[4] and takes its reporting functions under the Convention seriously. But whereas the International Covenant on Civil and Political Rights (ICCPR)[5] has in part been incorporated in the New Zealand Bill of Rights Act 1990, there is no legislative parallel for the Women's Convention. The Minister of Women's Affairs, relying on the advice of her officials, monitors legislative and policy initiatives for their impact on women. As a result, the Convention is generally well known amongst women and on the whole New Zealand's obligations under the Convention are discharged.

[4] 1249 UNTS 13. New Zealand signed the Convention on 17 July 1980 and ratified it on 10 January 1985.
[5] 999 UNTS 171. New Zealand signed the Covenant on 12 November 1968 and ratified it on 28 December 1978.

It should be noted, however, that where in the opinion of individuals or groups of women, principles of the Convention have been breached, or not adequately implemented by the New Zealand, or indeed any other ratifying government, there is no direct means by which the courts can redress grievances. Unlike the complaints mechanism which enables direct communication with the Human Rights Committee under the ICCPR, as yet there is no optional protocol under the Women's Convention. Women in New Zealand must instead rely on a wide variety of agencies, tribunals and courts with no one body having overall responsibility and accountability for advocating women's equality.

Legislative measures

The New Zealand Bill of Rights 1990 has since its enactment had a significant and much publicised influence on the affirmation of rights generally in New Zealand. Originally intended to be entrenched legislation, following often heated public debate, it emerged from Parliament in a much weakened form. There is no power for judges to strike down legislation and no remedies clause. The Court of Appeal has, however, emphasised the importance of the Act for the general body of New Zealand law, describing it as being "intended to be woven into the fabric of New Zealand"[6] and to be "construed generously and in a manner... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[7]

To date much of the jurisprudence which has developed under the Bill of Rights Act is in the area of the right to legal advice and restraints on illegal search and seizure. It was in this latter field that a woman whose house was mistakenly, and therefore illegally, searched by the police was granted damages by the Court of Appeal, notwithstanding the absence of a remedy clause.[8] The Court found that compliance with the ICCPR must have been contemplated by Parliament when the bill was introduced and relied on article 2(3) of the Covenant which calls for nations to "ensure an effective remedy... for violation and to develop the possibilities of judicial remedy."

In its development of this part of New Zealand jurisprudence it is true that the courts may have been more assertive in their interpretation and application of the Act than Parliament intended. But the Act's application to issues of particular significance for women has thus far been limited.

Over the last two decades however the advancement of women or their protection from discrimination has been a focal point of many enactments, notably the Human Rights Act 1993 which was designed to

6 *R v Goodwin* [1992-93] 3 NZBORR 214 at 242 per Cooke P, [1993] 2 NZLR 153.
7 *Flickinger v Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1 at 4, [1991] 1 NZLR 439 at 440.
8 *Simpson v Attorney-General [Baigent's Case]* [1994] 2 NZLR 667.

"provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights."[9]

Among the prohibited grounds of discrimination sex (including pregnancy), child-birth and marital status have particular significance for women.

Where women's rights are in conflict with other rights, such as the right to a fair trial, freedom of expression, freedom of religion and the rights of minorities, there has however been limited opportunity to examine competing rights claims in a measured and progressive manner. Few if any disputes which are primarily concerned with gender issues reach the Court of Appeal, and those which are considered by the Complaints Review Tribunal, established under the Human Rights Act, are not subjected to rigorous analysis. For example, in proceedings before the Tribunal a woman was awarded damages for her dismissal by an employer who had considered, based it appears on religious beliefs, that a married woman ought not to work, citing women's work outside the home as a major reason for the decline of moral standards since the Second World War. The Tribunal did not explore the rationality of this belief, or even its religious basis, both of which, it must be said, are dubious, but instead found that the dismissal occurred "by reason of the sex and marital status"[10] of the applicant.

In another instance where there were clearly competing issues of rights and freedoms between the accused and the complainant,[11] delays in assigning a date of hearing to a rape trial resulted in the Court of Appeal directing a stay of the indictment against the accused. While the accused undoubtedly felt that his rights to a timely trial had been vindicated, the complainant was left isolated without any real means of achieving justice and security for herself, unless the government's apology to her could be considered as such. Women's groups which have protested at the unfairness of the outcome for the woman have been partly mollified by the Court's stated intention that only in extreme cases will indictments be quashed for delay in the court process.

Development of courtroom procedures which protect and promote women's rights

Measures in New Zealand introduced to make it easier for women to give evidence in rape and indecency trials have had a largely positive outcome. Under amendments to the Evidence Act 1908 there is a prohibition on the disclosure of identifying details of the complainant in trials involving offences of a sexual nature. The complainant may not be

[9] Human Rights Act 1993 (No 82 of 1993), Preamble.
[10] *Proceedings Commissioner v Boakes* CRT 1/94 13 April 1994 (unreported), [1994] NZCLD at H576.
[11] *Martin v Tauranga District Court* [1995] 2 NZLR 419.

cross-examined on her sexual experience with any person other than the accused, nor on her reputation in sexual matters except with leave of the judge and leave will not be granted, unless the evidence has such direct relevance to facts in issue in the proceedings, or to the issue of the appropriate sentence that to exclude it would be contrary to the interests of justice. There is no longer any need for corroboration of the complainant's evidence and where there has been a delay in making a complaint the judge may tell the jury that there "may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint."[12]

There are a variety of rules in cases involving child complainants which enable their evidence to be given by video tape, screened from the accused or by closed circuit television. There are restraints placed on cross-examination by the accused in person or by counsel if the judge considers that, having regard to the age of the complainant, the questions are intimidating or overbearing. Medical practitioners or psychologists with training and experience in the treatment of sexually abused children may be called as experts to comment on their assessment of the complaint's behaviour and whether it is consistent with that of sexually abused children of the same age group. In considering what mode of trial shall be adopted, the judge must have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.

In a joint Practice Note issued in 1992, the Chief Justice and the Chief Judge of the District Court directed that cases involving alleged sexual offences are to be disposed of promptly. The Practice Note has been widely interpreted as requiring that cases of a sexual nature must be given a degree of priority over civil and other criminal cases in the interests of the women and child complainants.[13]

While these general provisions have been welcomed by those who must give evidence in cases of a sexual nature, there remain a large number of suggestions for further reform of the rules of evidence, directed towards improving courtroom procedures and thereby lessening the stress on complainants and witnesses in trials. But concerns are beginning to be voiced:

> "Keeping the pendulum of the fair trial exactly in the middle is a delicate process. I have little doubt that before the reforms of the last decade it was inclined in favour of the defence. It has received a strong push, and I know some Judges are uneasy that it has swung too far."[14]

[12] Evidence Act 1908, s 23AC.

[13] See [1992] NZLJ 78.

[14] The Chief Justice, The Rt Hon Sir Thomas Eichelbaum, "Rape: 10 Years' Progress?", Address to Inter-Disciplinary Conference, Wellington, March 1996.

It is difficult to assess whether in the balancing of women's rights against the rights of the accused there has been "... greater justice for rape complainants or greater injustice for the accused...."[15]

Although in New Zealand rape convictions have increased 150% since 1986, on the actual numbers of complainants this translates to a 42% conviction rate in 1986 and 48% in 1995. In fact, it is estimated that fewer than 1 in 10 rapes are reported, suggesting that the whole process of police investigation and court trial presents an insuperable barrier to the vast majority of women, women who are therefore denied the opportunity to seek a just resolution of crimes perpetrated against them. "Common [woman] sense would suggest that for every false allegation there are countless others that are never made. For though the public trial is useful to set boundaries,... the cost to the individual players may be unjustifiably high."[16]

Policy initiatives

There have also been general social policy initiatives introduced in an effort to improve attitudes to women. Concerns about the portrayal of women in the media have for example led to the consolidation of censorship legislation into the Films, Videos and Publications Classification Act 1993. Administered by a chief censor and classification officers, rather than by a tribunal, it is subject to the courts' overriding control and monitoring only through proceedings brought by way of judicial review.

In recent years too, the acknowledgement that violence against women is a violation of their human rights has steadily gained attention and importance. Reflecting the concerns about the impact on individual women, on their families and on the community which must bear the social and economic costs of the high incidence of violence against women in the community, there are many legislative and policy measures in place in an attempt to stem the tide.

The New Zealand Police are the first line of defence for women who complain of violence perpetrated upon them by members of their own families. For some years now official police policy has been to arrest when there is independent evidence of an assault upon a woman, lessening the reliance on her evidence to obtain a conviction. This policy has enormous advantages: it enables the police to arrest and remove the assailant from the home and makes it less likely that the man's influence over his female partner or family member can be brought to bear to force her to refuse to give evidence.

Nonetheless, women's perception of the manner in which the police enforce complaints of family or sexual violence remains poor, with only

[15] Report from 19 *The Capital Letter II* at 859.
[16] *Ibid.*

50% in a recent survey being satisfied with police treatment of rape complaints. In the end, as with the judiciary, much may depend on education of the police force to help its members appreciate that violence against women is not only a physical assault, but also a violation of their human rights rendering them less able to operate on a basis of equality with men in their families or in the community, diminishing their opportunity to participate fully in education and employment, and affecting their health and well-being.

Recent legislation enacted with the intention of reducing and preventing violence in domestic relationships specifies that any court which or any person who exercises power conferred under the Act must be guided in the exercise of that power by, inter alia "recognising that domestic violence, in all its forms, is unacceptable behaviour...."[17]

The Family Court which will largely administer the Domestic Violence Act 1995 will be placed under enormous pressure, as the result of the expected greatly increased number of applications due to the extension of the definition of domestic relationship to spouses, partners, family members, persons who share the household or have a close personal relationship. Moreover, strict provisions concerning the possession of any weapons by a person against whom a protection order is made under the Act will undoubtedly result in many more defended hearings directed at avoiding the operation of those sections.

But on the whole it is agencies such as the police, the professional disciplinary tribunals, volunteer and community agencies such as women's refuges and rape crisis centres, Maori community organisations and the department of social welfare, which are the enforcers of women's rights in New Zealand. While those agencies will all have criteria to work to, there is no overarching principle as found in the Women's Convention by which they must apply their policies and against which the delivery of services can be measured. Moreover, legislation which is inherently biased against women cannot be struck down by the courts under the Bill of Rights Act, or because it conflicts or does not comply with the Women's Convention.

New Zealand has been enduring a period of structural adjustment over the last decade. Legislation designed to free the economy from restrictive economic and trade practices and encourage market-driven reforms has seen an improvement in economic conditions. But arguably women have been obliged as a consequence to bear a disproportionate share of the burdens of market reform. In its first legislative action in 1991, the incoming right of centre government repealed legislation designed to provide equality of opportunity and pay equity for women in the workplace.[18] Reform of the no-fault scheme of compensation for

[17] Domestic Violence Act 1995 (No 86 of 1995), s 5(1)(a).

[18] The Labour Relations Amendment Act was passed on 19 December 1991, only three weeks after Parliament convened.

accidental injury[19] has abolished lump sum compensation, the only monetary compensation available to women who are injured accidentally and who work outside the paid work force.

The Health and Safety in Employment Act 1992, which dismantles a complex series of health and safety regulations and places primary responsibility on employers, arguably does not apply to voluntary workers and those engaged in doing housework in private homes, workers who are overwhelmingly women. Much needed reforms of mental health legislation have returned the majority of patients to the community where they are cared for often with little or no financial support, predominantly by women. None of these measures can be challenged except electorally, and arguably none comply with the provisions of the Women's Convention.

Developing the common law and providing guidance to tribunals and other bodies

As with other common law systems the path to implementation of their rights leaves women in New Zealand facing a bewildering array of statutes, tribunals and administrative criteria to negotiate. The courts' significance in the enforcement of human rights for women is much diluted by the absence of a clearly defined path to their doors. But when the courts demonstrate that it is open to a rights-centred approach to the resolution of disputes as the Court of Appeal emphasised in proceedings brought under the Bill of Rights Act, then their influence will be more significant than at first sight appears.

The Court of Appeal in New Zealand has led the way in noting the relevance of international law norms and instruments to the law. In the first case to be argued under the Bill of Rights Act, the judge at first instance, rightly identifying the weaknesses of the legislation, said "in the absence of constitutional entrenchment and the omission of any remedies clause, it would be inappropriate for this Court to provide a prosthesis for a statute that is more crippled than debilitated."[20]

Clearly viewing this as too readily conceding defeat, by 1994 the Court of Appeal had already determined a number of important Bill of Rights cases and in a matter involving the rights of an immigrant from the Pacific Islands, the Court commented that the ratification of international instruments must be taken seriously by the courts, otherwise New Zealand's "adherence to the international instruments has been at least partly window dressing."[21] The fundamental rights contained in the New Zealand Bill of Rights Act highlight the obligations New Zealand assumed when it acceded the Optional Protocol to the

[19] Accident Rehabilitation and Compensation Insurance Act 1992.
[20] *Ministry of Transport v Noort*, District Court Wellington, 7 May 1991, Hobbs DCJ.
[21] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266, [1994] 1 LRC 421 at 431h (per Cooke P).

ICCPR.[22] The Court of Appeal suggested that the United Nations Human Rights Committee is "in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it."[23]

Those remarks made obiter have had a dramatic impact on the development of the law and policy in this field and have provided valuable guidance to the lower courts and tribunals.

Developing judges' understanding of obstacles to women's access to justice

It is critical that the judiciary also focus its attention on this aspect of the promotion of women's human rights. In a number of jurisdictions including Australia, Canada and the United States of America, studies demonstrate that there are elements of the court system that deter women from using the courts, make women's experiences of court proceedings unduly traumatic or hinder the ability of courts to deal justly with women. New Zealand's experience in attempts to reduce the stress for women and children who must give evidence in cases of a sexual nature have undoubtedly achieved a great deal, but the reforms appear to have had little impact on the number of rape complaints or convictions. Efforts to make the courts more accessible to women and therefore equality of justice available to all citizens, must then be of an ongoing nature.

While some of the obstacles to women's full access to the court system stem from matters which are strictly outside the judiciary's responsibility (such as the physical environment of the courts), others (including education which helps to improve the manner in which women are treated in courts) could prove beneficial. In a number of studies in Australia and North America women involved in court proceedings as parties, witnesses, lawyers and judges have given examples of the ways in which the court process, or the attitudes of those involved in it left them feeling that they had been treated unfairly because they were women. In New Zealand, a study conducted by the Law Commission on women's access to justice recounts similar experiences.[24] Since the fundamental obligation of the justice system is to deliver justice to all its citizens, it is disturbing to consider that there may be elements of our court processes that knowingly or otherwise discriminate against women.

While each jurisdiction will confront the problem in a different way, in New Zealand we have established a Judicial Working Group on Gender Equity which, as well as commissioning research on judicial

[22] 999 UNTS 11. New Zealand acceded to the Optional Protocol on 28 May 1989.

[23] [1994] 2 NZLR at 266, [1994] 1 LRC at 431h.

[24] For references, see New Zealand Law Commission, "Women's Access to Justice: Information about Lawyers Fees: Consultation Paper", MP3, and "Women's Access to Justice: Women's Access to Legal Information: Consultation Paper, MP4.

responses to issues of equality between women and men, will embark upon a study programme designed to assist the judges to understand more fully the nature of the difficulties faced by women in the court system so that they, in compliance with the judicial oath, can work progressively towards eliminating any bias in the system. As leaders in the court system, the judges bear a particularly serious responsibility to examine our own beliefs and prejudices and to lead the way in the attempt to eliminate bias.

There are other good reasons for ensuring that the judiciary understands the systemic nature of the bias against women in society in general and in the court system. In New Zealand, in accordance with the modern trend towards incorporating principles upon which a statute is based, the legislature has often included in the body of the Act a significant area within which a judge's discretion must be exercised. A discretion can only be validly exercised if it is based on accurate information, and not upon values and traditions which, while honestly held, may well be mistaken or outmoded. For this reason programmes designed to inform judges of the subtle but widespread bias against women who participate in any way in the court system will assist judges to comply with their judicial oath, which in New Zealand is to do justice to all people without fear or favour, affection or ill-will.

So too there are a number of reasons for emphasising the importance of greatly increased numbers of women in the judiciary. Firstly, the composition of the judiciary should reflect the population that it serves. Secondly, a significant number of women in the judiciary normalises the institution and demonstrates to women lawyers in particular that the power and status attaching to judicial office is open to both women and men. Thirdly, it is only when a critical mass, of at least one third of the judiciary, comprises women that the institution itself will begin to change to reflect the values and experiences of women.

While the total numbers of women in the judiciary in New Zealand may be higher than in some comparable jurisdictions (approximately 10 to 12 per cent), nonetheless, there are no women judges in the Court of Appeal, or in the Maori Land Court. Nor are there any female judges in the Employment Court, which deals daily with issues of employment law which have a significant impact on women.

The delivery of justice is not a scientific process; the law is developed by interpretation of statutes and application of precedent. At its foundation development of the law depends on the ethos, views and experiences of those who apply it. Where women are excluded or are underrepresented, their contribution to the nation's jurisprudence will be minimal. I do not argue that when they do serve equally with male judges at all levels of the domestic jurisdiction, the development of the law will be better, but I do argue that it will be different and that women's life experiences should be included. Without the dimension provided by half of the world's population, the law's focus will lack the breadth of vision which application of human rights norms demands.

Conclusion

Enforcement of human rights remains essentially male-focused. The cases brought thus far under the New Zealand Bill of Rights Act are concerned with matters which mostly affect men: arrest and detention following commission of criminal offences, the right to consult a lawyer in private following arrest for alcohol-affected driving. Women still feature mainly as the complainants in crimes of violence and sexual assault. But few if any landmark judgments have been delivered concerning violence against women as a human rights issue. Moreover women are rarely to be seen as expert witnesses in commercial causes or seeking review of administrative action. They remain largely confined to the private sphere of human activity and for that reason, if not invisible, remain marginalised in the court system.

The challenge for those in New Zealand who wish to see a coherent development of the law by reference to the Women's Convention is to find the right case, with a willing litigant and bring proceedings for relief before the court. If that is achieved, then I have no doubt of the far reaching influence of the Convention in the interpretation of New Zealand legislation, or application of policy. *New Zealand Van Lines v Proceedings Commissioner*[25] was a case concerning sexual harassment in the work place which was so serious that the woman concerned felt obliged to leave her employment. On appeal, the court after considering the Women's Convention and the United Nations Declaration on the Elimination of Violence against Women,[26] said that human rights legislation "is to be accorded a liberal and enabling interpretation." And in *Coburn v Human Rights Commission,* the court said "the proper construction of [the Human Rights Act] requires an appropriate regard for the substantial body of authority both in New Zealand and abroad, as to the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one."[27]

The courts are poised to give real and practical effect to international instruments ratified by New Zealand, but the paucity of proceedings involving interpretation or application of norms guaranteeing the human rights of women demonstrates the inaccessibility of the courts to women, rather than a general commitment to the achievement of equality.

There is much to be said for the manner in which countries like New Zealand develop the common law. Attentiveness to public opinion or compliance with international human rights principles can result in policy or legislation which the courts can interpret and apply in a wide

[25] [1995] 1 NZLR 100, (1994) EOC ¶92-620 (digest).
[26] GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.
[27] [1994] 3 NZLR 323 at 333, (1994) EOC ¶92-609 (digest).

range of cases. At its foundation however, such a system depends on an unswerving commitment to apply human rights norms developed internationally and ratified locally. Without this grassroots commitment to the achievement of equality the courts' ability to develop the law becomes more constrained. In New Zealand we can point to a tradition of compliance with international human rights instruments. We can say too that, although we have no written constitution or entrenched Bill of Rights, there is the New Zealand Bill of Rights Act which states and reflects the principles of the ICCPR. While Parliament clearly never intended the courts to have much power under the legislation, the courts have in fact seized that power, imposed remedies where none were apparent, and have highlighted the country's commitment, particularly in the civil and political rights areas affecting the accused's right to a fair process of arrest, detention and trial. New Zealand citizens are now more fully aware of our obligations under the ICCPR and the most lowly burglar now claims as a first-defence point that his rights under the Bill of Rights were not observed.

But in the success of the courts' application of this legislation, in heightening public awareness of civil and political rights, may well lie the seeds of political failure for other measures. In order to demonstrate commitment to equality for women, a range of tribunals have been established which determine or mediate disputes which affect women most potently. The Complaints Review Tribunal (which administers the Human Rights Act) and the Social Security Appeal Authority (which examines the grant or refund of welfare benefits) are both examples of tribunals, chaired by those with legal qualifications, which operate outside the central court system. These tribunals and the Family Court examine issues which are personal and private and as a consequence receive little publicity except in cases where women's rights come into conflict with other rights or interests which are strongly held. In proceedings brought for instance by female flight crew to secure promotion equal to their male colleagues of similar service, the Tribunal said:

> "There would be few who would openly espouse the view that employers should be free to engage in discriminatory practices which deny women equal opportunity in the work place. Yet, this case illustrates, against a background of complex legal and factual issues, a situation of serious inequality which has existed over a period of many years, and which continues to exist. Years of discussion and debate between the employer, Air New Zealand Limited..., the women whose complaints are the subject of these proceedings, their Union, and the Human Rights Commission...did not produce a remedy because there was a fundamental conflict between the demand for equality made by a small group of senior female air cabin crew and the career expectations of their male colleagues.

> Ultimately, [there was] no option but to commence these proceedings under the Act in order to obtain a remedy."[28]

This decision, unlike most others before the Tribunal, attracted much public comment concerning the tactics employed over the years by the cabin attendants' male colleagues to discourage the proceedings. But there is seldom a wide-ranging public debate concerning human rights issues concerning women, and perhaps that is a measure of women's complacency about their status in our society.

Furthermore, only rarely do these issues come on appeal to the High Court or to the Court of Appeal. The resolution of complaints of human rights violations then do not as a rule receive the level of rigorous examination that commercial litigation and criminal issues do. By their nature they are resolved in a semi-private forum. While the tribunal decisions are in writing and accessible, the lack of judicial examination in the higher courts results in an uneven development of jurisprudence and a low level of impact on policymakers and the public in general.

Given Parliament's failure to keep control of the "toothless tiger", the Bill of Rights Act, it is unlikely that other tribunals charged with resolving issues that primarily affect women will be accorded greater status or even better resources to expedite their work. It is only when the courts more regularly and publicly consider cases involving women's human rights and when an optional protocol which will provide a complaints mechanism is established under the Women's Convention that this area of jurisprudence will begin to develop coherently and thereby benefit all women in New Zealand.

[28] *Proceedings Commissioner v Air NZ Ltd* (1988) EOC ¶92-258, at p 77, 532, 7 NZAR 462 at 465.

THE WORK OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: ITS FOCUS ON NATIONALITY, CUSTOM, CULTURE AND THE RIGHTS OF THE GIRL-CHILD

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In November 1979 when the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention),[1] the Convention became the springboard which catapulted women's rights into the rarefied atmosphere of human rights guaranteed to all human beings under the Universal Declaration of Human Rights (the Universal Declaration),[2] and which affirms everyone's entitlement to all rights and freedoms without distinction of any kind including distinction based on sex.

In order to monitor progress made by States parties in the implementation of the Women's Convention, a Committee on the Elimination of Discrimination against Women (CEDAW) was established in 1982 comprising twenty-three experts of "high moral standing and competence in the fields covered by the Convention", and elected by States parties to serve in their personal capacities, consideration being given to equitable geographical distribution.[3] The Women's Convention requires States parties to submit reports periodically to CEDAW indicating measures adopted to give effect to the provisions of the Convention — an initial report within one year after ratification or accession and thereafter every four years or whenever CEDAW so requests.[4]

In carrying out its mandate under the Women's Convention, CEDAW endeavours to enter into constructive dialogue with States parties when considering their reports. The formula used is one of posing questions to a State party's representative or making comments, in order to elicit answers which may clarify or elucidate information contained in the report or supplement the presentation of the representative in introducing the report. Members of CEDAW encourage States parties to be frank and open in their reports and presentations, and very often commend States parties whose reports seek to present the true position

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[1] 1249 UNTS 13, adopted on 18 December 1979 by GA Res 34/180, entered into force 3 September 1981.

[2] GA Res 217A(III), adopted on 10 December 1948, UN Doc A/810, at 71 (1948).

[3] For details, see Women's Convention, article 17.

[4] Article 18.

of the status of women in their countries, rather than paint a glowing picture which is very often misleading.

The main thrust of the Women's Convention is aimed at eliminating all forms of discrimination encountered by women in all areas affecting their lives, and a perusal of the relevant articles attests to this. It urges States parties to embody the principle of equality in their national constitutions or other instruments and to adopt appropriate legislative measures prohibiting discrimination against women, and even special temporary measures if necessary, to ensure their full development and advancement in all areas.[5] States parties are also enjoined to modify social and cultural patterns of conduct with a view to eliminating prejudices and customary practices based on stereotyped roles for men and women as well as to take appropriate measures to suppress all forms of traffic in women including exploitation of prostitution.[6] The involvement of women in the political and public life of their countries is also addressed, including their right to vote and participate in national elections and represent their governments at the international level.[7] Certain specific aspects of life are highlighted, e.g., equal rights to acquire, change or retain their nationality and that of their children; equal rights to all forms of education; equal rights in the field of employment, including equal remuneration in respect of work of equal value, the provision of social support services and benefits; equal rights to health care and access to family planning services; equal rights before the law and in respect of all matters relating to marriage and the family including the same rights to ownership of matrimonial property.[8] The rights of rural women are given special attention in order to ensure to them equal development with other women.[9]

Although reservations can be made by States parties to any of the articles of Women's Convention, a reservation which is incompatible with "the object and purpose of the Convention" is not permitted.[10] Over the years, CEDAW has consistently urged States parties to withdraw reservations which effectively destroy the whole basis of the Convention, and in some instances reservations have been withdrawn.

The focus of this paper is on the issues of nationality, custom, culture and the rights of the girl-child and ways in which the Women's Convention can be used to address them. I shall address each issue separately by examining the relevant article of the Convention and its implications.

5 Articles 2 to 4.
6 Articles 5 and 6.
7 Articles 7 and 8.
8 Articles 9 to 13, 15 and 16.
9 Article 14.
10 Article 28.

Nationality

In its simplest form the nationality of a person is determined by his or her place of birth. If one is born within the boundaries of a particular country, one ought to be regarded as a citizen or national of that country. One's nationality can also be determined by the nationality of one's parents, either of them, or by choice. However acquired, it is an inalienable human right to which everyone is entitled. It is guaranteed under the Universal Declaration.[11] No one ought to be stateless, and every legal means must be pursued to safeguard this right. Further, States must ensure to every citizen protection from arbitrary withdrawal of his or her nationality within their legal framework. This is also guaranteed under the Universal Declaration.[12]

The Women's Convention accords to women equal rights with men in respect of their nationality and that of their children. Article 9 provides as follows:

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

Experience has shown that equal treatment is not always accorded women in the conferring of their nationality on foreigners whom they marry. The nationality laws of many countries do not permit the foreign husbands of female nationals to acquire their nationality in the same way as the foreign wives of male nationals. Similarly, even though all children born during a marriage automatically acquire the nationality of their fathers, in some countries children born to a foreign mother do not acquire her nationality. In some countries, laws governing change of nationality are also different for males and females.

This discrimination is not confined only to countries where women are subjugated to an inferior status in all aspects of life, but is also evident in countries which are committed to eliminating discrimination against women. Reports of States parties examined by CEDAW consistently reflect discrimination in the conferring of nationality on foreign spouses and children by male and female nationals. Concerns are expressed repeatedly by CEDAW when States parties report on article 9.

[11] Universal Declaration, article 15(1).
[12] Universal Declaration, article 15(2).

Some States have, upon ratification or accession to the Women's Convention, entered reservations to article 9. In a few instances, they expressed the intention to withdraw the reservation upon amendment of their relevant domestic law;[13] in others the State party was of the view that article 9 contravened the express provisions of its domestic law on nationality. Under the nationality laws of some States, a female national can transmit her nationality to her children only if the father's nationality is unknown, if he is stateless, or if the paternity of the child or children has not been established.[14] Under the laws of other States, the alien husband of a female national can only acquire her nationality through naturalisation, but the alien wife of a male national may acquire his nationality by benefit of law, by submitting an application in due form and establishing residence for a specified period of time.[15]

It has been contended justifiably that a reservation entered to any of the articles of the Women's Convention which seek to remove discrimination suffered by women is incompatible with article 2 and renders ratification or accession nugatory, as upon such ratification or accession, States parties undertake to adopt appropriate legislative measures to eliminate all forms of discrimination against women and to modify or abolish existing laws which constitute such discrimination. I submit that article 2 is the core of Women's Convention around which all obligations of States parties are centred, and non-compliance with article 2 flies in the teeth of the whole spirit of the Convention. It is hoped that all reservations entered to articles of Women's Convention will be withdrawn in the immediate future. The States parties that have already done so must be commended.

At its thirteenth session in 1994, CEDAW adopted *General recommendation No 21* in respect of articles 9, 15 and 16, having regard to the fact that 1994 was designated by the General Assembly as International Year of the Family and that those articles have special significance for the status of women in the family.[16] I set out hereunder the comment made by CEDAW on article 9:

> "Nationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to

[13] Reservation made by the Government of Cyprus on 23 July 1985: UN Doc CEDAW/SP/1996/2, at 16.

[14] Report of the Government of the Arab Republic of Egypt, UN Doc CEDAW/C/13/Add.2 (14 May 1987).

[15] Report of the Government of Tunisia, UN Doc CEDAW/C/TUN/1-2 (12 April 1994), paras 339 and 340.

[16] For details, see CEDAW, *General Rrecommendation No 21* (thirteenth session, 1994), *Report of the Committee on the Elimination of Discrimination against Women 1994*, UN Doc A/49/38, at 1 (1994), paras 4 and 5, reprinted in UN Doc HRI/GEN/1/Rev.2, at 119-128 (1996) and (1995) 2 IHRR 1.

> stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality."[17]

The recommendation following the above comment was that in their reports, States parties should "set out whether their laws comply with the principles of articles 9, 15 and 16 and where, by reason of religious or private law or custom, compliance with the law or with the Convention is impeded."[18] It was also recommended that States parties, in order to comply with these articles of the Convention, should enact and enforce legislation.[19]

Recommendations are made by CEDAW in accordance with article 21 of Women's Convention. They are based on the assessment and evaluation of reports considered by CEDAW. It is hoped that they are regarded as being made constructively and not critically, and that States parties will see it fit to implement these recommendations in the interest of improving the status of the women in their countries.

Custom and culture

In many countries of the developed and developing worlds, traditional customs, deep-rooted cultural mores, and religious beliefs influence and inhibit women's full integration into the mainstream of development and their advancement in all fields of endeavour, even when all legislative measures have been put in place to eliminate discrimination. Articles 2(f) and 5(a) of Women's Convention expressly mandate States parties as follows:

Article 2(f): "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

Article 5(a): [to take all appropriate measures] "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Social norms based on customary, cultural and religious beliefs are not changed or eradicated easily, being rooted in centuries of tradition and

[17] *Id* at para 6.
[18] *Id* at para 48(b).
[19] *Id* at para 49.

an inherited value system. The mores of a nation can be traced, in some instances to the beginning of its civilisation and handed down from generation to generation. Reversing these customs and beliefs can be traumatic, and cannot be achieved overnight or in the short term. Change has to be gradual and brought about by reeducation and acceptance of new values, while preserving the positive aspects of a nation's culture.

An often cited example of a traditional practice which is regarded as being prejudicial and injurious to a woman's health, apart from emphasising her inferiority to men, is female genital mutilation. Generally children and young girls are the victims of this practice, the objective being to preserve virginity and suppress sexuality, thereby ensuring fidelity to their male partners. In carrying out the practice, certain parts of the female genitalia are excised, resulting in excruciating pain and consequential complications, such as infections and haemorrhages. Women as children and adolescents throughout history have been victims of this practice, mainly in the countries of Africa, Middle East and Asia, and have accepted it without flinching as part of the process of becoming a woman. Custom and culture dictate that they submit to the excision without question. Similarly, women have also suffered as a result of the traditional practice of the payment of dowry, which if inadequate may lead to the death of a young bride.

However, in recent years, women in the countries where these practices are carried out have been raising their voices loudly and clearly in campaigns aimed at eradicating them. The effect has been that in some countries, legislation has been enacted prohibiting the practices with criminal sanctions. Education programmes have been launched to inform the public of the consequences of such practices.

Articles 2(f) and 5(a) of Women's Convention constitute a two-pronged attack on customs and practices which discriminate against women. Under article 2(f), States parties undertake "to take all appropriate measures, including legislation" to modify or abolish these practices. This involves the use of the legislative process as a means of eradicating traditional practices, and will apply to States that have no or no adequate legislation aimed at this objective. Of course, their efforts in this regard ought not to be confined to legislation, but should embrace all measures which will result in the abolition of customs and practices that discriminate against women.

The main thrust of article 5(a) is directed at "the social and cultural patterns of conduct of men and women", based on the inferiority of women and the superiority of men and which in turn result in stereotyped gender roles. This suggests that States parties should seek to change attitudes by the educational process, particularly in the context of the family, having regard to article 5(b) which emphasises family education and shared parental responsibility.

The practice has developed within CEDAW, when examining reports, of seeking information from States parties on traditional practices under article 12, which addresses the health concerns of women, since the effects of a traditional practice such as genital mutilation affects adversely the health of girls, adolescents and women. At the ninth session of CEDAW in 1990, after noting the studies of the Special Rapporteur on Traditional Practices affecting the Health of Women and Children[20] and the Working Group on Traditional Practices,[21] CEDAW, being gravely concerned "that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as female circumcision",[22] adopted the following recommendation:

"That States parties:

(a) Take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include:
   (i) The collection and dissemination by universities, medical or nursing associations, national women's organisations or other bodies of basic data about such traditional practices;
   (ii) The support of women's organisations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;
   (iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to co-operate in influencing attitudes towards the eradication of female circumcision;
   (iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;

(b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision;

(c) Invite assistance, information and advice from the appropriate organisations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices;

[20] UN Doc E/CN.4/Sub.2/1989/42 (21 August 1989).
[21] UN Doc E/CN.4/1986/42.
[22] CEDAW, *General recommendation No 14* (ninth session, 1990), *Report of the Committee on the Elimination of Discrimination against Women 1990*, UN Doc A/45/38, at 85, reprinted in UN Doc HRI/GEN/1/Rev.2, at 108-109 (1996).

(d) Include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision."

The term "genital mutilation" is now used to include any traditional practice involving the genitalia of females, and therefore the *General recommendation* must be taken to include all forms of genital mutilation and not be confined only to female circumcision.

Reference is made in the recommendation to article 10 of Women's Convention, which addresses the educational needs of women, but more specifically to article 10(c) which exhorts States parties to take appropriate measures to eliminate any stereotyped concept of the roles of men and women at all levels and in all forms of education, and it is in this regard that *General Recommendation No 14* recommends that States parties to include in their reports, under articles 10 and 12, information on measures taken to eliminate female circumcision.[23] This is a recognition by CEDAW that the eradication of harmful traditional practices based on customary and cultural norms which give rise to gender-role stereotyping can only be successfully achieved by a reformation of values, both in the formal and informal education system.

So far, discussion has centred mainly on the traditional practice of genital mutilation based on custom and culture, but it can also be classified as an act of violence and a breach of women's human rights. The Women's Convention does not specifically address the issue of violence in any of its articles, unlike the Convention on the Rights of the Child.[24] However, CEDAW, when examining States parties' reports, has consistently sought information on violence under articles 2, 3, 5, 6, 11, 12, 14 and 16.

Articles 2 and 3 are of a general nature and exhort States parties to adopt appropriate measures to eliminate all forms of discrimination encountered by women in all aspects of their lives. Consequently, violence of any kind suffered by women is a form of discrimination when perpetrated by men in pursuance of their stereotyped superior roles. Attention has already been directed to article 5. Article 6 addresses the problem of traffic in women and exploitation of prostitution, and it is a notoriously accepted fact that women involved in the world's oldest profession are easy targets of violence.

Article 11 seeks to eliminate discrimination against women in the field of employment, and recognises the right to work as an inalienable right of all human beings. Therefore, any act which seeks to interfere

[23] *Id* at para (d).

[24] See Convention on the Rights of the Child (the Children's Convention), articles 19 and 24(3), GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

with or disrupt the enjoyment of this right can be regarded as discrimination against women, if perpetrated by men in positions of authority or in positions where they can adversely affect a woman's advancement in the workplace. I am referring specifically to the ever-increasing problem of sexual harassment, which includes unwelcome physical contact and advances, or sexual acts or demands.

Reference has already been made to article 12, which addresses the health concerns of women. The problems faced by rural women are not dissimilar from those encountered by women generally, including being victims of violent behaviour. Although article 14 concerns itself primarily with enhancing the contributions rural women can make to their economic development and that of their communities, it also seeks to ensure that all of the provisions of Women's Convention are applicable to them.

The highest incidence of violence perpetrated against women occurs in the home and within the bosom of the family. Therefore, article 16 forms a convenient springboard to launch an attack on discrimination resulting from abuses committed against women within the family.

The concerns of CEDAW about the pervasive scourge of violence, after an examination of reports of States parties from all geographical regions over a period of ten years, were expressed first in *General recommendation No 12* (adopted at its eighth session in 1989),[25] and in *General recommendation No 19* (adopted at its eleventh session in 1992).[26] The CEDAW concluded that "not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms."[27] After a detailed commentary on the specific articles mentioned earlier, a multi-faceted recommendation was adopted which inter alia urged States parties to identify in their reports the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the measures taken to overcome violence, including all available data on the incidence of such violence.

To date, a few States parties have entered reservations to articles 2(f) and 5(a), and various reasons have been advanced for doing so. The reservation entered by the Government of the Cook Islands through the Government of New Zealand is based on the fact that customs governing inheritance of certain Cook Islands chief titles may be inconsistent with the Women's Convention.[28] The main concern here seems to be a

[25] CEDAW, *General recommendation No 12* (eighth session, 1989), *Report of the Committee on the Elimination of Discrimination against Women 1989*, UN Doc A/44/38, at 81 (1989), reprinted in UN Doc HRI/GEN/1/Rev.2, at 106-107 (1996).

[26] CEDAW, *General recommendation No 19* (eleventh session, 1992), *Report of the Committee on the Elimination of Discrimination against Women 1992*, UN Doc A/47/38, at 5 (1989), reprinted in UN Doc HRI/GEN/1/Rev.2, at 112-118 (1996).

[27] *Id* at para 4.

[28] Reservation by the Government of New Zealand, the Government of the Cook Islands and the Government of Niue (10 January 1985), UN Doc CEDAW/SP/1996/2, at 28-29.

question of inheritance based on custom and compliance with the relevant articles of the Convention may affect the titles of certain chiefs.

The Arab Republic of Egypt entered a reservation to the whole of article 2, but the State party expressed willingness to comply with the content of the article, provided that such compliance does not run counter to the Islamic Shariah.[29]

The Government of Iraq also entered a reservation to article 2,[30] but it did not expressly base the reservation on an inconsistency with the Islamic Shariah.

The reservation of the government of the United Kingdom of Great Britain and Northern Ireland to article 2 was based on the fact that substantial progress had already been achieved in the United Kingdom in promoting the elimination of discrimination.[31] It reserved the right to give effect to articles 2(f) and 2(g) by keeping under review such of its laws as may still embody significant differences in treatment between men and women. It also reserved the right to continue to apply its laws relating to sexual offences and prostitution.

As stated earlier, it is hoped that in the immediate future, the States parties will see fit to withdraw the reservations in order to ensure full development and advancement of women's rights.

One cannot conclude a discussion on the issue of violence against women without mentioning the United Nations Declaration on the Elimination of Violence against Women (the Violence Declaration), adopted by the General Assembly in December 1993.[32] It urges States to condemn violence against women and not to invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination, and inter alia to consider where they have not yet done so, ratifying or acceding to the Women's Convention or withdrawing reservations made to its articles.[33] The Declaration can be regarded as the most significant effort to combat violence against women, and one hopes that States will pay heed to its provisions even though they are merely declaratory.

Rights of the girl-child

There are no separate provisions in the Women's' Convention for girls. As a whole, it applies equally to all females regardless of age. Protection is also afforded to girls under the Convention on the Rights of the Child, which applies to all children up to the age of eighteen years.[34] However,

[29] Reservation by the Government of the Arab Republic of Egypt (18 September 1981), *id* at 16.
[30] Reservation by the Government of Iraq (13 August 1986), *id* at 20.
[31] Reservation by the Government of the United Kingdom of Great Britain and Northern Ireland (7 April 1986), *id* at 34.
[32] GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.
[33] Violence Declaration, article 4.
[34] Children's Convention, article 1.

in spite of these international treaties which are ratified and acceded to with alacrity by the member States of the United Nations, discrimination against children of the female sex persists. In some instances, the discrimination begins even before birth, and if one is fortunate enough to be born, the discrimination continues into adulthood.

Custom and culture in certain communities dictate that girls be relegated to a secondary role to boys. They are not regarded as an asset to the family. Hence, pregnant women seek ways of determining the sex of a foetus. If found to be a girl, the pregnancy is terminated. Upon birth, death is the inevitable consequence for a girl-baby. In the likely event that her life is spared, her future is grim. Her sole-perceived role in life is to reproduce and to minister to the needs of her male partner and family. In some societies, as mentioned earlier, she is prepared for womanhood by circumcision. Educating a girl is regarded as being unnecessary, and she may, if fortunate, be given only an elementary education. Inevitably, she drops out of school to care for younger siblings or to assist her parents with household chores. At an early adolescent age, a marriage is arranged for her, and she continues to minister to the needs of her own family. Her health is usually neglected, as a result of which her life expectancy is shortened, or she is beset with illnesses of a varied nature.

There are instances world-wide where girls are sold into slavery, either to satisfy debts or to relieve the financial position of her family. This slavery can result in either sexual or economic exploitation or both. They are forced into prostitution or employed ostensibly as domestics in affluent households, with paltry wages for endless hours of work, in addition to being sexually abused by their male employers. Other forms of discrimination encountered by girls include deprivation of their rights to inherit and succeed to their parents' estate, abandonment if disabled or incapacitated, employment in family enterprises with no wages, and diminished food allocations.

Article 10 of the Women's Convention seeks to eliminate the discrimination suffered by girls in the field of education, from pre-school to university, by urging States parties to take all appropriate measures to ensure the same conditions for career and vocational guidance, equal access to all educational establishments and to the same curricula, teaching staff, school premises and equipment. An important exhortation to States parties is the elimination of any stereotyped concept of the roles of men and women at all levels of education, and the reduction of female student drop-out rates.

The health needs of girls are safeguarded under article 12 which urges States parties to eliminate discrimination against women in the field of health care, by ensuring equal access to health care services. This includes provision of adequate food and nutrition, immunisation, and sanitary living conditions.

In relation to article 16, which addresses rights within the family, CEDAW adopted at its thirteenth session in 1994 *General recommendation No 21* and suggested the following with regard to inheritance:

> "Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884 D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession. That provision has not been generally implemented.
>
> There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished."[35]

All that has been discussed earlier in relation to custom and culture as well as violence will apply equally to the girl-child to whose plight attention was specifically directed during the Fourth World Conference on Women held in Beijing, China, in September 1995. The Platform for Action stipulates actions to be taken by governments, international and non-governmental organisations in order to eliminate all forms of discrimination against the girl-child. This includes eliminating the injustice and obstacles in relation to inheritance and enacting legislation guaranteeing equal rights to succession; enacting and strictly enforcing laws to ensure that marriage is entered into freely and with full consent; developing and implementing comprehensive policies and programmes for the survival, protection, and advancement of the girl-child as well as protecting the full enjoyment of her human rights. Governments are also urged to take action to eliminate negative cultural attitudes and practices against girls, including the root causes of son preference which result in prenatal sex selection and female infanticide. Action should be taken to eliminate discrimination against girls in education, skills development and training and in health and nutrition, also to eliminate the economic exploitation of child labour and seek to protect young girls at work. In relation to the eradication of violence against girls, governments are

[35] *General recommendation No 21, supra* note 16, paras 34 and 35.

urged to take effective action and enforce legislation protecting them from all forms of violence including sexual abuse, genital mutilation, sexual exploitation and prostitution as well as child pornography. The final objective in the Platform for Action is to strengthen the role of the family in improving the status of the girl-child.[36]

The objectives of the Platform for Action reflect in large measure the provisions of and concerns which the Women's Convention seek to address. In order to ensure continuity and implementation of the Platform of Action, it invites States parties to include, in their reports submitted in accordance with their obligations under the Women's Convention, information on measures taken to implement the Platform for Action.[37] CEDAW is also requested, within its mandate, to take into account the Platform for Action when considering the reports of States parties.[38]

Conclusion

Since its adoption in 1979, the Women's Convention has grown and come of age, with the number of States parties that have ratified or acceded to it increasing from twenty in 1981 to more than one hundred and fifty to date.[39] Concurrently, the number of reports submitted by States parties for consideration by CEDAW has risen steadily over the last fourteen years, with both initial and periodic reports being considered at present. The experience gained by CEDAW over the years is reflected in the range of general recommendations it has adopted, covering most of the articles of the Women's Convention.

There seems to be an upsurge of interest in promoting the rights of women, with countries hastening to ratify or accede to the Women's Convention even with reservations. This is an indication that women's rights are being recognised, and that they are in effect human rights which ought to be protected and enforced. Women have invaluable contributions to make in all spheres of the development of their countries and communities. This is exemplified by the following excerpt from the Vienna Declaration and Programme of Action:

> "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the

[36] For details, see *Report of the United Nations Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995), at 112-121.

[37] *Id* at 127, para 323.

[38] *Id* at para 322.

[39] As of 14 July 1997, there were 160 ratifications and accessions.

> eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."[40]

In pursuing the laudable objectives of the Vienna Declaration, one must not lose sight of the large number of women and young girls who are outside of the formal structure of society, whose rights are also universal and indivisible human rights which must be protected and safeguarded.

[40] UN Doc A/CONF.157/24, Part I, Chap III, para 18. The Declaration was adopted by the United Nations World Conference on Human Rights, Vienna on 25 June 1993.

NATIONALITY AND WOMEN'S HUMAN RIGHTS: THE ASIA/PACIFIC EXPERIENCE

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*Savitri W E Goonesekere**

Introduction

Migration of women across borders has been familiar to the Asia Pacific region for centuries. The phenomenon has acquired new dimensions in the last few decades because of the problems of refugees, displaced women needing international protection and migration of large numbers of women workers from the region for employment within and outside the region. Residence, employment and acquisition of citizenship within the host country raise difficult cross-border issues with political implications. Consequently, there is often a lack of political will by governments in addressing gender discrimination in laws and policies that violate international and national constitutional standards. The 'sensitivity' of these issues has resulted in some States parties to international conventions entering reservations in respect of articles on nationality. For instance, a reservation to the article on non-discrimination in regard to laws and policies on nationality stated in the Convention on Elimination of All Forms of Discrimination against Women (the Women's Convention) has been entered by several countries, including two countries in the Asia Pacific region.[1] It is estimated that half of the countries of the world have nationality laws that discriminate against women.[2]

A 1993 report of the International Women's Rights and Action Watch (IWRAW) referred to the various dimensions of discrimination in nationality laws and recommended that all States parties should address, as a matter of urgency, the need to review and amend laws and policies on nationality that discriminate against women.[3] *General recommendation No 21* of the Committee on the Elimination of Discrimination against Women (CEDAW), on equality in marriage and family relations, also calls upon States parties to enact and enforce legislation so as to comply with the provisions in the Women's Convention on nationality.[4]

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1 Article 9 of the Women's Convention, 1249 UNTS 13. Both Thailand and Korea entered reservations to the article. Thailand subsequently withdrew its reservation to article 9(2) on 26 October 1992: UN Doc CEDAW/SP/1996/2, at 31 and 53 (Thailand), and 29 (Korea).

2 International Law Association Committee on Feminism and International Law, *Preliminary Study and Comparative Analysis of the Immigration and Nationality Laws of Different States and their Impact Upon Women*, in *Report of the International Law Association, Sixty-Sixth Conference* (Buenos Aires, Argentina, 1994) 641 at 641 [hereinafter *ILA Preliminary Study*].

3 Marsha Freeman, *IWRAW Report: Human Rights in the Family* (Minnesota, University of Minnesota, 1993), pp 10-11.

Yet, States parties to the Convention from the region have rarely changed their laws. The report of the United Nations Fourth World Conference on Women in 1995 also indicates that the Beijing Declaration and Platform for Action does not deal specifically with the issue of nationality.[5] The importance of the issue of discrimination in nationality laws has therefore been undervalued, and it is merely considered one of many instances of gender discrimination that infringes the human rights of women. This is ironical, since the very capacity to claim rights and assume responsibilities, both at the national and international levels, depend on the crucial concept of nationality or citizenship.

These terms are used synonymously in international law as well as in most national legal systems. International law recognises that each State can determine who its citizens are, according to its own national law. It is the conferment of nationality on an individual that gives a State *locus standi* as well as responsibility in regard to an individual within national boundaries. Consequently, the human rights and responsibilities of an individual, within a State as well as his or her status within the regime of international law, depend on the important status of nationality.

In the *Nottebohm case*[6] nationality was described as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[7] Due to historical and other reasons, many States in the Asia Pacific region have accepted norms in determining effective linkage with the State that reflect bias against women. Discrimination surfaces traditionally in the acquisition and loss of nationality by married men and women, and the transfer of nationality to children.

International standards on nationality

Though nationality is an issue that can be determined by domestic law, several multilateral instruments have set standards which impact on the acquisition and retention of nationality. Most of the international instruments that impact on nationality relate to general standards on human rights. Consequently, the Universal Declaration of Human Rights (the Universal Declaration)[8] contains an important norm on gender equality, while the right to nationality is expressed as a right to have *some* nationality.[9] The Universal Declaration is sometimes considered to embody customary international law which is binding on all

[4] CEDAW, *General recommendation No 21* (thirteenth session, 1994), *Report of the Committee on the Elimination of Discrimination against Women 1994*, UN Doc A/49/38, at 1 (1994), reprinted in UN Doc HRI/GEN/1/Rev.2, at 119-128 (1996) and (1995) 2 IHRR 1.

[5] For details, see *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995).

[6] *Liechtenstein v Guatemala*, Judgment of 6 April 1955, [1955] ICJ Rep 1.

[7] *Id* at 23.

[8] GA Res 217A(III), adopted on 10 December 1948.

[9] Universal Declaration, articles 2 and 15.

nation States. If the norm on gender equality is considered a standard of customary international law, the right to non-discrimination in nationality law can be considered a core norm of international law, and binding even on States that have not ratified multilateral treaties and instruments that deal with the issue of gender discrimination and nationality.

Several multilateral treaties deal with the subject of non-discrimination in nationality law, and these are binding on States parties that ratify these treaties and voluntarily consent to abide by these human rights standards in determining the issue of who is entitled to citizenship under their own domestic laws. The International Covenant on Civil and Political Rights (ICCPR)[10] contains important standards regarding the conferment of political and civil rights on men and women, and equality before the law without discrimination based on sex.[11] Articles in both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[12] contain norms which recognise "the family" as the "natural and fundamental group unit within society" and a State party's obligation to protect the unit.[13] An article in the ICCPR, which creates a child's right to "a nationality", is repeated in the Convention on the Rights of the Child (the Children's Convention);[14] it does not address the specific issue of a denial of a right to nationality through gender discrimination against the mother. The article in the Children's Convention emphasises that a State party is required to ensure that a child has "a nationality and as far as possible, the right to know and be cared for by his or her parents." The obligation of States parties is to ensure the implementation of this right in accordance with their national law and obligations under other international treaties, "in particular where the child would otherwise be stateless."[15] The emphasis on domestic law and the avoidance of statelessness re-enforces the concept that a child can acquire a nationality through one parent, a position that can legitimise transmission of nationality exclusively through the male parent.

In this environment, specific standards on nationality set by the Women's Convention and the Convention on the Nationality of Married Women[16] have expanded and strengthened the international standards set by multilateral treaties. The Convention deals with the right of a woman to retain and acquire a nationality as an autonomous individual, irrespective of the solemnisation or dissolution of a marriage. Article 9 of the Women's Convention contains the strongest standard,

[10] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.
[11] ICCPR, articles 3 and 26.
[12] 993 UNTS 3, adopted on 16 December 1966, entered into force 3 January 1976.
[13] ICCPR, article 23; ICESCR, article 10.
[14] ICCPR, article 24(3); Children's Convention, article 7, GA Res 44/25, UN Doc A/44/49, at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.
[15] Children's Convention, article 7(2).
[16] 309 UNTS 65, adopted on 29 on January 1957, entered into force 11 August 1958.

since it recognises autonomy and equality in transferring or acquiring nationality and also permits either spouse to confer nationality on their children. However, it has been pointed out that since a woman cannot now automatically acquire her husband's nationality, she will have to prove a period of residence in his country, making her vulnerable to deportation.[17]

Reception of international human rights standards in nationality and domestic laws

Despite the lack of consensus in regard to nationality issues, it is possible to argue that the standard of non-discrimination is now an aspect of customary law, and that even States that are not parties to the international instruments discussed, are bound by an obligation to eliminate discrimination against women in nationality laws. If this standard is not accepted as customary international law, the application of the human rights standards will depend on whether or not a State in the Asia Pacific region has ratified these treaties.

As of January 1996, twenty-five countries in the Asia Pacific region had ratified the Women's Convention. These countries include many from the Commonwealth. Several countries, including Fiji and Malaysia in the Commonwealth, have entered reservations to article 9 of the Women's Convention, as recently as 1995.[18] The fact that the CEDAW has adopted a general recommendation governing the nationality issue and also requiring States parties to review and justify their reservations, has not inhibited the record of reservations to the nationality provision.[19] The records of ratification of the other international conventions are also poor, but there has been a nearly universal ratification of the Children's Convention.

The Children's Convention does not state that a child has a right to nationality through both parents. However, this interpretation can be argued on the basis of general articles in the Convention on the family, parental rights and responsibilities, gender equality and the norm of the best interests of the child.[20] These international standards on children's rights link to the standards in the Women's Convention, and can prove extremely important in forging an international consensus on non-discrimination in the politically sensitive area of nationality. The issue of nationality has received little attention as a general human rights issue and has in some ways become marginalised because of political sensitivity in

[17] *ILA Preliminary Study*, *supra* note 2, at 647.

[18] Papua New Guinea, Vanuatu, Fiji, Malaysia and Singapore acceded in 1995, and Pakistan acceded in 1996: *Status of ratifications of the Convention*, available on the website of the United Nations Division for the Advancement of Women: http://www.un.org/DPCSD/daw/cedaw.htm (status as of 25 March 1997).

[19] *General recommendation No 21*, *supra* note 4.

[20] For family life, parental rights and responsibilities, see articles 5, 18, 8, 9 and 10; for gender equality, see article 2; and for the best interests of the child, see article 3.

regard to cross border relations and gender equality in this region. The international standards on children's rights may become one strategy for obtaining interventions and policy change in domestic legal systems.

Realising international standards in domestic legal systems: problems and prospects

Many countries in the Asia Pacific region adopt a dualist approach to international law, and have, in the case of countries within the Commonwealth, been influenced by English common law values on the relationship between international law and domestic law. The act of ratification of any of the above international instruments does not lead to an automatic reception of international standards, so as to create rights and the capacity for enforcement at the domestic level. In the absence of an individual complaints procedure, by ratification to the Optional Protocol to the ICCPR,[21] ratification does not create individual rights. The obligation is placed on the State to bring its legislative policies and domestic practices in line with the standards of a treaty. In countries that follow this approach, courts of law are reluctant to incorporate or indeed be influenced by norms of international treaties, in the absence of domestic legislation that reflects these standards. It is very rarely that an appeal court will refer to an international treaty standard even in interpreting a national constitution or domestic law.[22]

In this environment, reception of international law depends on legislative intervention and judicial activism.

Legislative intervention

Discrimination in the area of nationality in legal systems based on English law derive their inspiration from early perceptions on gender relations in the family. Most legal systems in the region confer nationality by legislation which distinguishes between citizenship acquired on the basis of birth within the territory (*ius soli*) or birth and descent (*ius sanguinis*), or a combination of these principles. Sometimes, as under the Indian Constitution, acquisition of citizenship depends on the additional factor of being "domiciled" within the country.[23] Domicile is a complex concept that is interpreted by courts applying early English law as the establishment of a permanent home within a territory.[24] The *ius sanguinis* concept, as well as the domicile concept, have been influenced by deeply entrenched values on the male head of household within the family.

[21] 999 UNTS 301.

[22] A decision of the Supreme Court of Sri Lanka which does so is *Leela, Violet, Saminona and Beetanona v Inspector General of Police and others*, 2 December 1994 (unreported), per Sarath Silva J.

[23] Indian Constitution, article 5.

[24] *Whicker v Hume* (1858) 7 HLC 124 at 160.

The family unit created within marriage was perceived in early English law as well as in European civil law as a family, with a single male head of household and a female spouse under the marital power or 'coverture' of her husband. Blackstone, for instance, commented that "by marriage the husband and wife are one person in law; that is the very being and legal existence of the woman is suspended during marriage or at least is incorporated and consolidated into that of the husband."[25] Inevitably, a wife and minor children had a domicile that was 'dependent' on the husband or father.[26] A child born to an unmarried woman was considered a *filius nullius* in early English law, but was subsequently considered to have an exclusive relation to the mother. Such a child was not considered to have a status that could be linked to the biological father.[27]

These legal values have influenced the legislation and administrative regulations on citizenship and grant of visas in several countries in the region. Consequently, the citizenship law of Sri Lanka, Bangladesh, Fiji, Nepal, Pakistan, Malaysia and Singapore reflect or continue to reveal the influence of this ideology on family relations. India's citizenship law also reflected a bias against women until a recent amendment enacted in 1992.[28]

In Bangladesh and Pakistan which share a similar piece of legislation, and in Fiji, Nepal and Sri Lanka, different standards apply in regard to the grant of citizenship and resident visas to non-national male and female spouses of citizens.[29] In general, male spouses cannot apply for citizenship and, where they can do so, find it more difficult to obtain resident visas. Since Pakistan and Bangladesh recognise a qualified concept of *ius soli* or citizenship by birth, the law is less harsh than Sri Lankan law, which is limited to grant of citizenship by birth or registration. In all these countries, a married woman cannot transmit nationality by descent to her children, and a child of married parents obtains citizenship by descent exclusively through the father or male relatives. In addition to these general constraints, certain specific provisions reinforce the discrimination against women. In Bangladesh, even a child born outside wedlock in the territory obtains citizenship by descent through the link to the

[25] W Blackstone, *Commentaries on the Laws of England* (London, A Strahan, 1825) 366.

[26] For example, see *Lord Advocate v Jaffery* [1921] AC 146 and *Attorney General for Alberta v Cook* [1926] AC 444.

[27] Blackstone, *supra* note 25, at 454-459.

[28] Indian Citizenship (Amendment) Act 1992.

[29] For details, see Pakistan Citizenship Act (1951), sections 2, 3, 5 and 7; Sri Lanka Citizenship Act (1948), sections 4, 9, 11 and 7 and Administrative guidelines based on regulation 1956; Bangladesh Adaptation of Existing Law Order No. 48 (1972), retaining Pakistan Citizenship Act (1951), subject to amendments in Bangladesh Citizenship Order 1972, discussed by M R Islam, "The Nationality Law and Practice of Bangladesh" in Ko Swan-Sik (ed), *Nationality and International Law in Asian Perspective* (Dordrecht, Martinus Nijhoff, 1990) [hereinafter *Nationality in Asian Perspective*] 1; Constitution of Fiji, articles 26(2) and 25, Citizenship Act, section 7(3), cited by Imrana Jalal, "The Legal Status of Fiji Women", unpublished paper, ESCAP Expert Group Meeting, Saitama, Japan, August 1996; Nepal Constitution, article 9(1) and (5), cited by Sapana Malla Pradhan, "Country Paper Nepal", unpublished paper, ESCAP Expert Group Meeting, August 1996.

biological father. The mother's Bangladeshi nationality becomes relevant only if biological parentage of the father cannot be proved. The law also recognises that a Bangladeshi married woman can travel on the passport of her husband in the same manner as a child under 16 years. Pakistan recognises the right to citizenship on the basis of birth within the territory (*ius soli*) but denies citizenship to a child born to a Pakistani woman in circumstances where the child's father is a foreign diplomat. A similar constraint is found in Bangladeshi law.

In Sri Lanka, even a foundling acquires citizenship on the basis of a fiction that he or she is "a citizen of Sri Lanka by descent" through the male line. The adult child of a Sri Lankan married woman can apply for citizenship by registration (naturalisation), on the satisfaction of rigid requirements such as a specified period of continuous residence by the mother immediately prior to the application. The period of residence is seven years in the case of a married woman and ten years in the case of an unmarried woman. The current administrative interpretation that has not been challenged requires residence for this period by the child. This makes it even more difficult to obtain citizenship by registration, since the mother or the child may travel abroad for studies or employment and may not be able to prove the required period of residence. Sri Lankan law permits an unmarried woman to transfer her nationality to her child, but there must be evidence that certain male relatives, such as the maternal grandfather and maternal great grandfathers, were born in Sri Lanka.

Malaysia and Singapore recognise the concept of *ius soli* in determining citizenship, and birth within the territory enables a person to obtain citizenship through either parent.[30] However, when a child is born outside the territory, the paternal parentage is the only relevant criterion. A similar position in regard to birth outside the territory is found in Fiji. In Malaysia and Singapore, a woman who is an alien can apply to be registered as a citizen when she marries a man who is a citizen, if she satisfies the specified requirements. A similar provision has not been introduced in respect of alien spouses of Malaysian or Singaporean women. The Singaporean and Malaysian laws also discriminate against women who have acquired nationality by registration on marriage to a citizen, when the marriage is subsequently dissolved by divorce. Such women can lose their citizenship when they contract a marriage with an alien, though women who are citizens by birth or descent continue to retain their citizenship after marriage to a foreigner. This makes a woman vulnerable to deportation.

The Citizenship Act 1955 of India recognised the concept of *ius soli*, so that citizenship could be acquired by birth in India without evidence of domicile. An anomalous provision in the Act, which infringed the constitutional provision on acquisition of citizenship through either

[30] Constitution of Malaysia, articles 14 and 15; Constitution of Singapore, articles 122(1) and 123(2) (as modified by an 1967 amendment).

parent, prevented an Indian woman from transferring citizenship by descent to her marital or non-marital children. This provision was repealed by a recent amendment to the Act introduced in 1992.[31] A person can now claim citizenship by descent if either of his parents are citizens of India at the time of birth. The amendment ensures that section 4 of the Citizenship Act, which had other discriminatory aspects against women, now applies on a basis of equal rights for men and women. For instance, a provision that refers to the employment of the parent in government service refers to both the father and the mother. Another provision in the Citizenship Act which referred to the impact of renunciation of citizenship by the father on a minor child refers to both father and mother.[32]

Other countries in the region, both within and outside the Commonwealth, have nationality legislation which recognises the principle of gender equality in the acquisition and transmission of nationality to children. Thus, New Zealand enacted legislation which permitted both men and women to transfer citizenship to children and a married woman is not required to retain the same domicile as her husband.[33] Acquisition of citizenship in Australia is based on rules that apply equally to men and women and marriage has no impact on the acquisition or loss of citizenship.[34] Japanese nationality law permits both the father and the mother to transmit nationality to a child, while a child of unknown parentage acquires nationality on the basis of *ius soli* or birth in Japan. The spouse of a Japanese national may apply for Japanese nationality by naturalisation and the rules on loss of nationality do not differentiate between men and women. The law generally discourages dual nationality.[35]

Several of these countries that discriminate against women in their nationality laws are States parties to international conventions that require them to take positive steps to change their legislative policies and domestic practices that impact on nationality. For instance, Sri Lanka, Malaysia and Singapore are States parties to the Convention on the Nationality of Married Women. These countries are also States parties to the Women's Convention and they have ratified the Children's Convention. The Committee on the Elimination of Discrimination against Women (CEDAW), established by the Women's Convention to review the performance of States parties in bringing their laws and policies in line with the Convention, has unfortunately not been able to promote accountability in conforming with these standards.

[31] Articles 3(1) and 4 of the Indian Citizenship Act modifying article 5 of the Indian Constitution, were amended by the Citizenship (Amendment) Act 1992. The same applied for article 8 of the Citizenship Act 1955.

[32] 1995, 1 *Gender Justice Reporter* 14, National Law School of India University.

[33] Citizenship Act 1977.

[34] Reference to Australian Citizenship Act 1948, *Achievements of the United Nations Decade for Women in Asia and the Pacific*, UN Doc ST/ESCAP/434, 53 at 158 (1987).

[35] Japanese Nationality Act (c147 of 1950), articles 2, 7 and 11.

The regular country reports on Sri Lanka, for instance, have not indicated that this issue has been given any priority for legislative intervention.[36] Yet, CEDAW has not been able to persuade the government to address the issue. The Constitution of Sri Lanka guarantees gender equality and a local policy document, the Women's Charter (1993), has set guidelines that require an extensive review of nationality laws. Efforts by non-governmental organisations and the local monitoring committee, the National Committee on Women, established under this Charter to raise nationality law reform as a critical issue, have not yet met with an effective response. A recent report by the National Law Reform Commission has recommended extensive changes in the law, in conformity with Sri Lanka's international obligations, constitutional guarantees on gender equality and the norms of the Women's Charter (1993). The report is being studied by the Ministry of Defence, the appropriate ministry responsible for matters connected with immigration. No action has yet been taken to amend the citizenship laws and administrative guidelines on the issue of visas to foreign spouses.

In this environment of clear lack of political will in effecting change, the superior courts are being used to challenge these laws and administrative decisions on nationality. The touchstone for judicial review is the provisions in national constitutions which incorporate a general standard of gender equality.

Constitutional litigation

South Asian constitutions in particular contain articles which restate and incorporate the international norms on gender equality and equality before the law which are found in the ICCPR. Where these provisions are combined with a wide power of judicial review of all laws that infringe the constitution, there is a legal basis for challenging discriminatory laws on nationality, as well as governmental and administrative decisions based upon these laws.

In Pakistan, a writ petition, filed some years ago, challenged the provision of the Pakistan Citizenship Act that denied a Pakistani woman the right to obtain nationality for her spouse while permitting an alien woman to obtain citizenship on satisfaction of conditions set for alien female spouses of male Pakistani citizens.[37] Since Pakistani law remains unchanged, it appears that the petition is pending or that it failed. A similar petition has been filed recently, by a Pakistani grandparent on behalf of a Pakistani minor born to her daughter, who is married to an Indian and residing in one of the Gulf States. The application is being

[36] For the initial and second reports of Sri Lanka, see UN Docs CEDAW/C/5/Add.29 (1985) and CEDAW/C/13/Add.18 (1988).

[37] *Begum Rashida Patel and others v Federation of Pakistan*, 1987 Petition No 515, cited in Patel Rashida, *Socio, Economic, Political Status and Women and Law in Pakistan* (Karachi, Faiza Publishers, 1991) at 16.

made on the basis that the grandparent wishes to apply for guardianship of the child and cannot do so, because Pakistani law infringes the constitutional guarantee on gender equality, by preventing a Pakistani woman from transferring her citizenship to her child.[38] A similar case was filed in 1992 or 1993 in Bangladesh and appears to be pending. In this case a Bangladeshi woman living in France and married to an Indian applied to the Bangladesh Consulate to have her children's names included in her passport. The entries were made in her passport and cancelled later on the basis that the mother could not transfer citizenship to her children, born of a marriage to an alien. A constitutional petition filed in the High Court in Bangladesh by this woman alleged a violation of the constitutional guarantee on gender equality stated in the Bangladesh Constitution. The case is still pending.[39] However the Nepal Supreme Court has recently struck down a regulation discriminating against the foreign spouses of Nepalese women in the issue of visas, on the ground that they were inconsistent with the provision on gender equality in Nepal's Constitution.[40]

The power of judicial review of Sri Lanka courts is limited. Past legislation cannot be challenged for infringement of fundamental rights, including the right to equality before the law and gender equality.[41] The Citizenship Act (1948) which discriminates against women cannot therefore be challenged for infringement of the constitution. Consequently, an administrative decision by the Controller of Immigration which refuses to issue a passport to the minor child of a Sri Lankan woman married to an alien, cannot be challenged as an infringement of the constitutional guarantee on equality, since the Citizenship Act incorporates such a discriminatory provision. On the other hand, an arbitrary administrative decision to deny naturalisation of an adult child, who has the right to make an application to be registered as a citizen, can be challenged, since Sri Lanka courts are increasingly interpreting the constitutional guarantee on equality before the law to strike down arbitrary and unfair administrative or executive action.

Sri Lanka's Citizenship Act also contains a provision which gives male and female spouses of Sri Lankan citizens the same right to apply for citizenship. Nevertheless, administrative guidelines issued by the Controller of Immigration require a male spouse of a Sri Lankan citizen to satisfy strict conditions, including deposit and remittance of a substantial

[38] Case referred to the author by Pakistani lawyer and human rights activist Hina Jilani, as a fundamental rights action on nationality, filed by her in the Supreme Court of Pakistan, under article 25(1) and 25(2) of the Constitution.

[39] Case filed in Bangladesh High Court in 1992-1993 under articles 27 and 28 of the Constitution, as cited *Women's Rights, Human Rights, Asian Women's Profile*, Asia Pacific Forum for Women, Law and Development, Kuala Lumpur, Malaysia, 1993, p 2.

[40] *Meera Gurung v Department of Immigration*, Nepal Decision No 4858, NLJ 2051, at 68, cited in Pradhan, *supra* note 29.

[41] See the Constitution of Sri Lanka: article 12(1) on equality and article 16(1) on limited power of judicial review.

amount of foreign exchange, prior to consideration of the application. These discriminatory guidelines have been questioned, by women affected by these regulations, in applications filed before the Commission on Elimination of Discrimination. The Commission has not been successful in persuading the Controller to revise and withdraw these regulations.

Sri Lankan Governments, in the past, have not intervened and the affected women have been unwilling to challenge the discriminatory exercise of administrative discretion, due to insecurity that their spouses may be denied resident visas pending such litigation. The first case brought by a woman, challenging an administrative decision to deny a resident visa to her foreign spouse, was filed in the Supreme Court in 1996, but was settled out of court when the man was granted his visa. Another case filed recently, as a violation of the constitutional right to gender equality, is still pending. It is only a few months ago that the present government has been persuaded to examine the nationality issue, with a view to revising and amending existing law. The recent concern with exploitation of Sri Lankan children by travelling paedophiles, seems to have re-enforced arguments that a new policy on issue of visas to foreign male spouses will encourage marriages of convenience for illegal purposes.

The provisions in the Malaysian and Singapore Citizenship Acts which infringe the constitutional guarantees on gender equality in these countries do not appear to have been challenged in the courts yet.[42]

Conclusion

Many countries in the region, particularly South Asian countries, influenced by values of English law derived from a colonial period, have enacted nationality laws that violate international standards that they have ratified and their own constitutional guarantees on equality. Powerful interests seem to discourage governments from acquiring the political will to revise obviously discriminatory laws.

The ideology of patriarchy that is reflected in legislation may have a historical origin, but it is reinforced by perceptions of gender relations among policy planners and even bureaucrats. When the law of the United Kingdom was changed in 1981 by a Nationality Act that permitted either parent to transfer citizenship to a child, one prominent Member of Parliament proposed an amendment suggesting that "nationality, in the last resort, is tested by fighting. A man's nation is the nation for which he will fight... [W]omen on the other hand, are involved in the preservation and care of life."[43] These attitudes are entrenched in

[42] M Sornarajah, "Nationality and International Law in Singapore" in *Nationality in Asian Perspective*, *supra* note 29.

[43] Speech by Enoch Powell MP, as quoted in *ILA Preliminary Study*, *supra* note 2, at 644.

many of the provisions of the post-independence citizenship legislation in South Asia, where the English legal values have been reinforced by local patriarchal values of policymakers and bureaucrats. The Controller of Immigration in Sri Lanka has justified discriminatory guidelines for the issue of residence visas and conferment of citizenship on the argument that different standards are justified because men are "the head of the household" in Sri Lanka.[44] The Blackstonian ideology on gender relations in the family, endorsed by local religious and social norms and beliefs, provides an easy rationale for resisting change. Political rhetoric on women's rights is, therefore, easily accommodated with discriminatory laws and policies, so that there is a failure to recognise the obvious contradictions.

The myth of protecting a domestic labour market against an 'influx' of foreign males in a situation of unemployment, has been used to justify discrimination against male spouses. In a recent letter to the editor justifying discrimination in the issue of visas, Sri Lanka's Controller of Immigration stated that "there is an element of irregularity... [but] this element of irregularity is prevalent in other countries. Sri Lanka is a very small country with limited natural resources and employment opportunities, and certain restrictions need therefore be placed in granting resident visas to male spouses in the interests of the country."[45] The fact that the rates of female unemployment in the country are also high and alien women could also compete in the labour market, has been completely ignored in this effort at rationalising discrimination. This type of rationale is not untypical of the official standpoint in immigration decisions that discriminate against women.[46]

The need to "protect" local women, from "marriages of convenience" to foreigners engaged in illegal activities, is another argument used to justify discrimination in nationality law.[47] On the other hand, the argument of "marriage of convenience" is also used to justify laws that lead to loss of nationality when a married woman, who has obtained citizenship by naturalisation as a spouse, is subsequently divorced. The motivation of preventing dual nationality has been often used against married women, on the argument that unless a woman loses her own nationality, there is a risk that she will not have the required bond of an effective link with the country of her husband's nationality.

It is vital that comparative experience should be shared through the international monitoring bodies, so that a comparative jurisprudence can be developed on nationality issues. Such an effort can strengthen the

[44] Interview with members of National Committee on Women on administrative guidelines and nationality in 1995.

[45] *Island* (Sri Lanka) 5 May 1996.

[46] A similar response is seen in the case of *Abdulaziz, Cabales and Balkandali v United Kingdom*, European Court of Human Rights, Judgment of 28 May 1985, Series A, No 94, 81 ILR 139, 7 EHRR 471.

[47] See *supra* note 45 and *ILA Preliminary Study*, *supra* note 2, at 648 (discussing administrative decisions under the UK Nationality Act 1981).

capacity of professionals, as well as non-governmental organisations, to lobby for change and counter the arguments of so-called 'political' expediency. Decisions of the Inter-American Court of Human Rights and the European Court of Human Rights that have dealt with the issue are not available for reference and use in the region. However, the interpretations of these courts of the guarantee of non-discrimination in the context of nationality laws, can be used in countries of the Asia Pacific region with written Constitutions.[48] Similarly, the decision of the Court of Appeal of Botswana in the landmark case of *Attorney General v Unity Dow*[49] is relevant to countries where custom and personal law, based on ethnicity and religion, are used to argue for a qualification of the fundamental right of gender equality guaranteed in national constitutions and even accepted through ratification of international instruments. In this case, an argument that the traditional and customary ideology of patriarchy must be accommodated in a constitutional interpretation of the core norm of equality was rejected by the Botswana Court of Appeal, which declared that in the event of a conflict of standards, "it is custom not the constitution which must go."[50] A similar activist approach is reflected in the decision of the Supreme Court of Nepal in *Meera Gurung v Department of Immigration,* when it struck down a discriminatory regulation on the issue of resident visas to foreign spouses of Nepalese women.[51] These decision have special relevance to countries in the Asia Pacific region that argue for a relativist approach to rights that accommodates the special ideology of a non-Eurocentric scale of "Asian family values".

Relativist arguments justify an erosion of international standards on human rights and will, if they prevail in the area of nationality, prevent a revision of existing law and practice in the region. It is important to recognise that social values and customary tenets have never been static, and that egalitarian attitudes to gender relations have existed in countries of the region, and that they have been transformed or revived through the process of change. A perusal of matrimonial property and inheritance laws in Thailand, Vietnam, Burma and Sri Lanka indicates that community of property and the concept of sharing economic assets equally was superseded by later trends that gave preference to males.[52] Women's

[48] See *ILA Preliminary Study, supra* note 2, at 655 and Cecilia Medina, "Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System" in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994) 257 at 267.

[49] (1992) 103 ILR 128, [1992] LRC (Const) 623 (CA of Botswana), affirming [1991] LRC (Const) 574 (HC of Botswana).

[50] [1992] LRC (Const) at 640c.

[51] Pradhan, *supra* note 29.

[52] For details, see My Van Tran, "The Position of Women in Traditional Vietnam" in K M de Silva and others (eds), *Asian Panorama* (New Delhi, Vikas Publishing House, 1991) 274 at 281; C Bunnag and V Nasakul, *Thailand in Law Asia Family Law Series,* Vol 1 (Singapore, Lawasia, 1979), at 197; S Goonesekere, "Colonial Legislation and Sri Lanka Family Law: the Legacy of History" in *Asian Panorama,* at 193; and Alan Gledhill, "Community of Property in the Marriage Laws of Burma" in J N D Anderson (ed), *Family Law in Asia and Africa* (London, Allen and Unwin, 1968) 205.

groups who are studying and interpreting the Koran refer to a similar concept of equal property and preferential custodial rights of women in Islamic law. They would deny that Islamic law justifies the State preventing a married woman in a Muslim country like Pakistan or Bangladesh transmitting her nationality to her child or seeking citizenship for her spouse.

It is therefore vital that international standards on gender equality should be used, to review and revise the obvious discrimination in nationality laws of domestic legal systems. The Children's Convention is a widely ratified document but its provisions on nationality are not strong enough, unless they are interpreted in relation to other articles, so as to link with the standards on nationality in the Women's Convention. There is a strong case for both monitoring committees under these two conventions drafting a general recommendation on the nationality issue.

Monitoring government performance, so as to promote accountability and legislative and policy changes, through these committees must be combined with jurisprudential developments that give women access to judicial fora and alternative tribunals, so that they can challenge discriminatory laws and policies. The concept of *locus standi* must be expanded, so that the nationality issue can be raised on behalf of women who cannot or are unwilling to be identified as victims of injustice. Similarly, the concept of state inaction, which is being developed in the jurisprudence of South Asian countries with written constitutions, can be used to ensure that state action in infringing the right to gender equality is as justifiable in the courts as state apathy and inaction in preventing discrimination. Such a development can help to promote accountability on the part of bureaucrats and law enforcement officials concerned with immigration issues.

The adoption of an Optional Protocol to the Women's Convention will also be helpful in providing for an individual complaints procedure. In *Aumeeruddy-Cziffra v Mauritius*,[53] twenty Mauritian women used the Optional Protocol to the ICCPR to make a submission to the Human Rights Committee that Mauritian nationality law discriminated in favour of men. The decision of the Committee that the law infringed certain standards set by the Covenant resulted in the government revising the law. The ICCPR and its Optional Protocol has been ratified by a very few countries. It may be possible to ensure wide ratification of an Optional Protocol to the Women's Convention, so as to enable the key issue of nationality to be raised in an international forum, through the more visible device of an individual complaint.

International standards are, in the ultimate sense, a strategy to promote governmental accountability at the domestic level to all

[53] Human Rights Committee, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to Sixteenth sessions)* (United Nations, New York, 1985) vol 1, 67, (1985) 67 ILR 285, 2 HRLJ 139.

citizens. That accountability is a matter of critical concern to women of all countries in the region. The realisation of the basic human right to nationality on the basis of gender equality is as vital for the peasant and the urban poor. These women also cross borders as workers or migrants and they, as well as women of other classes, form cross-national family units and face similar problems of marginalisation through discriminatory nationality laws. This reality must be recognised. Nationality and infringement of human rights must no longer be perceived as one of low priority and a middle-class issue that does not concern a majority of women in the Asia Pacific region.

THE DOMESTIC APPLICATIONS OF INTERNATIONAL HUMAN RIGHTS NORMS RELEVANT TO WOMEN'S HUMAN RIGHTS: STRATEGIES OF LAW REFORM IN THE INDIAN CONTEXT

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Introduction

The Declaration on the Elimination of Violence against Women[1] has called upon the member States of the United Nations to enact appropriate laws and procedures to give women redress and to sensitise judges, lawyers and policemen on problems of violence against women. In this context, this paper attempts to examine recent trends in legislative reforms and their impact in curbing violence against women in India. Three approaches to the issue are analysed here.

The first section examines the legislative reforms which followed campaigns by the women's movement. The amendment to the rape law following the anti-rape campaign is discussed in the context of its impact on women in rape trials.

The second section examines the biases against minorities and marginal sections in a communally vitiated atmosphere, while introducing reforms in the realm of family laws. The abolition of bigamy and the demand for a uniform civil code are issues of primary concern of this debate.

The third section examines the impulsive and ill formulated initiatives to liberate women. The chaos and confusions caused by judicial directions for "rescuing" minor sex workers in Bombay recently are dealt with.

Amendment to rape law and its impact on women

The amendment to the rape law, enacted in 1983, was the precursor to the later amendments.[2] This was followed by legislative reforms in other areas as well. In fact, during the decade 1980-1989, every single issue concerning violence against women addressed by the women's movement resulted in legislative reform. Dowry deaths (bride burning), sati (immolation of the widow on the husband's funeral pyre), prostitution and trafficking in women, indecent representation of women in the

[1] GA Res 48/104 (1994), UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.
[2] Criminal Law (Amendment) Act 1983.

media, and sex determination tests leading to female foeticide are some examples. If oppression could be tackled by legislative reforms, this period could be judged as the golden era for Indian women, when laws were given on a platter.[3]

But despite the enactment of these laws, the statistics revealed a disturbing trend. Each year the number of reported cases of rapes and unnatural deaths of women increased. The rate of convictions under the lofty and laudable legislation was dismal. This was partly due to the fact that the positive recommendations of the expert committees did not find a place in the Bills presented to the Parliament. The callously framed laws were full of loopholes.

In addition, the reforms seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the good and the bad woman in society. For instance, the campaign against rape did not question the belief that rape is the ultimate violation of a woman and a fate worse than death. It did not transcend the conservative definition: forcible penile penetration of the woman's vagina by a man who is not her husband.

Before examining the judicial biases in rape judgments during the post-amendment period, a brief summary of the campaign needs to be mentioned. Mathura, a 16-year-old tribal girl, was raped by two policemen within a police compound.[4] The Sessions Court acquitted the policemen on the ground that, since Mathura had eloped with her boy-friend, she was habituated to sexual intercourse and hence she could not be raped. The court further ruled that Mathura was a liar and the sexual intercourse was with her consent.[5]

The High Court convicted the policemen and held that mere passive or helpless surrender induced by threats or fear could not be equated with the desire or will and hence it could not be deemed to be consent.[6] On appeal, the Supreme Court set aside the conviction and acquitted the policemen. The court concluded that since there were no visible marks of injury on her body, Mathura's allegations of rape were untrue and the consent could not be brushed aside as passive submission.[7]

The judgment triggered off a nation-wide campaign for changes in rape laws in 1979 which resulted in an amendment in 1983. Although the campaign focused primarily on abuse of police power in custodial situations and demanded procedural regulations to curb police power, the amendment did not focus upon procedural irregularities and emphasised only stringent punishment.

[3] See Flavia Agnes, "Protecting Women Against Violence? Review of a Decade of Legislation, 1980–1989" X/XVII/17 *Economic and Political Weekly* WS-19, 25 April 1992.

[4] *Tukaram v Maharashtra* 1979 AIR SC 185, [1979] 1 SCR 810.

[5] [1979] 1 SCR at 814D–815A.

[6] [1979] 1 SCR at 815B–816D.

[7] [1979] 1 SCR at 817D–819F.

A minimum punishment of seven years for rape and ten years for compounded and aggravated offences such as rape in custodial situations, gang rape, rape of children under 12 years and rape of pregnant women was stipulated. The premise underlying this stipulation was that stringent punishment would act as a deterrent and curb violence against women.

But despite the stipulations, the courts continued to award less than the minimum sentence. Hence the deterrent aspect of stringent punishment was rendered meaningless. Also, the higher the stipulated sentence, the fewer were the convictions. The theory of stringent punishment also clashed with the reformers' theories of leniency for juvenile and youth offenders.

While there was greater emphasis in statutory provisions leading to enhanced punishment, procedural regulations and stricter investigative measures were not granted due importance. Since the basic premise of the criminal law is *innocent till proved guilty*, unless there was greater accountability of the investigative machinery, proving guilt in a criminal court continued to be an impossibility. The dictum *ninety-nine guilty can be set free so that one innocent is not hanged* could be violated only at the cost of corroding the rights of civil society.

Defined within these parameters, the age of the victim, the injuries and trauma suffered by her, or the violations to her dignity and personhood within courtrooms became redundant. The equations of power during a rape trial continued to be confined within the binaries of the State versus individual men. The dignity and rights of women during investigations and trials did not invoke the protection ensured by article 21 of the Constitution which guarantees life and liberty and the interpretation that life includes life with dignity.[8]

While reformers advocated enhancement of State power, the patriarchal biases within penal statutes were not questioned. Hence the offence of rape was confined to penile penetration. Chastity and virginity continued to be the prime concerns of the judiciary. Rape trials were often rendered titillating sexual farces in which the prosecution, the defence and the presiding judge all participated in equal measure, to the cost of the victim. Collusion between defence and prosecution, which is the bane of the criminal legal system, was far more evident in issues concerning violations of women's rights.

While at one level the women victims had to confront the patriarchal biases of the State, at the other, they also had to confront biases against caste, class and community. When the State was cast in the role of the protector, a proprietorial role was assigned to the State to safeguard 'its women' and 'their morality'. Within this context, the term 'our' women could be interpreted in its widest and all inclusive sense to include 'all Indians' and thereby excluding 'foreigners' (ie Nepalese, Bangladeshis,

[8] See Flavia Agnes, *State, Gender and Rhetoric of Law Reform* (Mumbai, SNDT University, 1995) at 35.

Pakistanis, Africans or whites) to more limited ones such as "Hindu" or "upper caste".

The positive judgments often reflect conservative notions regarding women and their sexuality. The judicial comments include "when a woman is ravished what is inflicted is not merely physical injury but a deep sense of deathless shame..." and "...no woman of honour will accuse another of rape and thereby sacrifice what is dearest to her...".[9] While lamenting the loss of virginity, the courts proclaim during rape trials that "virginity is the most precious possession of an 'Indian' woman",[10] thus insinuating that rape of foreigners is not a serious offence. (As one chief minister expressed, "for foreigners rape is like drinking tea."[11])

This premise could be further restricted to exclude the marginalised sections — lower caste, poor, minority and tribe, ie the women who do not command honour and respect. If rape is an expression of power and control by the dominant class (or caste), then more women from the marginalised sections are likely to be the victims of rape by men from the dominant class. The inherent biases of the State against the marginalised sections would extend to women from these sections, and that women would not form a different category away from the baggage they carry of their caste and class — this factor was glossed over while strengthening the State to deal with issues of gender.

The judgment in the *Pararia rape* case[12] in 1988 is an example of this bias. The State machinery had destroyed a whole village, looted property and raped several women. Rs 1,000 was declared by the government as compensation to the victims. In this context, while acquitting the police of the charge of rape, the court commented: "It cannot be ruled out that these ladies will speak falsehood for a sum of Rs 1,000. These women cannot be equated with ladies who hail from decent and respectable society. They were engaged in menial work and were of questionable character." While the judge did not rule out molestation and assault, he was convinced that there was no rape, since rape could not take place when a group of assorted men in the age group of 25 to 68 were assembled together. "Will a sub-inspector ever open his pants in the presence of a constable?" was the exasperated query.

In another 1992 judgment, in a case concerning the abduction and rape of a tribal girl, while reducing the sentence from four years (which is less than the minimum stipulated by the statute) to two months, the court explained that since the rape did not result in any serious stigma to the girl, the sentence could be reduced and reasoned "sexual morals of

9 *Rafia v State of Uttar Pradesh* 1980 Cri LJ 1, [1981] 1 SCR 402.

10 *Babu v State of Rajasthan* 1984 Cri LJ 74.

11 Flavia Agnes, "The Anti Rape Campaign: the Struggle and the Setback" in Chhaya Datar (ed) *The Struggle Against Violence* (Calcutta, Stree, 1993) at 121.

12 An unreported trial court judgment. The judgment received wide media publicity. See Agnes, *supra* note 11, at 123-124.

the tribe to which the girl belongs are to be taken into consideration to assess the seriousness of the crime."[13]

The latest in this trend which has attracted public attention is the decision of the Sessions Court at Jaipur on 15 November 1995 in the case of *Bawri Devi*.[14] The community worker of the State-sponsored Women's Development Programme was gang raped in the presence of her husband, by a group of men from a dominant caste.

The court acquitted the accused, labelling the social worker as a liar. Insinuations regarding her character were made through a remark that the semen found on her skirt belonged neither to her husband nor to the two men but to a fourth person. Further, the men belonged to "respectable families" and would not rape a woman from the lower caste. The judgment included a further comment that it was highly improbable that the husband would stand by and witness the rape of his wife. The trial was held in camera, and hence during the trial she was the only woman in a room of 17 men.

Within this context the powers vested in the State for the protection of women could be used by the State more effectively against men from the marginalised sections rather than in favour of women from these sections.

The spate of reforms introduced by the State in response to the campaigns initiated by the women's movement uniformly strengthened State power. Arrest without warrant, pre-trial detentions, non-bailability of offences, shifting of onus of proof, in-camera trials and mandatory minimum punishments were the common feature of these reforms. There was a misplaced presumption that the longer association with the law enforcement machinery, which is generally believed to be extremely and sadistically violent, would render individual men less violent.

Enhancing State power against civil society does not render individual women strong enough to counter male violence. A strong State conversely means weaker citizens, a term which also includes women. The women could gain only as 'wards' of the State, within the parameters defined by the State. At best, this concept viewed women as imbeciles and weak, and weaker the women, more vulnerable they would be to male violence. The reforms could not break this vicious cycle of violence.

The undercurrents of the debate for a uniform family code

The second issue, the complexities of enacting a uniform family code, has generated an important debate in the context of uniformity versus plurality in recent times.

[13] *Dayaram and Another v State of Madhya Pradesh* 1992 Cri LJ 3154 (MP).

[14] An unreported trial court decision. The judgment was delivered on 15 November 1995 by the District and Sessions Court, Jaipur in *The State of Rajasthan v Ramkaran and Others*.

This debate has some relevance to the Convention on the Elimination of all Forms of Discrimination Against Women (the Women's Convention).[15] Article 16(1) of the Convention stipulates equal rights to spouses within marriage and article 16(2) stipulates compulsory registration of marriages. India signed the Convention in July 1980 with a declaration in respect of its pluralistic culture and practical difficulty of stipulating compulsory registration of marriages in view of the low level of literacy and cultural diversity.

Some preliminary comments regarding the family laws in India are perhaps necessary before we proceed with the complexities of the current debate. Family relationships are governed by personal laws which are based either on religious precepts or customary practices. The colonial rulers refrained from legislating in the realm of family law and these matters were left either to the religious heads, or to local caste or community bodies. Hence, at the time of independence there was a great diversity in the cultural practices of various communities.

Many of the customary practices were anti-women. Denial of property rights and plurality of wives were two prevalent practices. After independence, by a statutory enactment of 1955, Hindu women were granted property rights.[16] But this right remained mainly on paper due to the loopholes provided in the legislation through which Hindu men could deprive women of their property rights. In this process of codification Hindu women were granted the right of divorce and Hindu marriages were rendered monogamous.

Due to the communal conflict which led to the partition of the country, the Muslim leadership viewed the issue of personal laws as a symbol of its cultural identity and resisted State interference in the realm of personal laws. However, Muslim women were granted the right of divorce through a pre-independence enactment and Muslim women also had better rights of property inheritance. The two aspects of Muslim personal law which have attracted criticism are the issue of plural marriages and the right of husband to unilateral divorce.

An important case in this debate is the judgment in the controversial case of *Mohammad Ahmed Khan v Shah Bano Begum*[17] where the Supreme Court awarded maintenance to a divorced Muslim woman. The communal undertone of the judgment led to protests by the minority community and resulted in an enactment which placed Muslim women out of the purview of secular and uniform legislation.[18] While this was projected as an anti-woman piece of legislation, in quite a few instances, it worked in favour of women by granting them the right of lump sum divorce settlements.

[15] 1249 UNTS 13. India signed the Convention on 30 July 1980 but ratified it only on 9 July 1993.

[16] For details, see Hindu Marriage Act 1955 (Act 25 of 1955), reprinted in 1955 AIR Act 80 and Hindu Succession Act 1956 (Act 30 of 1956), reprinted in 1956 AIR Act 252.

[17] 1985 AIR SC 945, [1985] 1 SCJ 96.

[18] Muslim Women's (Protection of Rights on Divorce) Act of 1986 (Act 25 of 1986), reprinted in 1986 AIR Act 152.

The issue of concern here is that while the *Shah Bano* judgment and the events that followed received wide publicity, instances where the Hindu community was taken out of the realm of common and secular laws went unnoticed. For instance, in 1976, the Hindus were taken out of the purview of the secular legislation, ie the Special Marriage Act, and were permitted to be governed by Hindu Succession laws to preserve male privileges. This issue did not receive any publicity. Also the communal undertones of the *Shah Bano* judgment went unnoticed by most secular and progressive movements.

This is the background against which the demand for a uniform code is now being raised. In recent years, the Hindu communal forces have made this an important plank in its anti-minority propaganda. The communal demand focuses primarily on inadequacies of the Muslim law. The fact that a large number of women who are murdered or who are driven to suicide are Hindus, and that this might be due to the gender bias within Hindu cultural practices and legal provisions is conveniently glossed over in this debate. A myth created by the media is that the 'enlightened' Hindus are governed by an ideal gender-just law and this law now needs to be extended to Muslims in order to liberate Muslim women.

A recent Supreme Court judgment in the *Sarla Mudgal* case[19] has given a boost to the demand. While adjudicating upon a case of conversion and bigamy by Hindu men, the court held that prevalence of polygamy under Muslim law provides "... an open inducement to a Hindu husband, who wants to enter into a second marriage to become a Muslim...." The judgment commented more upon the Muslims and Muslim law rather than the tendency of Hindu man towards bigamy.

The communal undertones of this judgment can be ascertained only when we study the judgments of the Supreme Court and the High Courts on the issue of bigamy by Hindu men over a span of thirty years. The penal provisions of bigamy became applicable to Hindus only in the year 1955. In the first case decided by the Supreme Court in 1965,[20] the Court held that even if a couple was living together as husband and wife and the community accepted them as such, there could not be a conviction for bigamy unless essential ceremonies of a Hindu marriage were proved. This was followed by several judgments of the Supreme Court and the various High Courts over the span of thirty years until the decision in the *Sarla Mudgal* case in 1995. Relying upon technicalities within the Hindu Marriage Act, the judiciary absolved the Hindu husbands of any criminal consequences of bigamy. An analysis of the judgments confirms the fact that an Hindu marriage is the most illusory

[19] *Sarla Mudgal v Union of India* [1995] 3 SCC 635.

[20] *Bhaurao Shankar Lokhande v State of Maharashtra* 1965 AIR SC 1564.

[21] For a detailed study of these judgments, see Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code", XXX/50 *Economic and Political Weekly* 3238, 16 December 1995.

legal entity and the conviction for bigamy of Hindu men is an impossibility.[21]

The Hindu Marriage Act unified diverse cultural practices of the Hindus along Brahminical rituals. In many of these communities, customary divorce and remarriage of divorcees and widows was prevalent even prior to the Hindu Marriage Act. The rituals for solemnising the marriage of virgin brides differed from the rituals for solemnising the second marriages. But the Act which homogenised diverse rituals and customs into rigid Brahminical rites could not provide for these cultural variants. Due to this, the marriages which are valid in the community became "no marriages" in the eyes of the law and hence they did not attract the penal provisions of bigamy.

But what is even more significant in the context of rights of civil society, the judiciary would have to exercise great care and caution before invalidating a marriage which is customarily accepted by the community. Hence the need for strict proof in criminal litigation, lest rights and legitimacy of women and children are not jeopardised.

There are instances where the first wife, by initiating a criminal prosecution against her husband, loses the presumption of marriage by which she will be governed under the provisions of section 50 of the Indian Evidence Act in matrimonial litigation. This presumption (which has worked well for Indian women) lays down that, if the man and woman are living together and the community has accepted them as such, the woman will be entitled to civil rights such as maintenance and residence and strict proof of marriage is not necessary. But since criminal prosecution requires strict proof of both marriages, the marriage of the first wife who has initiated the proceedings is set aside and the second marriage is held to be the valid one.[22]

The demand for abolishing polygamy overlooks the fact that every bigamous or polygamous marriages affects the rights of two sets of women, ie the first and the subsequent wife (or wives). If the cultural practices of a community permit collateral marriages and if poverty and illiteracy are the factors which contribute to this phenomenon, then marriages will continue to be polygamous despite penal prohibitions, in the same manner that the phenomenon of child marriages continues defying penal prohibitions to this effect.

But the second wife, whose situation is most vulnerable, will be devoid of any enforceable legal rights. This is one of the primary effects of abolishing polygamy among Hindus. The legal dictum that no one is permitted to reap the benefits of his wrong does not seem to apply to men in bigamous relationships. It only operates against women who are denied maintenance.

It is significant to note that in 40% of the cases reported in a

[22] *Ravana Siddaswamy v Public Prosecutor* 1990 Cri LJ 1001, referred to in Agnes, *supra* note 21.

matrimonial law journal in 1994, where maintenance was the issue, the husbands denied the validity of their marriage in order to escape the liability of paying maintenance to their wives. At another level, despite legal provision for or prescription of monogamy the percentage of bigamous marriages is more among Hindus than Muslims. After a prolonged battle, only in recent years the Supreme Court has recognised the rights of second wives and granted them maintenance.[23]

A uniform civil code and the compulsory registration of marriage seems to be an apparent solution to the problem posed by cultural diversity. But this is rather a simplistic solution to a far more complex phenomenon. Two proposed legislative measures which have been formulated to deal with this issue are discussed below.

The first is a Bill drafted by the National Women's Commission and titled "The Marriage Bill 1994". In one stroke, this Bill repeals all existing laws on marriage and divorce, and seeks to abolish polygamy by the compulsory registration of marriages. For default in registration, the Bill stipulates a fine of Rs 100 per day for a period of one month and thereafter invalidates the marriage. The fact that a significant section of the Indian population does not earn Rs 100 per month is conveniently overlooked.

The Bill also overlooks the fact that more often than not, it is the woman who would be in need of legal redress and it would be to the husband's advantage not to register the marriage and thereby escape economic liabilities.

While many countries in South Asia region provide for registration of marriages, no country has extended this logic so far as to invalidate an existing marriage with its adverse implications for women and children. In fact, a growing tendency in western countries is to grant rights and benefits to people in informal relationships. While the global trend is towards granting rights to cohabitees, the tendency in India seems to be towards increasing regimentation and State interventions in family relationships.

In a country which cannot provide basic facilities like shelter, primary education or drinking water and where a large number of women are illiterate and live below the poverty line, the requirement of compulsory registration of marriage is not practical. The presumption of marriage under the Indian Evidence Act has served us well and is better suited to Indian socio-cultural conditions. Stringent punishment and invalidation of non-registered marriages will only lead to increasing State control in people's personal lives without in any way protecting women.

Even 40 years after the enactment of the Hindu Marriage Act, most States have not even provided the minimum infrastructure for the registration of Hindu marriages. While there is an urgent need to set up

[23] *Vimala v Veeraswamy* [1991] 2 SCC 375, [1991] 1 SCR 904.

the necessary infrastructure, registration of marriages can only be a facilitating measure.

While the Bill deals elaborately with the issue of registration, only one section collectively deals with economic rights of maintenance and residence. The Bill does not even protect women's exclusive rights under ancient systems, ie the Islamic provision of *mehr* or the customary right of *stridhana*. By using the term spouse, the Bill presumes an equality between husband and wife which does not exist in reality. Situating unequals on an illusory premise of equality will only serve to widen the gulf of inequality.

The second example of giving legislative effect to this demand is the Bill introduced by the State of Maharashtra, which is ruled by a communal Hindu alliance which was responsible for the riots in Bombay during 1992-93 and which has a clear and explicit anti-minority stand. After the Supreme Court decision in the *Sarla Mudgal* case (discussed above), a Bill was hurriedly rushed through the State legislature in August 1995. There was no public debate on the issue. While the Bill seeks to abolish polygamy, the manner in which this is to be achieved is not specified. It does not even stipulate registration of marriages as a measure to curb polygamy.

The only purpose of enacting this Bill is to grant the communal state an additional lever to interfere in the lives of the Muslim community. This Bill must be viewed in the context of other developments within the State. During the one year of its rule, the right wing Hindu communal alliance disbanded the State Minority Commission, and introduced a Bill to ban cow slaughter (a sensitive issue for Muslims). The government also, on the eve of the recent elections, unceremoniously scrapped the Srikrishna Commission enquiring into the communal riots of 1992-1993 in Bombay, which had examined hundreds of affected people. Human rights activists had expressed great hopes for the findings of this commission. Against this background, a Bill to abolish polygamy will cause further insecurity within minority leadership and rigidify the positions internally, something which will hinder the process of gradual reform from within.

The initiatives of Muslim women who are working within community structures are far more relevant here. These women are opposed to banning polygamy, as they fear that this move will affect their work among Muslim women. They in turn have put forward an alternate scheme to deal with the issue of polygamy which aims to regulate polygamy by economic constraint. The first wife of any man contracting a polygamous marriage will be entitled to maintenance, custody of children and the right to reside in the matrimonial home (or an alternate residence) and will herself also have the right to divorce. The Muslim women feel that these measures will work far better rather than a blanket ban on polygamy, which would only serve to drive a further wedge between communities without strengthening Muslim women.

While the Women's Convention stipulates equality for spouses within the marriage, this provision needs to be contextualised within national and regional politics and plurality of cultures. Resisting homogenisation of communities through uniform legislation has become an important agenda of human rights, and women's rights need to be situated within this context.

While reforms are necessary, the strategies of reform are of equal significance. Community initiatives will have greater significance to women rather than legislation imposed through centralised enactment with hidden agendas. Great care and caution needs to be exercised while initiating strategies of legal reform so that they do not place further fuel in the hands of anti-minority forces. This is the challenge before the Indian State. Hence one hopes that the declarations made while ratifying the convention will be adhered to while bringing in reforms in women's favour.[24]

Judicial initiatives to rescue minor sex workers of Bombay

The third section addresses the issue of ill thought-out strategies of reform which create further trauma for the beneficiaries of such programmes. This is in the context of a recent rescue operation carried out by the city police under judicial directions.

In February 1996, the Chief Justice of the High Court of Bombay converted a newspaper article into a *suo moto* petition. The article mentioned that 65% of the 70,000 sex workers in the red-light districts of the city were infected with AIDS. As a sequel to this news article, the Chief Justice of the High Court of Bombay directed the city police to rescue minor sex workers, carry out HIV tests, and evolve a scheme for rehabilitation.

In response to this, the police contacted rescue homes and orphanages to ascertain the number of vacant beds, without specifying the purpose for which this information was sought and arrived at a magic figure of 450. In a swift and highly confidential operation, brothels were raided and 450 girls were "rescued" and dumped upon unwilling wardens of orphanages and shelter homes. The operation was so swift that there was no time even to collect the clothes, personal belongings, babies or medicines of the minor girls. Nor did the fact that not all of them

[24] India made the following declarations upon signature and confirmed upon ratification:

"With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent.

With regard to article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that, though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

UN Doc CEDAW/SP/1996/2, at 19-20.

were minors or sex workers matter. The magic figure of 450 had to be reached.

Usually, these raids are a white-wash. When the rescued girls are produced before the magistrate the following day, they are bailed out by the brothel keepers and then it is "business as usual". But since the higher judiciary was seised of the matter and the operation was under public scrutiny, things did not follow the usual course. When the police reported about the successful operation, the Chief Justice issued a further direction that the rescued minors could not be released through an order of a juvenile court.

Meanwhile, the rescued girls posed a social problem. The aided orphanages also run schools. There was fear and panic among "respectable" parents who did not want their children to mingle with the infected scum of the city. The institutions rushed to court and obtained an order that their orphanages should be cleared of the rescued girls.

The girls were then shunted away to the Beggars Homes and kept in quarantine. The State which now became the guardian of the rescued minors insisted that no one should be allowed to meet the girls to prevent their re-entry into the trade. With this, the little solace offered by a few social activists was cut off.

Then started the round of health check-ups. Compulsory HIV testing was done despite the government policy on AIDS which prohibits mandatory testing. But the results of the HIV tests were not communicated to the institutions housing the girls. Regarding the purpose of the test, the State welfare functionaries caustically commented that two different schemes would be evolved and the negative ones would be rehabilitated. Specific questions about the HIV positive girls revealed the stance that since they were doomed to die, nothing further needed to be done regarding their rehabilitation.

This comment caused alarm among social activists, who intervened, to secure a ban against further testing. Since the blood was already collected, the rare opportunity of testing 450 child sex workers to gather epidemiological data was not to be lost on grounds of "human rights" or "morality". But a concession was made that the tests would be "unlinked" and "anonymous".

There were so many ironies. Half the rescued girls were minors aged between 10-15 years for whom childhood meant captivity. So they lied that they were 20 and above. The others were above 20. Some were even above 25. But to meet the magical figure of 450 the police insisted that they were minors. So ossification tests were ordered to arrive at the correct age and until then even those who were visibly and obviously adults could not be released.

There was also the problem of "outsiders": the Nepalese and the Devadasis of Karnataka. They ought to be rehabilitated in their own native land. It did not matter that they were used and abused in this city. It did not matter that back in the village there was no "home" left. They

were the wards of their native State. The constitutional guarantee of freedom of movement did not seem to apply to minors in captivity. It was only feasibility that mattered. The rescue homes in and around Mumbai have no space for rehabilitating "outsiders".

Through all this, the girls continued to be in a state of shock. The food in the government homes was inadequate. For almost a month the girls slept on the floor, wearing the clothes in which they were "rescued", and huddled together in fifties and hundreds.

In the days that followed, the "outsiders", the Nepalese and the girls from Karnataka were dispatched. A few of the girls died in the city hospitals. According to experts offering support to AIDS victims, the trauma caused by the rescue operation aggravated their situation. No scheme had been evolved yet for long-term rehabilitation.

The stark reality of this operation is that if the city needs 450 more girls to take the place of those in captivity, they will be procured. But, on the other hand, if the present economy warrants a new type of flesh trade, then the brothels situated in the midst of the city which have catered to the industrial workers of yesteryear will have to give way and the land will be made available to the new market forces. Then there will be another raid and the cycle will start all over again.

Conclusion

In conclusion it needs to be stressed that while international conventions have to be implemented, they have to be contextualised within national, regional and local specificity. Care has to be taken so that not only the letter of the conventions but the spirit is maintained while legal strategies are formulated and implemented.

PROTECTING THE RIGHTS OF THE GIRL-CHILD IN COMMONWEALTH JURISDICTIONS

◆

Bart Rwezaura[*]

Introduction

The United Nations Fourth World Conference on Women stressed in its Beijing Declaration and Platform for Action that the experience of growing up as a girl-child in most world cultures has the effect of perpetuating those forms of inequality and discrimination that women experience in their adult lives. It was resolved therefore, inter alia, that "in addressing issues concerning children and youth, Governments should promote an active and visible policy of mainstreaming a gender perspective into all policies and programmes so that before decisions are taken, an analysis is made of the effects on girls and boys, respectively."[1] The importance of mainstreaming a gender perspective in policy-making is that it sensitises policy makers to concern the likely effects of what may seem gender-neutral policies and laws on the girl-child. In the case of lawyers and children's rights advocates, the notion of mainstreaming a gender perspective points to the need to reappraise existing policies and structures (or lack of them) to determine their effectiveness in protecting and advancing the interests of the girl-child.

Our attention is therefore drawn to the fact that the application of gender-neutral human rights norms has different effects on girls. We are reminded that the allocation of community resources, the division of labour in the home, the choice of curriculum at school, and more generally, the education and socialisation of female children, have the effect of undermining the life chances of the girl-child and thus compromising her equality of rights during her childhood and later in life as an adult. Hence, having regard to the fact that these issues are primarily structural, any effort to raise the status of the girl-child must be grounded on a broader strategy in which law is viewed as one element, albeit an important part, of the overall design. Such an approach should aim at

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1 See Beijing Declaration and Platform for Action, *Report of the Fourth World Conference on Women, Beijing, September 1995,* UN Doc A/CONF.177/20 (17 October 1995), at 114, para 273 [hereinafter *Beijing Platform for Action*]. Another call to the same effect was made in 1991 when the Executive Board of UNICEF recommended to the United Nations Commission on the Status of Women that the Committee focus on issues concerning girl-children by reference to the human rights standards contained in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) and the Convention on the Rights of the Child (the Children's Convention). See generally Savitri Goonesekere, *Women's Rights and Children's Rights: the United Nations Convention as Compatible and Complementary International Treaties* (Florence, ICDC, 1992) at 37 [hereinafter *Women's Rights and Children's Rights*].

creating ideal conditions that assure to the girl-child a smooth transition from childhood to a state of adulthood that is not characterised, nor indeed predetermined, by these structural inequalities.[2]

This paper considers the extent to which international human rights norms have been applied to protect and advance the rights of the girl-child in Commonwealth jurisdictions. The paper also looks at the extent to which the experience gathered in other jurisdictions of the Commonwealth might be adopted to enhance these efforts. Attention is directed particularly to those human rights norms and standards that have not been given direct effect by local legislation. Although this focus might appear rather narrow, it is certainly the most critical because many states that are parties to international human rights treaties have usually shown little enthusiasm to enact domestic legislation to render these instruments locally applicable.

Localization of international human rights norms

Brian Fitzgerald, in a recent paper concerning "the internationalization of Australian law" has noted that although a few years ago Australian lawyers, "whether they be practitioners, academics or judges", could have afforded to remain ignorant of the basic tenets of international law, it is now increasingly becoming necessary for everyone to have at least basic knowledge of international law in order to function effectively in what he has described as "the decade of international law."[3] Relying on several decisions of the High Court of Australia, Fitzgerald showed how the High Court has resorted to principles of international human rights law to clarify certain common law principles, for example, the circumstances under which an accused person has a right to free legal representation.[4] Peter Bayne, another Australian lawyer, also wrote in 1990 about the growing influence of human rights standards in the development of Australian administrative law.[5]

It must be stressed, however, that such developments have not been confined to Australia. Indeed, the Hon Justice Michael Kirby has noted, "... Australian courts are simply following, belatedly, developments which are well-established in courts in England, India, Sri Lanka, Canada, the United States and [more recently; Africa]."[6] In England and

[2] See Sue Lees and Jenny Mellor, "Girls' Rights" in Bob Franklin (ed), *The Rights of Children* (Oxford, Blackwell, 1986) 163 at 165.

[3] Brian F Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *James Cook University Law Review* 78 at 79. The Hon Justice Michael Kirby has also noted to the same effect that "judges and lawyers of the future in every land will pay increasing attention to the backdrop of international legal norms, including those dealing with human rights": M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 516.

[4] See, eg, *Dietrich v The Queen* (1992) 177 CLR 292

[5] Peter Bayne, "Administrative Law, Human Rights and International Humanitarian Law" (1990) 64 *Australian Law Journal* 203.

[6] Kirby, *supra* note 3, at 516.

Wales, as pointed out by Kirby, "it is now well-established doctrine that, in construing local statutes and in developing the common law, the judge may seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates."[7] Considering that England and Wales (as part of the United Kingdom) do not have a written constitution, any reference to common law and statutes must be understood as including fundamental rights and freedoms which in other jurisdictions are ordinarily guaranteed in written constitutions.

The Canadian position on this point has been examined by, among others, Maxwell Cohen and Anne Bayefsky, who have argued that, although traditionally Canadian judges have been cautious in drawing from international law to assist in the interpretation of domestic legislation or public policy, the enactment of the Canadian Charter of Rights and Freedoms in 1982 has changed all this. Today, Canadian judges are able to draw more readily on principles of international human rights jurisprudence in order to interpret the Charter and other statutory provisions. This major shift has come about mainly because the Canadian Charter has been linked by its language and concepts to the wider family of international human rights principles and conventions.[8] Moreover, because Canada has also ratified several international human rights treaties, which have a common value system and comparable standards to those of the Charter of Rights, this has expanded the jurisprudential base from which the courts are now able to draw.

Similar developments are taking place in the superior courts of several Commonwealth African states. For example, the superior courts of Botswana,[9] Namibia,[10] Nigeria,[11] South Africa,[12] Tanzania,[13] Zambia[14] and Zimbabwe,[15] have all handed down important decisions in

7 *Id* at 515. In the case of England, the influence of the European Commission and the European Court of Human Rights are also to be noted. According to Kirby, "the status of that law in England is precisely the same as the status in Australia of the international covenants and treaties which Australia has ratified but not specifically incorporated into municipal law": *id* at 515.

8 Maxwell Cohen and Anne F Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265.

9 *Attorney General v Unity Dow* (1992) 103 ILR 128, [1992] LRC (Const) 623 (CA of Botswana), affirming [1991] LRC (Const) 574 (HC of Botswana). See also E K Quansah, "*Unity Dow v Attorney General of Botswana*: One More Relic of a Woman's Servitude removed?" (1992) 4 RADIC 195. In *Unity Dow*, the Court of Appeal of Botswana held that although the African Charter on Human and Peoples' Rights (OAU Doc CAB/LEG/67/3/Rev.5 (1981), reprinted in (1982) 21 ILM 58, adopted on 27 June 1981, entered into force 21 October 1986.) does not "confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land ... we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations:" [1992] LRC (Const) at 656.

10 *S v D*, 1992 (1) SA 513, [1992] LRC (Crim) 253 (SC of Namibia). See also Pamela-Jane Schwikkard, "Sexual Offences —the Questionable Cautionary Rule" (1993) 110 *South African Law Journal* 46.

11 *Abibatu Folami & Ors v Flora Cole & Ors* (1990) All Nig LR 310.

12 *Mfolo v Minister of Education, Bophuthatswana*, 1992 (3) SA 181 (SC of Bophuthatswana).

13 *Ephrahim v Pastory* (1990) 87 ILR 106, [1990] LRC (Const) 757 (HC of Tanzania).

14 *Longwe v Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).

15 *Ncube and Others v State* (1987) 90 ILR 580, 1988 (2) SA 702, [1988] LRC (Const) 442 (SC of Zimbabwe); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, 1995 (2) SA 182, [1994] 1 LRC 343 (SC of Zimbabwe); *Salem v Chief Immigration Officer of Zimbabwe*, [1994] 1 LRC 354 (SC of Zimbabwe).

which they have declared their willingness to draw on international human rights norms to interpret domestic law including national constitutions.[16] Thus, referring to the legal effect under domestic law of Zambia's ratification of various international human rights instruments, Musumali J said in *Longwe v Intemcontinental Hotels* that

> "...ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provision of such [an instrument]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute."[17]

All the above examples indicate therefore, that the process of localising international human rights norms through the judicial process has been taking place in several jurisdictions of the Commonwealth. It was in view of this global development that in 1988, at the Judicial Colloquium in Bangalore, the participants concluded that, although in the common law system treaties were not directly enforceable in domestic law, there was "a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete."[18] Whereas such "growing tendency" constitutes a positive development in human rights jurisprudence, the major question is how this developing jurisprudence can be harnessed to improve the legal status of the girl-child in our jurisdictions.

Before considering the above question, it is necessary first to provide a brief overview showing how the human rights of the girl-child are in practice violated. Furthermore, I will show the underlying social and cultural factors that generate and buttress such violations. The notion of "gender-specific violations" is used here to describe this phenomena in order to underline the need to take special measures of protection to the girl-child in our jurisdictions.

[16] This is not to ignore cases of lost opportunities such as the Kenya case of *Virginia Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga,* Nairobi Civil Appeal No 31 of 1987 (CA of Kenya), reprinted in Eugene Cotran, *Casebook on Kenya Customary Law* (Milton Park, Professional Books Limited, 1987) at 331-345, where the Supreme Court of Kenya did not consider the compatibility of Luo customary law with international human rights standards. For a more recent critique of the Kenyan situation, see Mumbi Mathangani, "Women's Rights in Kenya: A Review of Government Policy" (1995) 8 *Harvard Human Rights Journal* 179. See also Marsha A Freeman "Measuring Equality: a Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries" (1989-90) 5 *Berkeley Women's Law Journal* 110 at 121-125.

[17] *Longwe v Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).

[18] *Bangalore Principles* (1988), para 4, reprinted in *Developing Human Rights Jurisprudence: the Domestic Application of International Human Rights Norms* (London, Commonwealth Secretariat, 1988) at ix.

Gender-specific violations of the rights of girl-child

In a study concerned with the role of gender in the definition of human rights violations, Andrew Byrnes argued that "[a] failure to be aware of the relevance of gender can result in a distorted picture of patterns of human rights abuses," thus leading to an incorrect diagnosis and inevitably to an inappropriate policy intervention.[19] What is needed in women's rights advocacy, therefore, is to adopt an approach that is both sensitive and open to the possibility that there could be gender-specific violations whose form has been influenced by the fact that the victims are women and not simply because these victims just happened to be women.[20] Such an approach suggests that there is a need to analyse certain aspects of gender-specific violations before one can discuss how domestic courts might address them. It is to this discussion that this paper will now turn.

What are gender-specific violations?

It has been noted above that the best way to identify gender-specific violations of human rights is to consider those violations that are influenced by the fact that the victim is of a particular gender. On the other hand, since the concept of gender itself is socially constructed, such gender-specific violations are usually connected with local customs or culture and the prevailing social belief systems of the community.[21] In this section three aspects of gender-specific violations are analyzed. These are discrimination of the girl-child; control of female sexuality; and sexual abuse and exploitation of the girl-child.

Discrimination against the girl-child

The problem of discrimination has recently been spotlighted again by the United Nations Fourth World Conference on Women which noted that "...in many countries available indicators show that the girl-child is discriminated against from the earliest stages of life through her childhood and into adulthood."[22] The above observation is generally accurate. Thus, referring to the position of the girl-child in India, Mukhopadhyay noted that "the first lesson that a female child is made to

[19] Andrew Byrnes, "Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flows or Meaningful Marginalisation? Some Current Issues" (1992) 12 *Australian Yearbook of International Law* 205 at 211.

[20] Sarah Y Lai and Regan E Ralph, "Female Sexual Autonomy and Human Rights" (1995) 8 *Harvard Human Rights Journal* 201 at 203.

[21] According to Coomaraswamy, the United Nations Special Rapporteur on Violence against Women, "certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman's human rights". Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its causes and consequences*, UN Doc E/CN.4/1995/42, at 16, para 67 (1995).

[22] *Beijing Platform for Action*, *supra* note 1, at 112, para 259.

learn... is that the differential treatment between her and her brothers is a fact of life."[23] Some of the evidence concerning discrimination of the girl-child in India is given by Asha Bajpai who has noted that, although amniocentesis is intended to identify genetic diseases or defects in a fetus, "in India, amniocentesis has become synonymous with female foeticide."[24] According to Bajpai, "[t]he data collected from six hospitals in Bombay reveal that out of 8,000 fetuses aborted 7999 were female."[25]

Such discriminatory practices are indeed not confined to India. In many cultures, the practice of son-preference is usually a symptom of a deeper form of discrimination that is perpetrated against the girl-child.[26] Such discrimination is rooted in patrilineal cultures that depend on sons for the transmission of family property and family name. Lineage continuity and succession on death of the parent are some of the reasons why families greatly desire to have male children. O'Connell noted, "[a] study of 898 villages around the world found that males were usually given priority over females in the family food distribution system."[27]

One of the cultural practices that lowers the social status of the girl-child in her family is that since by custom daughters are expected to be married into other families, parents do rely on male children and their offspring for material support, particularly during their old age. There is therefore a great demand for male progeny in these societies. Such demand in turn accounts for the existence of social practices, such as polygyny and 'widow inheritance' that are primarily (but not exclusively) designed to maximize the opportunity for men to have sons.[28] These cultural beliefs and practices are also responsible for the denial of inheritance rights to women in most societies. And in cultures where on the daughter's marriage a large dowry is paid by her family, the potential economic burden on her family has a dampening effect on the enthusiasm of families to have female children. As might be expected, in order for such cultures to survive and reproduce themselves, children were socialised from an early age to adapt to their socially-determined

[23] M Mukhopadhyay and Silver Shackles, *Women and Development in India* (Oxford, Oxfam, 1984) at 11-12.

[24] Asha Bajpai, "The Girl Child and the Law" in *Report of a Seminar: Rights of the Child*, sponsored by the National Law School of India and UNICEF, 1990, at 118.

[25] *Ibid.* In a study of 700 pregnant women in India who received genetic amniocentesis, "only 20 of the 450 women being told they would have a daughter went through the pregnancy; all the 250 male infants predicted, even where a genetic disorder was likely, were carried to full term." For details, see Helen O'Connell, *Women and the Family* (London, Zed Books, 1994) at 75-76.

[26] Such practices include the unequal allocation of family resources between the girl-child and her brothers. This might include more basic things such as preferential allocation of food in home and access to medical treatment. In cases where crucial choices have to be made concerning which child of the family should be sent for further education, a girl child is likely to be considered last.

[27] O'Connell, *supra* note 25, at 78.

[28] Such practices include adoption of male children (by a son-less family), polygyny and concubinage, especially where the first wife has failed to bear a son. In some African cultures, there are several forms of unions such as the "daughter-in-law marriage" found among certain East African societies whereby a marriage takes place between a notional son in a son-less family, primarily for purposes of giving birth to a son. For more details, see Bart Rwezaura, *Traditional Family Law and Change in Tanzania: a Study of the Kuria Social System* (Baden-Baden, Nomos, 1985) at 143-167.

positions. Whereas boys, for example, are trained to be aggressive and dominant, girls are socialised to be submissive and to accept without question their inferior position in a society as a natural order of things. Within the home, a girl-child will be required to assist her mother in gendered household tasks, while the boys will be free, much like their father, to engage in play or to do their school homework, thus improving on their formal education prospects.[29]

In a 1991 worldwide study by UNICEF, it was found that over 125 million children between the ages of six and eleven were not enrolled in formal schools. When these figures were analyzed, they revealed that two-thirds of the children who were not enrolled were girls.[30] Pamela Reynolds, commenting on the early life experience of Tonga girls of Zimbabwe, has noted that girls work harder than boys partly because women supervise children's labour and are, therefore, able to control girls more firmly; adding that "a woman's duty is to bind her daughter into service in order to secure her future as a farmer and a useful servant in the kinship network."[31] Unfortunately, women, as trainers of their children, are also perpetrators of practices that are harmful to their own daughters. In the words of O'Connell, "[i]t is a cruel irony that it is the women who teach, practise and uphold the traditional practices surrounding differential feeding and food taboos that are so harmful to their girl children."[32] Such a gendered approach to child upbringing continues to create problems in most of our jurisdictions and further affecting the enrolment of girls in schools; their choice of curriculum; and eventually, their career choices.[33]

As the Beijing Platform for Action has noted, "the percentage of girls enrolled in secondary schools remains significantly low in many countries. Girls are often not encouraged or given the opportunity to pursue scientific and technical training and education, which limits their... employment opportunities."[34] In sum, the gender-bias begins from the cradle and attaches to the woman throughout her whole life.

Control of female sexuality

The social status and place of the girl-child in a particular community is also closely connected with the issue of sexual control. In most parts of Asia and Africa, local cultures consider a woman's natural destiny to be marriage and procreation. Lai and Ralph have indeed argued that "...many societies in all regions of the world continue to accept the

[29] This issue has been highlighted in a recent study of the girl-child in Tanzania: see R Mabala and S R Kamazima, *The Girl Child in Tanzania: Today's Girl Tomorrow's Woman: A Research Report* (Dar es Salaam, UNICEF, 1995).

[30] See O'Connell, *supra* note 25, at 78.

[31] Pamela Reynolds, *Dance, Civet Cat: Child Labour in the Zambezi Valley* (London, Zed Books, 1990) at 106.

[32] O'Connell, *supra* note 25, at 78.

[33] See Christine K Rwezaura, *A Path Analysis of Factors Affecting Girl's Choices and Careers in Tanzania*, M Ed Thesis, Brandon University, Canada, 1991, Chapter 4.

[34] *Beijing Platform for Action*, *supra* note 1, at 113, para 259.

exercise of female sexuality only for the purpose of reproduction and within the context of marriage."[35] Anything that interferes with this important objective tends to be strongly opposed. In many rural communities, even today, young girls are pre-maturely withdrawn from schools to undergo puberty rites and some get married soon after. In certain societies puberty rites include female genital mutilation (FGM) in its various forms and degrees, with the worst form being infibulation.[36] Given the fact that FGM is intimately connected with marriage and procreation, much of the efforts that has been made to eliminate it has been largely unsuccessful.

In Kenya, for example, Kabeberi-Macharia found that even though between 1982 and 1984 the President of Kenya had strongly condemned this practice and ordered its abolition, FGM has not shown any signs of decline. Indeed, in some communities where this practice had been previously abandoned as a result of abolition by the British colonial administration, it has now been revived because it is believed that "the previously successful social conditioning [of girls] could work today" as it had done during the pre-colonial period.[37] Some of the community leaders interviewed, such as the Kuria people of Tanzania, thought that there was a connection between the growing assertiveness of women and the dilution or abandonment of the ritual of female circumcision (ie, FGM). Perhaps to stem the tide of social disintegration and female assertiveness (which is believed to arise from the current failure to adhere to a correct FGM procedure), the elders have resolved that "women should be circumcised a second time." However, this threat has been strongly resisted by the women notwithstanding "the awe in which...these guardians of community culture and traditions...are held and the fear of their supernatural powers, women are openly opposing such an idea [of re-circumcision], and it has made no headway at all."[38] It appears, therefore, that FGM has provided a site not only for conflict between generations but also it acts as a focal point for political struggles between the sexes.[39]

[35] Lai and Ralph, *supra* note 20, at 202.

[36] According to Kabeberi-Macharia, there are three main types of FGM. "The first is the *sunna* which is often referred to as female circumcision and is likened to male circumcision. This involves the removal of the tip of the clitoris and the prepuce. The second is excision or clitoridectomy which involves the removal of the clitoris and the labia minora. The third which is more severe is infibulation which is excision 'plus the removal of the labia majora and the sealing of the two sides, through stitching or natural fusion of the scar tissue...[leaving] a very smooth surface, and a small opening to permit urination and the passing of menstrual blood'." See Janet Kabeberi-Macharia, "Female Genital Mutilation and the Rights of the Girl in Kenya" in the forthcoming *Proceedings for the Workshop on Law, Culture and the Rights of the Child in Eastern and Southern Africa* (July 1996) (manuscript) at 4 [hereinafter *CLESA Proceedings*]. See also *Human Rights: Harmful Traditional Practices Affecting the Health of Women and Children*, Fact Sheet No 23 (New York, United Nations Centre for Human Rights, 1995).

[37] See J Kabeberi-Macharia, *Reproducers Reproduced: Socio-Legal Regulation of Sexuality and Fertility Among Adolescent Girls in Kenya*, PhD Thesis, University of Warwick School of Law, Coventry, 1995.

[38] Mabala and Kamazima, *supra* note 29, at 56.

[39] FGM is probably the best example of a system of sexual control of women. As one Masai elder said, "[i]f a girl is not circumcised, she will not live in a good way with her husband. She will be jumping from one man to another and will finally be divorced:" see Mabala and Kamazima, *id* at 54.

In societies where female virginity at marriage is highly valued or where pre-marital pregnancy is disapproved, parents will endeavour to exercise maximum control over their daughters' movements to ensure that they do not lose their virginity or become pregnant before marriage. The fear that the daughter might lose her virginity invariably leads to early marriages.[40] It can also create more repression against the girls. In the rural Wuhan province of China, young brides who fail to pass the test of virginity are fined between 200 yuan and 2000 yuan by local authorities and are required to write a self-criticism. As noted by the Director of the Wuhan marriage department, "stiff fines were necessary to stamp out immoral trends that had emerged since China opened up to the outside world."[41]

In the Philippines, despite modernisation, community norms provide that a woman has to be chaste, pure, and "untouched" at the time of marriage.[42] Indeed, Medina noted that "a kiss or an embrace used to be enough reason for the woman's kin to insist on marriage in order to 'save face' and uphold the family honour."[43] Yet, as in most world cultures, Filipino males are not equally sexually restrained. According to Medina, "[m]en are allowed greater sexual freedom before marriage; their premarital 'experience' is accepted and even preferred by their wives."[44]

As noted above, the fear that a daughter might lose her virginity prematurely invariably leads to early marriages, sometimes because parents (usually mothers or grandmothers) are eager to release themselves from what seems to be the onerous task of "guarding" or chaperoning their daughters.[45] For some parents, an early marriage may provide a much needed device for forestalling the emerging assertiveness or "rebellion" of the girl-child and, in some societies, a means to secure the needed bride-wealth for the marriage of an overgrown son of the family. Thus, according to Lai and Ralph, pre-pubescent and adolescent girls among the Hausa of northern Nigeria "are frequently given away by their parents in arranged marriages, despite the girls' express objections or attempts to run away."[46]

[40] Some parents also consider early marriage as a device for forestalling the emerging assertiveness and rebellion of the girl-child which is assumed to increase with her maturity.

[41] "Non-Virgin Brides Face Hefty Fines", *South China Morning Post*, 11 May 1996, at 7. Lai and Ralph have noted that "[v]irginity exams can be seen as political in the sense that they target women's sexuality and operate as a form of social control reinforcing women's subjugation." Lai and Ralph, *supra* note 20, at 214.

[42] Belen T G Medina, *The Filipino Family: A Text With Selected Readings* (Diliman, University of the Philippines Press, 1991) at 100.

[43] *Ibid.*

[44] *Ibid.*

[45] For example, it is considered shameful among the Hausa of northern Nigeria for a daughter to start menstruating before marriage, "since she may embarrass her family by becoming pregnant out of wedlock while still residing in her father's home:" Lai and Ralph, *supra* note 20, at 220.

[46] *Id* at 219.

In some jurisdictions, control of female sexuality is either legally enforced by the use of State law[47] or where State law is neutral, by religious law.[48] In either case, such female sexual regulation is exerted through administrative control of women in places such as schools and youth centres, by restricting their movement, opening their private mail, subjecting them to a specific dress code and by regular medical examination, so as to ensure that they are not pregnant. Non-compliance with such strictures often leads to various forms of stiff sanctions including suspension or expulsion from school. Many schools and colleges in Africa and Asia have regulations that make pregnancy an automatic ground for expulsion. Such expulsion from school not only punishes the pupil but also contributes to the already high levels of female drop-outs from formal schools. It aggravates the widely recognised low level of trained women in the community. Parents are also negatively affected by such expulsions, given that many of them do sacrifice immensely so that their daughters can obtain good education. For the same reasons, the expulsions have the effect of discouraging other parents from attempting to send their daughters into institutions of higher education.

Sexual abuse and sexual exploitation

Sexual abuse and sexual exploitation of the girl-child are part of the larger question of gender relations and the poor attitude towards women's human rights in certain Commonwealth jurisdictions.[49] It is best examined within the wider social context of a given community, wherein the role and place of a woman in a society is culturally and socially defined. Therefore, in seeking to understand and to explain why such violations occur, one must not ignore the culture and the norms of a society in which the act is perpetrated.[50] For example, in cultures where females are considered to be eligible for marriage at the onset of puberty (ie, about the age of 12 or 13), they can be married off to selected husbands in total disregard of their consent, or long term interests such as continuing with further education.

[47] For example, section 497 of the Penal Code of India provides that "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case the wife shall be punishable as an abettor."

[48] According to Goonesekere, the idea of a father gifting his daughter to a husband was all pervasive in India and this tradition "was combined with a later development in Hindu law which suggests that she could be given in marriage before puberty. Consequently, Brahmin girls could be married between the ages of eight to ten years." See Savitri Goonesekere, "The Best Interests of the Child: a South Asian Perspective" in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford, Clarendon Press, 1994) 117 at 122 [hereinafter *Best Interests of Child*].

[49] The term "sexual abuse" which includes rape, is used here to mean unlawful sexual intercourse with a female child (either without her consent, if she has attained the legal capacity to consent, or irrespective of her consent if she lacks such capacity).

[50] See Eunice Uzodike, "Child Abuse and Neglect in Nigeria-Social-Legal Aspects" (1990) 4 *International Journal of Law and the Family* 83 at 84 and Patti Henderson, "Silence, Sex and Authority: the Contradictions of Young Girls' Sexuality in New Crossroads, Cape Town" (1994) 6(2) *Vena Journal, the Girl Child* 33.

The performance of tasks such as domestic work (which is defined as a woman's job), or running errands for adults can expose the girl-child to sexual abuse and exploitation. Research conducted in some Tanzanian schools has uncovered cases of sexual abuse and harassment of female pupils by their male teachers. When girls attending grade 6 and 7 at one local primary school were interviewed about sexual harassment, 75% of them said that some teachers attempted to seduce female pupils. Indeed, "several girls interviewed gave the names of the teachers and, although interviewed individually, they gave the same names."[51] It appears that an opportunity for such abuse occurs when female pupils are instructed to draw water for their male teachers or to perform other domestic chores for them, such as preparing meals. On the other hand, girls who perform domestic chores in non-school contexts are equally vulnerable to sexual abuse. Alice Armstrong found in her research in Zimbabwe that 7 out of 36 case studies (ie, 19%) concerned girls "who were raped while carrying out a chore for a parent, a neighbour or an acquaintance."[52]

Enforced prostitution and trafficking in young women and girls continues to be a problem particularly in Asia and Africa.[53] As Goonesekere noted, "[r]esearch has revealed the extent of the abuse of girls in child marriage. Its connection with child trafficking is apparent from the fact that girls are taken across national borders for prostitution or marriage."[54] In 1993, the International Women's Rights Action Watch (IWRAW) noted that Japanese companies "employ travel agencies to organise sex tours, typically in Thailand or the Philippines, as rewards for good business performance."[55] And within Japan itself, it was noted that "[t]rafficking in women and sexual enslavement or enforced prostitution within Japan also show little sign of abating."[56]

[51] For details, see Mabala and Kamazima, *supra* note 30, at 43.

[52] These victims included Fatima (a 12-year old girl) who was raped by a neighbour when she went to his house to pick up some cash in order to buy paraffin for him. Also, a 5-year old girl was raped by a neighbour when she was sent there by her mother to collect a debt. See A Armstrong, "Custom, Culture, and the Sexual Abuse of Girls in Zimbabwe", in *CLESA Proceedings*, *supra* note 36, (manuscript) at 17-18.

[53] In its recent report, the International Labour Organisation (ILO) has strongly condemned the continued practice of child slavery in parts of South Asia and Africa, noting that children in these regions are "typically sold into bondage by their parents to pay off debts." ILO, *Child Labour: Targeting the Intolerable*, a report for the 86th Session International Labour Conference, 1996 (Geneva, ILO, 1996). See also Asia Watch Committee (US), *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, Asia Watch and Women's Rights Project* (New York, Human Rights Watch, 1993). This report is based on accounts by women victims and exposes practices such as the use of debt bondage to force women to remain in the sex industry with the complicity of local officials.

[54] Goonesekere, *supra* note 48, at 131. In the above-mentioned report by ILO, it is reported that there has been a marked increase in the number of child prostitutes worldwide. The increase is linked to the belief that child prostitutes are thought less likely to be infected with the AIDS virus: See Douglas Roberts, VOA Correspondent Report, Geneva, 10 June, 1996.

[55] According to IWRAW, "[m]any of the women, who are usually Thai or Filipina, are recruited with the promise of jobs as factory workers, hostesses, waitresses or domestic workers. Upon arrival in Japan their passports are taken, they are driven to night clubs and confined. They are often beaten if they do not agree to have sex with the customers to work off the debts they owe for their passage. In October 1993 Japanese Kyodo News Service reported that immigration officials had to rescue ten Thai women from a snack bar. The rescue came after the women wrote a letter to the Thai Prime Minister appealing for help." See Sharon Ladin, *1994 IWRAW to CEDAW Country Reports on... Japan*, (Minneapolis, University of Minnesota, 1993) at 41.

[56] *Ibid.*

It might be imagined that the outbreak of AIDS worldwide would be counteracted by radical changes in social attitudes and sexual habits. Yet, in many places, this has not yet happened. Considering the lack of accurate information on various aspects of the disease; the low level community awareness regarding how AIDS is transmitted; the existence of traditional pressure on women to marry and bear many children; the well-known unwillingness of men to use protective condoms; and the unequal gender relations that undermine the woman's right to say no to unprotected sex; all these factors provide ideal conditions for the transmission of the deadly disease.[57] A study supporting the above observation was made at a local hospital in Tanzania, where it was revealed that a big age difference existed between males and females who had recently tested HIV-positive. Within the age group of 13 to 18 years, there were 32 girls and only one boy, whereas within the age group of 13 to 25 years, there were 203 females and only 84 males.[58]

In summary, when considering the strategies for raising the status of the girl-child, we have to remember that these gender-specific violations are in many ways a reflection of the local cultures and religious systems in which they occur. Nevertheless, as mentioned above, these cultures have been deeply invaded and transformed by the market and other external influences such as state regulation.[59] In looking at how judges have ruled on issues of children's rights, it is useful to bear in mind the fact that we are dealing here with structural violations of rights and not merely isolated incidents of abuse. This suggests that since law alone cannot change these deeply rooted social practices overnight, we have to try to locate the law into a wider socio-economic matrix and to ask ourselves the ways in which court decisions can be used as a springboard for social action.

Domestic protection of children's rights: a new role for the courts?

Within the context of municipal or domestic law, it is possible to secure the protection of the girl-child's rights by relying on either one or both of the following approaches. The first approach is to invoke the fundamental rights and freedoms contained in most national

[57] For an insightful study on how the process of transmission and control of AIDS is affected by differential power relations between men and women in Uganda. See Christine Obbo, "Gender, Age and Class: Discourses on HIV Transmission and Control in Uganda" in Han ten Brummelhuis and Gilbert Herdt (eds), *Culture and Sexual Risk* (Australia, Gordon and Breach, 1995) at 79.

[58] See Mabala and Kamazima, *supra* note 29, at 63. These findings are consistent with the finding in Uganda. Obbo noted that "there are three times as many girls as boys, in the age group 15-25, who are infected with HIV:" Obbo, *supra* note 57, at 83. Such findings suggest that it is girls who are being infected by older men, not women.

[59] As Angeles-Bautista found, "there are no easy answers or explanations for sexual exploitation and abuse, especially child prostitution, as was the case with families in Pagsanjan, Laguna (in the early 80s) who objected to the interference of NGOs who exposed the paedophiles or the cases of parents who were pimps for their own daughters." See Feny de los Angeles-Bautista, "The Filipina Girl: from Vulnerability to Resilience and Power", *Vena Journal, the Girl Child* 16 at 21.

constitutions.[60] The second is to utilise the principle of the best interests of the child contained in most domestic legal systems. Although in most Commonwealth jurisdictions litigants have not frequently invoked constitutional provisions to protect children's rights, this position is now slowly changing. The use of the best interests principle has traditionally been linked and limited to family disputes and often within the context of family law, this practice is also changing to the better. Today, in a number of Commonwealth jurisdictions, the best interests principle has seemingly crossed the realm of domestic law to become a general principle of international human rights law. This development has opened up new possibilities for the advancement and protection of children's rights.

In the following sections, this paper considers the ways in which these two approaches have been used or may be applied to protect the girl-child in Commonwealth jurisdictions. I conclude this section by examining the extent to which the experience of the Indian Supreme Court could be adopted to overcome current problems, including the lack of access by most victims to the legal system.

Constitutional protection

Professor Goonesekere has suggested that in seeking to raise the status of children in our individual countries "...national constitutions represent a powerful value framework that should be used to link with international standards on child rights that have been accepted by all countries through ratification of the [United Nations Convention on the Rights of the Child]."[61] A comparable suggestion has been made by the Chief Justice of Tanzania, the Hon Francis Nyalali, who has advised that although Tanzania has not yet enacted a law to localise the Children's Convention, which it has nonetheless ratified, this is not a serious setback because "the Bill of Rights embodied under the Constitution covers all those areas of the Convention which concern Human Rights in general" and courts can draw on them to ensure that children's rights are fully protected.[62] What has come to be known as public interest or social action litigation in the Supreme Court of India has greatly relied upon constitutional provisions to protect individual or group rights. It can be argued, therefore, that the constitutional framework offers a viable option for the enforcement of children's rights. This is more so in those jurisdictions of the Commonwealth where courts have power to overrule ordinary legislation when this is proved to conflict with the national Constitution.

60 See, eg, Freeman, *supra* note 16.

61 Savitri Goonesekere, *supra* note 48, at 145. The Convention on the Rights of the Child (the Children's Convention), GA Res 44/25, UN Doc A/44/49 at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

62 Hon Francis Nyalali, "Perception of Children's Rights", *The Lawyer (Tanzania)*, April-August, 1994, 5 at 7.

A recent decision of the Botswana Court of Appeal shows how constitutional safeguards can be activated to redress human rights violations. In 1995, the Botswana Court of Appeal held that a local college regulation which provided that, on becoming pregnant, a female student was required to withdraw from studies for one year, was discriminatory and therefore, unconstitutional.[63] The Court of Appeal found that one year of suspension from studies was too long, compared to the three months maternity leave currently enjoyed by civil service employees. The court also found that the regulation did not apply to married women students at the college, who were normally treated as a special case whenever they became pregnant. Furthermore, the regulation provided that a student who became pregnant for the second time would be required to withdraw permanently from studies. Contrary to the claim by the college administration that the rule was intended for the benefit of the female students and, therefore was not discriminatory, the court held that the real object underlying the rule was to penalise unmarried female students.[64]

The practice of expelling female students summarily from schools and from other training institutions on account of their pregnancy is common in many Commonwealth jurisdictions.[65] The decision of the Court of Appeal of Botswana can be used by concerned groups and social reformers to challenge not only future expulsions of pregnant girls from educational institutions, but also other violations aimed at regulating and controlling female sexuality. These include the violation of girls' privacy, such as opening their private mail; interfering with their right to physical security by subjecting them to body searches; or to compulsory and regular medical inspection.[66] The Botswana decision may also be invoked to require college and school administrations to provide alternative facilities to pregnant students, so that they can continue with their education without being compelled either to undergo illegal abortions or to abandon their role as mothers.[67]

Other related policy interventions may be considered in the light of this decision. For example, it may be necessary to introduce a programme of family life education in schools as a preventive measure against

[63] *Student Representative Council of Molepole College of Education v Attorney General of Botswana*, Civ App No 13 of 1994, noted by E K Quansah, [1995] 39(1) *Journal of African Law* 97.

[64] More telling was the fact that no similar sanction applied to male students who "could be responsible for any number of pregnancies in the College during [their] course and suffer no such liability." See Quansah, *id* at 99.

[65] For the case of Tanzania, see Zubeida Tumbo-Masabo and Rita Liljestrom (eds), *Chelewa, Chelewa: the Dilemma of Teenage Girls* (Uppsala, Scandinavian Institute of African Studies, 1994).

[66] In a recent study of the girl-child in Tanzania, it was found that the practice of expelling girls who became pregnant was rampant: see generally *ibid*.

[67] It is important to note that in the *Molepole College* case, *supra* note 63, one of the College regulations stated that "[a] student whose pregnancy ceases while enrolled at the College shall not be allowed to attend studies at the College or stay in a hostel unless she has been certified as medically fit by a licensed medical practitioner." Such a rule was presumably aimed at penalising students who might terminate their pregnancy illegally.

accidental pregnancy and exposure to HIV infection. Notwithstanding the possible resistance of parents and guardians, provision of contraceptives and other forms of protective measures, including life skills education for girls, may be introduced. These and other strategies can be institutionalized in all public and private schools and colleges, in order to assist female pupils to manage their lives and reproductive capacities better.[68] This would enable them to benefit from the education and training facilities that are financed with public money to which the girl-child, as any eligible citizen, is equally entitled.[69] Such measures are also mandated by article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention),[70] which enjoins States Parties to take "all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education...".

Similar developments have also been taking place in other jurisdictions. For example, in 1990, the High Court of Tanzania, relying on the Constitution, the Universal Declaration of Human Rights (the Universal Declaration),[71] the Women's Convention, and other major international and regional human rights instruments to which Tanzania is a party, held that the customary law providing that women could only inherit clan land for use during their life time without an equal right to sell as male heirs were entitled, was discriminatory and therefore contrary to the Tanzanian Bill of Rights.[72] This decision is quite remarkable for a number of reasons. First, the fact that the term "sex" or "gender" is not specifically mentioned in the relevant provisions of the Tanzania Constitution did not deter the court from deciding that the Bill of Rights did prohibit discrimination against women. The reasons the judge gave to support his ruling included that the socialist government of Tanzania had emphatically rejected gender discrimination; that the Universal Declaration had been incorporated into the Tanzania Constitution by virtue of art 9(1)(f) of the Constitution;[73] and finally, that Tanzania had

[68] Such a step has to anticipate some resistance from traditionalists and religious leaders, some of whom take the view that sex education has the effect of promoting pre-marital sex among girls, adultery among married women and more generally, the corruption of public morals.

[69] Article 28 of the Children's Convention provides that "State Parties recognise the right of the child to education, and with a view to achieving this rights progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all...".

[70] 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

[71] GA Res 217 A(III), adopted on 10 December 1948.

[72] *Ephrahim v Pastory* (1990) 87 ILR 106 at 106-107, [1990] LRC (Const) 757 at 757-758.

[73] Article 9(1) states

> "The aim of this Constitution is to enable the Union Republic to develop as a nation of equal and independent people, who enjoy freedom, justice, brotherhood, and peace by following the policies of socialism and self-reliance, which require the implementation of the philosophy of socialism by taking into account the existing conditions in Tanzania.
>
> Therefore, the Authority of the State and all its instruments must direct all their activities and policies towards the task of ensuring:
>
> ...
>
> (f) that human dignity is preserved and maintained in accordance with the International Declaration on Human Rights."

ratified most of the major international and regional instruments prohibiting gender discrimination. In conclusion, Mwalusanya J noted that the principles contained in these human rights instruments constitute "a standard below which any civilized nation will be ashamed to fall."[74]

In 1992, the Court of Appeal of Botswana read the word "sex" into the relevant discriminatory provisions of the Botswana Constitution on the ground that the legislative intent behind the relevant section was not to exclude the word "sex" as a ground against which discriminatory law are not to be made.[75] Following this interpretation, the same conclusion was arrived at in *Molepole College*.[76] Besides the use of constitutional provisions, the principle of best interests of the child, particularly having regard to its expanding scope, offers an alternative as well as a complementary procedure for the protection of the girl-child. It is to the best interest principle therefore that this discussion will now turn.

The best interests approach to protection

Family lawyers and others practising in that branch of private law are familiar with the principle of the best interests or welfare of the child, along with its varying levels of emphasis. The best interests principle was introduced in most Commonwealth jurisdictions as part of the received English common law. In some jurisdictions, the application of this principle was at first confined to the general law applied to issues such as guardianship, custody, adoption and wardship. In more recent years, however, the best interests principle has been extended by courts, and in some cases by the legislature, to cover disputes involving customary and religious laws.[77] This development has come largely due to the growing concern throughout the world, for the security and welfare of the child.

From the beginning of the colonial era, there has been a certain convergence between the received English common law and the indigenous systems of law in both Asia and Africa. Both systems have traditionally placed strong emphasis on patriarchal notions of parental power.[78] Such shared ideals of patriarchy are usually expressed in a variety of rules, principles and procedures. For example, although the indigenous laws of Sri Lanka reflect child-centred concerns, they are also dominated by "ideas of parental power and family authority which tend to deny the identity of the child."[79] In the case of Islamic legal systems,

[74] (1990) 87 ILR at 110, [1990] LRC (Const) at 763b.

[75] *Unity Dow v Attorney General of Botswana*, (1992) 103 ILR 128 at 141-144 and 150, [1992] LRC (Const) 623 at 636-639 and 645.

[76] *Molepole College, supra* note 63.

[77] See Bart Rwezaura, "Tanzania: Building a New Family Law Out of a Plural Legal System" (1994-95) 33 *University of Louisville Journal of Family Law* 523 at 535 and Welshman Ncube, *The Convention on the Rights of the Child and Child Laws in Zimbabwe*, a study commissioned by and written for Redd Barna-Zimbabwe (1994) at 10-19.

[78] Goonesekere has noted that the "[e]arly English common law recognised the superior parental right of a man in a family unit created within marriage, and was more concerned with safeguarding his paternal rights than the interests of children." Goonesekere, *supra* note 48, at 119.

[79] *Id* at 122.

Goonesekere notes that "the concept of parental power was just as strong...[and this] enabled adult interests to prevail over the health and developmental needs of children."[80] Therefore, until early this century when courts begun to question the notion of absolute parental power, the best interests principle was in many parts of the Commonwealth dominated by paternalistic notions that were opposed to viewing the child as an autonomous being with independent or personal rights.

This situation is now changing in many parts of the world. In England, for example, after a series of judicial opinions, many of which sought to interpret and apply the best interests principle, parental power has considerably been weakened. Hence, in what is clearly a major landmark case along this winding road, the House of Lords held in *Gillick*[81] that "parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."[82] Based on an earlier decision in *Hewer v Bryant,*[83] the House of Lords noted that parental right to custody of a minor was "a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is."[84] Judicial opinion and statutory law in Australia, Canada and New Zealand have largely tended to reflect these developments.[85]

In the 1980s, the nature as well as the scope of the best interests principle has significantly altered. It seems to have evolved as a legal concept from the realm of private law into a principle of international human rights law. According to Professor Alston, the evolution begun by the insertion of the best interests principle into international human rights instruments accepted as binding by many states. For example, in 1959 the best interests principle was first included in the Declaration of the Rights of the Child[86] and has subsequently been inserted in the 1979 Women's Convention, in articles 5(b) and 16(1)(d).[87] A similar reference is found in the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally.[88] At the regional level, we have the African Charter on the Rights and Welfare

[80] *Id* at 120.

[81] *Gillick v West Norfolk and Wisbech Area Health Authority,* [1986] AC 112.

[82] [1986] AC at 184B. Professor Freeman has also noted that English courts began to make regular reference to the importance of children's rights from the 1970s. See Michael Freeman, "The Convention: An English Perspective" in Michael Freeman (ed), *Children's Rights: A Comparative Perspective* (Brookfield, Dartmouth, 1996) 93.

[83] *Hewer v Bryant* [1970] 1 QB 357.

[84] [1970] 1 QB at 369.

[85] See, eg, *Re Jane* (1988) 85 ALR 409, (1989) FLC ¶92-007. In England, the *Gillick* decision was followed within three years by the enactment in 1989 of the Children Act (6 *Halsbury's Statutes* (4th edn) (1992 reissue) 400). The Act came with a long list of guidelines to which English courts are expected to have regard in deciding issues affecting children within the context of family proceedings.

[86] GA Res 1386, UN Doc A/4354 (1959).

[87] Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in *Best Interests of Child, supra* note 48, 1 at 3.

[88] GA Res 41/185 (1986).

of the Child,[89] article 4 of which makes reference to this principle.[90] Besides these instruments, the preamble to the 1980 Convention on Civil Aspects of International Child Abduction[91] makes reference to the fact that "[t]he interests of children are of paramount importance in matters relating to their custody."[92]

Even in cases where no direct reference to the best interests principle is made, as in the case of the International Covenant on Civil and Political Rights,[93] the Human Rights Committee has referred in two of its *General Comments* to "the paramount interest of the children" in cases involving the dissolution of marriage.[94] Based on the above analysis, Professor Alston concluded that by 1989, when the principle of best interests was included in the Children's Convention, it had already been widely accepted by the international community as a principle of international law.[95]

Article 3(1) of the Children's Convention states:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The significance of this article is: first, it underlines the international status of the best interests principle; second, it introduces a principle whose scope is broader that [those] traditionally applied in the domestic law of most states. Thus, as Alston noted, "the principle applies not only in the context of legal and administrative proceedings, or in other narrowly defined contexts, but 'in relation to *all* actions concerning children'."[96] Although the standard of best interests required by article 3 of the Children's Convention is lower than that contained in most domestic statutes, it has the merit of extending to a much wider area of actions affecting the child.[97] The principle has now been extended to all

[89] OAU Doc CAB/LEG/24.9/49 (1990), adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, July 1990, not yet in force.

[90] Article 4 is on the best interests of the child. It states that

> "1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
>
> 2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those view shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

[91] 1343 UNTS 89, concluded at Hague on 25 October 1980, reprinted in (1980) 19 ILM 1501.

[92] Preamble, paragraph 2.

[93] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

[94] They are *General comment 17* (35) (1989), para 6, UN Doc A/44/40 (1989), Annex VI, reprinted in HRI/GEN/1/Rev.2, at 23; and *General comment 19* (39) (1990), para 6, UN Doc A/45/40 (1990), Annex VI, reprinted in HRI/GEN/1/Rev.2, at 28.

[95] Alston, *supra* note 87, at 4.

[96] *Ibid.*

[97] Freeman, *supra* note 82, at 94.

actions undertaken not only by courts of law, but by virtually all public and private institutions. Even though it remains to be seen what "actions concerning children" will be encapsulated in the best interests principle, there are encouraging signs that judges are willing to give the phrase a broad and generous interpretation, so as to catch most actions affecting children.[98]

A good example of how the principle has been applied is found in *Minister for Immigration and Ethnic Affairs v Teoh*[99] where the High Court of Australia held that although the Children's Convention had not yet been incorporated into Australian municipal law, its ratification by Australia "was an adequate foundation for a legitimate expectation, in the absence of statutory or executive indications to the contrary, that administrative decision-makers...would act in conformity with the Convention and treat the best interests of the child as a primary consideration."[100] In *Teoh*, an application for resident status by a non-citizen father of four minor children was rejected by the Australian immigration authorities before first considering the effect of its decision on the applicant's children. The decision was challenged by the applicant on the ground that the immigration authorities had failed to take into account the principle of the best interests of the child as stipulated in the Children's Convention. Evidence was given to the effect that the Review Panel and the Minister's delegate had treated the requirement that the applicant be of good character as the primary consideration when dealing with his application. Moreover, there was no indication that best interests of the children had been treated as a primary consideration. As the court put it, "it followed that there had been want of procedural fairness in the making of the decision to refuse resident status to the respondent."[101]

The effect of this decision is that the best interests principle contained in article 3 of the Children's Convention has now been raised into a relevant factor that every decision-maker has to consider before making a decision affecting a child, otherwise a review court would be entitled to set aside such a decision. On the other hand, if it is accepted that this requirement is not limited to administrators but extends (as per article 3) to "courts of law", this clearly enlarges the scope of best interests standard beyond the traditional area of child custody and guardianship. All this tends to suggest that the best interests principle has become the standard against which most decisions affecting children are to be measured. Such decisions are not limited to those made by public bodies and officials such as courts of law, educational institutions and administrative bodies, they

[98] See *Benjamin Daguio*, Immigration Review Tribunal No 5590 Adelaide, IRT Ref No V94/00143; referring to *Minister for Immigration v Teoh*.

[99] (1995) 128 ALR 353.

[100] *Id* at 354 (line 15).

[101] *Ibid* (line 35).

also include those decisions made by private institutions and local communities, including family heads and parents.[102]

By expanding the scope of its application, the best interests principle can now be invoked, for example, to require all decision-makers to show sensitivity to the best interests of the child including the girl-child. Where a child is capable of forming his or her views, article 12 of the Children's Convention requires that the views of the child be freely expressed and due weight be given to them before a decision affecting that child is taken.[103] While we must not overlook the known difficulty of defining, interpreting and applying the best interests concept even in a domestic law context, these difficulties are not insurmountable and at any rate, the trouble that will be taken in giving life to such a concept is well worth the while. The same can be said in relation to the difficulties that may be encountered in the interpretation of phrases such as "actions concerning children" (as stated in article 3(1)) and "matters affecting the child" (as stated in article 12(1)).

In summary, it can be argued that, if it is sensitively interpreted and applied, the best interests of the child principle can indeed be the very mechanism for achieving the goal of 'mainstreaming' a gender perspective into all national policies and programmes which are likely to impact on the girl-child. The principle can also complement the constitutional mechanism (examined above) and both would be used in appropriate circumstances (either together or separately) to advance the rights of the child.[104]

Public interest litigation: a practical means for accessing the law

Before concluding this paper, it must be noted that although national constitutions and the best interests principle have a great deal of potential for raising the status of the child in our jurisdictions, this potential is yet to be realised. Two important problems must be stressed here. The first is the general lack of awareness concerning the concept of children's

[102] For a recent evaluation of how the provisions of article 12 of the Children's Convention are applied in Tanzania and in Zambia, see Bart Rwezaura, "The Duty to Hear the Child Before Making a Decision: a View from Tanzania" in *CLESA Proceedings, supra* note 36, and Chuma Himonga, "The Child's Right to Participate in Decision- Making in Families and Family Tribunals in Zambia", in *id.*

[103] Article 12 states:

> "1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[104] It is possible that courts may differ in their interpretation of words such as "all actions concerning children". Some judges might be unwilling to accept that certain "actions" taken by administrators "concern children", while others may take a more liberal view of this article. It may depend on how their local circumstances and their understanding of the issues are. However, as Mason CJ and Deane J have advised, article 3 of the Children's Convention must be given a broad reading and application, ie, "one which gives to the word 'concerning' a wide-ranging application [that] is more likely to achieve the objects of the Convention": *Minister of Immigration v Teoh* (1995) 128 ALR at 363 (line 30).

rights, not only within various communities, but also among public officials such as lawyers and judges.[105] The second problem, which is connected with the first, is that the legal mechanism for the protection of children's rights cannot be easily accessed by the victims. It seems necessary, therefore, to consider, even if tentatively, alternative means by which the legal system can be mobilised to protect the economically disadvantaged and the politically marginalised members of the community, including the girl-child. It will be argued in this section that public interest litigation offers a practical option and is the most suitable, given the social and economic circumstances of Asia and Africa.

In this connection, the practice of the Supreme Court of India in public interest litigation under the Constitution requires our careful consideration. In exercising its constitutional powers, the Supreme Court has insisted, for example, that public officials must not only act in accordance with the specific statutory requirements, but also act in a manner consistent with the requirements of the Constitution, the Directives of State Policy, local statutes relating to children and the international treaties ratified by India.[106] The Supreme Court has also liberalised court procedures in order to permit concerned citizens to petition against perceived violations of fundamental rights of children, among other groups. Such petitions need not be technical documents. An ordinary letter has been held to be acceptable as a petition. Where necessary, the Supreme Court has appointed its own fact-finding commission of inquiry to investigate alleged violations and has generally maintained a monitoring role after its ruling has been handed down. In one case, the Supreme Court applied article 39(f) of the Indian Constitution[107] to require state governments to bring into force a long neglected statute that was beneficial to children.[108]

In order to improve particular social services offered to children, the Supreme Court of India has held that where legislation provides for the establishment of a juvenile court, or any public facility for children, it would be contrary to the spirit of that statute to appoint a person who had no special training in handling children's needs.[109] In this particular instance, the court ordered the State of Maharashtra to improve the living

[105] See for example, Bart Rwezaura, "The Legal and Cultural Context of Children's Rights in Hong Kong" (1994) 24 *Hong Kong Law Journal* 276.

[106] *Sheela Barse v Secretary, Children Aid Society* 1987 AIR SC 656 at 660, para 12.

[107] Article 39 of the Constitution provides that:

"the State shall, in particular, direct its policy towards securing:

...

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

[108] *Sheela Barse v Union of India* 1986 AIR SC 1773 at 1776. See also Goonesekere, *Women's Rights and Children's Rights, supra* note 1, at 30.

[109] In *Sheela Barse v Union of India*, the Court ordered that the child welfare officer and other officers in charge of children should be properly trained and further ordered that the Juvenile Court had to be staffed by a Judicial Officer with special training who was sensitive to the needs of children.

conditions of children in its remand homes, to ensure that their detention was not unduly prolonged, and while they were in these homes, to provide them with appropriate education and to prepare them to be good citizens.

These instances are just one aspect of the Supreme Court's crusade for children's rights. As noted by Goonesekere, "there are many cases...in which the Supreme Court of India has mandated State action to realize constitutionally guaranteed rights [for children]".[110] Professor Peiris has noted that the Supreme Court of India has in a number of times shown that it is willing to immerse itself in administrative detail in order to ensure that adequate facilities are available to disadvantaged groups, such as mental patients or, as in one instance, the inmates of a protective home for girls run by the government of Uttar Pradesh whose services were found to be very inadequate.[111]

Many observers believe that India's public interest litigation has achieved an identity of its own in the jurisprudence of the subcontinent.[112] This new jurisprudence provides a meaningful escape from the procedural strictures of the common law, particularly regarding the principle of *locus standi*. It also liberates the law, as it were, from the monopolistic service of the rich by making it accessible to the underprivileged social classes or politically marginalised groups. It is not surprising, therefore, that this spark has generated new fires in other jurisdictions in the region. In his inaugural address to the judges and lawyers of the South Asian Association for Regional Co-operation, the Chief Justice of Pakistan fully endorsed the need for the court to stick out for the weak and disadvantaged members of the community, adding that "the scope of social action litigation must be expanded in South Asia to realise fundamental rights, and provide access to justice for the people."[113]

The Indian experience has shown that in many cases there is no need to pass new legislation in order to improve the conditions of children or to protect their rights. The laws are often already there in the books. However, due to bureaucratic inaction, ignorance or lack of sensitivity to children's rights, and a shortage or lack of advocates to campaign for change, these laws remain largely dormant. And where these laws are applied, their fullest potential is never realised. Nevertheless, this problem is not peculiar to India. As the Chief Justice of Tanzania notes, although the Tanzanian version of the Children and Young Persons Ordinance[114] establishes a juvenile court and a special procedure for trying suspected young offenders, that Ordinance does not extend to the

[110] Goonesekere, *supra* note 48, at 142. For a more detailed evaluation of this approach, see G L Pereis, "Public Interest Litigation in the Indian Sub-Continent: Current Dimensions" (1991) 40 ICLQ 66.

[111] See Peiris, *supra* note 110, at 76. The case referred to is *Upendra Baxi v State of Uttar Pradesh* [1986] 4 SCC 106.

[112] Peiris, *supra* note 110, at 66.

[113] Cited in Goonesekere, *supra* note 48, at 143.

[114] Children and Young Persons Ordinance (Cap 13).

lowest courts where the majority of such cases are heard.[115] Under section 42 of the same Ordinance, the Chief Justice could issue direction to make the Ordinance applicable in these courts, but "[n]o such direction has been made since the Ordinance was enacted in the colonial days."[116]

Why then, one might ask, has this important Tanzania statute been ignored? The answer is that even in the District Court where the Ordinance is applicable, it is in practice never applied. Most District Court Magistrates who try cases involving juveniles are either unaware of this law or are "too busy" to apply it. Chief Justice Nyalali believes that the main problem is the "pervasive ignorance [on the part of] both the public and relevant officials, including judges, magistrates and lawyers regarding [children's] rights."[117] It appears that the major problem here is not really the lack of appropriate enactments to safeguard the interests of children, rather, it is the lack of efficient utilisation of existing legislation. On the other hand, the failure to utilise the law adequately also suggests the need to have a specialist body whose major task is to promote and protect the rights of children nationally. A body such as the Commissioner for Children's Rights can act as a child's advocate in the broader sense by promoting, inter alia, community education and awareness regarding the rights of children. Perhaps the Commissioner, working with interested non-governmental organisations, can also initiate social action litigation on behalf of children and even supervise the implementation of court's decisions. Such a body would arguably perform, more efficiently, some of the administrative duties that the Indian Supreme Court has been performing, and so perhaps, act as a bridge between the law and its enforcement.

In summary, although we cannot count on law alone to change society, the law can and should play the role of a leader and an educator by showing people the way forward. In that sense, if the law is carefully studied, dynamically interpreted and imaginatively applied, it can provide a basis for social action and a political platform for change.

Conclusion

This paper began by stressing the importance of looking at the violation of the rights of the girl-child as a structural issue embedded in the social and cultural systems of our societies. Because of the entrenchment of the conditions which give rise to these violations, the role of law in righting these wrongs must be seen not in isolation, but as part of wider effort for change and social justice. The law, if viewed in this way, can provide

[115] The Ordinance is not applicable in the High Court and Court of the Resident Magistrate.
[116] Nyalali, *supra* note 62, at 8.
[117] *Ibid.*

leadership and can become a legitimate platform for social action. The experience of the Supreme Court of India has shown that, with a well-informed and committed judiciary, much can be done to protect the weaker members of our communities. Moreover, given that for various reasons, our communities are not able to mobilise the legal system to protect their individual rights, the establishment of an independent body at state level seems the best way forward. Such a body will be best suited to deploy more effectively the emerging jurisprudence of public interest litigation and also to undertake an advocacy role aimed at creating greater rights awareness in the community. Such a body will have the power, and hopefully, the means to insist that the rights of the girl-child must be respected. It is also under these circumstances that the emerging judicial approach of drawing principles, values and standards from international human rights treaties to interpret domestic law, should be fully supported and encouraged as the best way forward in the continuing search for agreed universal standards to protect the interests of the girl-child in our various jurisdictions.

PERSONAL/COMMON LAW CONFLICTS AND WOMEN'S HUMAN RIGHTS IN THE SOUTH PACIFIC: THE SOLOMON ISLANDS EXPERIENCE

◆

The Hon Sir John Muria,
Chief Justice of Solomon Islands

Introduction

Human rights principles have been incorporated in most of the Pacific Islands countries' constitutions, something which was done as a pre-requisite to independence. These countries have a common feature of a plural legal system. There are the customary law, statute laws and legal processes imported during the colonial rule before independence, and laws passed by the national legislatures. All these co-exist and are assuredly changing to meet the circumstances of each of these countries.[1]

The countries in the South Pacific region are of varying background. The three main ones are Melanesian, Polynesian and Micronesian. Despite the different cultural and ethnic background, the common feature of a plural legal system runs through most, if not all, of the countries in the region. The space limitations of this paper do not allow exposition of the effect of the legal systems of all the countries in the region on the rights and freedoms of the individuals in those countries. I shall therefore limit this contribution to my own country, Solomon Islands.

Historical and cultural background

Solomon Islands lies about 2,000 kilometres northeast of Australia and had been settled as far back as 1300-1000 BC. The first European sighting of the islands was by a Spanish explorer, Alvaro de Mendaña in 1568.[2]

Solomon Islands consists of many islands, with six of them being the large ones and having large populations. The total population of Solomon Islands was 285,000 in 1986 and it is now well over 300,000, with the country's population growth rate as 3.5%.

The indigenous population is mainly Melanesian. There are however other races who make up the population, for example, Micronesian, Polynesian, European and Chinese.

[1] See generally M A Ntumy (ed), *South Pacific Islands Legal Systems* (Honolulu, University of Hawaii Press, 1993).

[2] *Id* at 268.

The country was declared a British Protectorate in 1893. It was in 1967 that steps were first taken to have Solomon Islands become self-governing and then independent. Self-government was actually given in 1976 and independence was achieved two years later on 7 July 1978.

Sources of law in Solomon Islands

The Constitution adopted at independence specifies the laws applicable in Solomon Islands. These are:

- the Constitution
- Acts of the National Parliament of Solomon Islands
- Acts of the United Kingdom Parliament of general application in force on 1 January 1961
- customary law
- the common law

The Constitution is the supreme law of the country and any law that is inconsistent with the Constitution shall be void to the extent of the inconsistency.

Human rights

The Constitution provides for the protection of individual rights and freedoms. These rights are respected by the authorities and have consistently been defended by an independent judiciary. The fundamental rights and freedoms of the individual are protected under the provisions of Part II of the Constitution. Section 3, Part II of the Constitution, provides as follows:

> "3. Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedom subject to such

limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedom of others or the public interest."

Protection against discrimination on the ground of "race, place of origin, political opinions, colour, creed or sex" is guaranteed under section 15 of the Constitution.[3] Any person whose rights or freedoms under the Constitution has been contravened is entitled to compensation. This is provided for under section 17 of the Constitution.[4]

Women and tradition

In order to express any views on the conflicts which may possibly arise on the rights of women in the modern Solomon Islands society, it is important to appreciate first the conflicts presented between traditional and introduced norms on the status of women in countries such as Solomon Islands, where traditional values play a considerable role in maintaining what the country now enjoys — peaceful co-existence between the various different groups of people in one happy peaceful country. Thus the name by which Solomon Islands is often referred to today is "the Happy Isles".

In Melanesian societies, such as Solomon Islands, women play important roles. These roles include maintaining continuity of the clans or the tribes through the bearing of children, maintaining and preserving the status of their husbands as well as the status of their leaders in their communities, maintaining continuity in land rights (in matrilineal society), and maintaining family stability in the homes. Simply because women perform these roles would not mean that women in Melanesian society are regarded as second-class or lower to men. It is very much a matter of perception, and in most cases that perception depends on those who are giving their perceptions and the basis on which their perceptions are made.

Rights over customary land are extremely vital in Solomon Islands society, especially where customary land comprises more than 85% of the land. In matrilineal communities, the women carry with them the rights over that land. They cannot simply be ignored in such situations.

[3] Section 15 states that "no law shall make any provision that is discriminatory either of itself or in its effect" and "no person shall be treated in a discriminatory manner..." and provides in paragraph (4) that

"In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[4] Section 17 states:

"Any person any of whose rights or freedoms under this Chapter has been contravened shall be entitled to compensation for the contravention thereof from the person or authority which contravened it."

Having said all that, it is observed that in developing countries such as Solomon Islands where very often traditional norms and structure are expected to function alongside the introduced non-Melanesian system, instances of incompatibilities between the two systems are bound to surface. Under the introduced system, the social structure, particularly in the secular sphere of the society in Solomon Islands, has been greatly affected.

The effects of these changes are more apparent in some areas than others, as illustrated in the following examples:

Family matters

Traditionally, a woman in some societies in Solomon Islands is expected to bear children for the husband, and his relatives who have paid the bride price for the woman before the marriage. The effect of the bride price is that the children will belong to the husband and his relatives should the wife die or leave the husband.

The traditional support system in the family will ensure that the children are cared for together by the husband's side of the family in the event that the husband and wife separate. Separating the children is not encouraged in custom since it is regarded as a disturbing factor for the children.

Those of us who have practised in the English common law system know that such a notion is not readily accepted, although we strive to find what is "in the best interest of the children" in cases of divorce or legal separations. In our attempts to do justice, we grant a decree *nisi* or decree of judicial separation and award the younger child to the mother and the older one to the father with the added justifying phrase, "in the best interest of the children", or award all the children to the mother who has limited means of support and order the husband to pay alimony.

The Constitution of Solomon Islands does not allow discrimination on the ground of sex, hence the interest of both the husband and the wife must not be sacrificed one for the other, whether by reason of custom or statute law. Yet, the Constitution clearly declares that custom is part of the law of Solomon Islands, with the qualification that it must not conflict with the Constitution or Acts passed by Parliament.

In this context I shall refer to a case decided by the High Court of Solomon Islands on appeal from the Magistrate's Court.[5] The Magistrate's Court decided that in accordance with custom the father should have custody of the two children of the marriage. On appeal, the High Court ordered retrial and ordered the custody of the younger child to the mother and the elder one to the respondent father. The court not only took into account what was in the best interest of the children, but obviously recognised that the woman had rights to her children as well,

[5] *Sukutaona v Houanihou* [1982] SILR 12.

a right which in some societies in Solomon Islands is curtailed by customary law.

Land matters

In Melanesian society, customary land is owned not by one person but by a tribe or a sub-clan and is passed on either patrilineally or matrilineally. Although in the matrilineal society, the rights of a woman over the land are recognised, she is very seldom consulted by men in land matters. Most of the land dealings are conducted by the men and in most cases the women are simply expected to accept the decisions made by men on such matters.

In the modern land tenure system, women are entering into the land registration system as joint-owners in registered land. However, not all women are able to do this. Those who do so have some measure of security to cling to, particularly when marriages break down. Where there are no joint registered interests in land, the courts have been able to accord women their entitlement in such cases.[6] In a male-dominated society like Solomon Islands, it has to be appreciated that the courts have been left free to administer equal protection of the law, so that the rights of women and their interests are not unduly sacrificed to their detriment.

Decision-making

One of the keys to balanced and harmonious society is shared decision-making, especially in a multi-cultural society like Solomon Islands, where many of the women's rights and duties are centred around child care, family health, nutrition or subsistence agriculture. The men have always been the key players in politics, economics and other national matters of importance.

It is not until recently that women in Solomon Islands have become involved in politics. Today a woman sits in the National Parliament as an elected representative of her people. Other women have also been elected into Provincial Assemblies. Thus, in the decision-making bodies, women have been able to exercise their rights to compete for membership in those bodies, an exercise which in traditional Solomon Islands would be very rare, if not unlikely.

The government has recognised and encouraged women to participate in decision-making. It has appointed women to be members of a number of important statutory bodies, for examples, the Leadership Code Commission, the Law Reform Commission, the Citizenship Commission, the National Education Board, the Town and Country Planning Board, the Solomon Islands Broadcasting Corporation and the Teaching Service Commission. These are some of the key areas where important decisions are made and the women are fully participating.

[6] *Kuper v Kuper* [1987] HC Civil Case No 12 of 1987 (unreported).

Currently the tribunal responsible for dealing with industrial disputes, the Trade Disputes Panel, is chaired by a qualified female lawyer. The other members of the Panel are men. As chairperson, she is responsible for determining the extent of the rights of thousands of employees and employers. Traditionally, such role would be an impossible assignment for a woman to undertake.

Domestic violence

There is very little documented evidence on violence against women in Solomon Islands. However, there are instances where women have been subjected to threats of violence both physically and emotionally. Though the magnitude of domestic violence has not been ascertained, it has been a cause for concern, not only for the women and women's organisations, but also for the interested groups outside the women's circle, such as non-governmental organisations and churches.

Instances of domestic violence usually occur in homes and reporting of instances to police is very rare. However, even if cases are reported, almost in all those cases, either they are dropped by the women before getting to court or are settled out of court. There is also a further aspect to this: police are often reluctant to interfere or prosecute in such cases, perceiving such cases as domestic disputes.

In today's Solomon Islands, the laws which give benefit to the women are derived from British practice.[7] To a Solomon Islander, these are "foreign laws" which are regarded as not reflecting the custom and traditions of the people. These laws empower the courts to grant custody of children to the wives and to order restraint, maintenance and other protective measures in favour of women. Despite the perception that such laws are foreign, the courts have always considered and dealt with cases that are brought before them arising out of instances of domestic violence. In many of these cases, restraining orders are issued against the husbands, these orders have very often resolved the conflicts. Experience has shown that court orders are always respected and abided by, even by the most irritated husband who sees such order as a product of "foreign law".

Women and modern Solomon Islands

Solomon Islands had been under colonial rule for more than a three-quarters of a century (85 years) before gaining independence on 7 July 1978. The impact of the colonial administration and outside influence have had a considerable effect on the people generally, in the way they think as well as in their social behaviour.

[7] For example, Islanders Divorce Act (Cap 48) and the Affiliation, Separation and Maintenance Act 1971.

One of the manifestations of this influence can be seen in the areas involving women and their related activities, such as programmes to raise women's awareness of their rights and interests.[8] Twenty years ago, such "women's activism" was a rare phenomenon or at least an activity that had not been encouraged in Solomon Islands. Perhaps one of the reasons for such rarity was that the notion of "gender equality" and "gender difference" were non-issues in those days, since women were perceived to be created to be different from men and each of them was ordained to order himself or herself according to the purpose for which he or she was created. This reasoning also perpetuates the notion that because of the gender distinction, there must also follow different treatment. It is no surprise that in present-day thinking, women have turned their attention to this seemingly discriminatory distinction, with a view to eradicating or at least minimising any recognition of gender difference, so that women and men should be considered to be essentially the same and treated the same.[9]

Women's "activism" and other women awareness programmes in Solomon Islands have not started until very recently, particularly after the government's assistance in establishing the Solomon Islands National Council of Women, which is a body responsible for addressing issues of concern to women, as well as providing a link with the relevant government ministries and other organisations for support in women's activities and development. Up to now the Council has been active and has had the support of the Government. As a result of some of the awareness programmes organised by the National Council of Women, some consciousness has emerged among the women groups and individuals of their rights and of the need to be given equal opportunities to exercise their rights. It is no longer uncommon to hear women asserting their rights publicly and demanding to be given equal opportunities to participate in the country's development.

In Solomon Islands, the law accords women equal legal rights both under the supreme law, the Constitution, and statutes. It must, however, be appreciated and has to be said that Solomon Islands is a tradition-based society, where custom and other traditional practices will still remain the order of the day while interacting with the introduced concepts in the same society. Based on the co-existence of the two systems, it is not surprising that a report on human rights in Solomon Islands remarked that despite constitutional and legal protection against discrimination, women remain victims of discrimination in this tradition-based society.[10]

[8] See, eg, *The Solomon Islands National Plan of Action for Women, Strategies and Programmes of Action 1995-1998.*

[9] Asia-Pacific Forum on Women Law and Development, *Workshop on Feminist Legal Theory and Practice,* Chiangmai, 20-22 July 1995.

[10] United States Department of State, *Country Reports on Human Rights Practices for 1995,* Solomon Islands, Section 5.

In strict observance of the Constitution, custom or tradition law and practices which are discriminatory in nature and effect must be regarded as contravention of the Constitution and must be null and void. The courts in Solomon Islands have continued to maintain their duties of upholding the provisions of the Constitution safeguarding the rights of the individuals against violation. The courts have also unhesitatingly declared customs which are contrary to the Constitution null and void. In *Loumia v DPP,*[11] both the High Court and the Court of Appeal rejected the argument that the appellant had a legal duty to kill the deceased because the deceased killed the appellant's brother. This argument is premised on the notion that custom is part of the law of Solomon Islands. Both courts held that such a custom is in conflict with section 4 of the Constitution, ie, protection of right to life, and so cannot be part of the law of Solomon Islands.[12]

The approach of the national courts to human rights guarantees

It is pertinent that the approach taken by the national courts in Solomon Islands on constitutional rights is seen not only as giving meaning and effect to the constitutional guarantees of fundamental rights and freedoms, but also as compatible with international and comparative human rights law. This has to be so, since the framers of the Constitution who incorporated these human rights provisions surely must have had in contemplation those international principles. This necessarily entails an exercise of observing the proper approach to interpreting those constitutional rights, the approach taken by courts of other countries with similar constitutional provisions and the principles as contained in the international legal instruments on human rights such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),[13] the Universal Declaration of Human Rights,[14] and other international declarations on human rights.

[11] [1985-1986] SILR 158, [1986] LRC (Crim) 62 (CA of Solomon Islands).

[12] Section 4 states:

"(1) No person shall be deprived of this life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable —

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war."

[13] 213 UNTS 221, with new text and protocols 1-11, 15 HRLJ 102.

[14] GA Res 217A(III), adopted on 10 December 1948.

The principle articulated by the Judicial Committee of the Privy Council in *Minister of Home Affairs v Fisher*[15] is that a "generous approach" must be taken when interpreting the words of the constitution regarding constitutional rights. This approach has been adopted without reservation in Solomon Islands in *The Speaker v Danny Philip,*[16] which is a case dealing with the respondent's right as a Member of Parliament to move a motion of no confidence in the Prime Minister. There are other cases which also consider the principle laid down in the *Fisher* case.[17] These cases, although not directly concerned with women's human rights as such, reflect the approach of national courts when considering the constitutional rights and freedoms of the individual.

In the above-mentioned case, *Sukutaona v Houanihou,*[18] apart from the other grounds of appeal, there was a constitutional right element which had been ignored by the trial court. The respondent husband gave evidence in the Magistrate's Court in English, a language the appellant wife did not understand. What was said by the husband in English was not interpreted to the wife. On this the High Court pointed out:

> "If this were so it is a most serious matter as she would, of course, be unable to understand the case what was being made out against her."

The wife's right to know what was said against her stems from the right to a fair hearing guaranteed by the Constitution of Solomon Islands.

Application of international and human rights law

With the growing awareness and application of the international and human rights law, courts in many Commonwealth countries have been influenced in this area of the law. Beside the Judicial Committee of the Privy Council, the Supreme Court of India,[19] the Supreme Court of Zimbabwe,[20] the Court of Appeal of Singapore,[21] the Court of Appeal of Botswana,[22] the High Court of Solomon Islands,[23] and many other courts in the Commonwealth have on occasions applied the highly

15 [1980] AC 319, [1979] 3 All ER 21.

16 (1991) Civil Appeal No 5 of 1990 (unreported).

17 For example, in *Kenilorea v AG* [1984] SILR 179, [1986] LRC (Const) 126 (CA of Solomon Islands), and *DPP v Rolland Kimisi* [1991] Civil Appeal No 67 of 1990, the Court of Appeal noted the four factors set out in *Barker v Wingo*, 407 US 514, 33 L Ed 2d 101 (1972), on the question of the right to speedy trial.

18 [1982] SILR 12.

19 *Rangarajan v Jagjivan Ram & Others* [1990] LRC(Const) 412 (SC of India).

20 *Ncube and Others v State*, 1985 (2) SA 702, [1988] LRC (Const) 442 (SC of Zimbabwe).

21 *Teo Soh Ling and Others v the Minister of Home Affairs* [1990] LRC (Const) 490 (HC of Singapore).

22 *State v Petrus and Another* [1985] LRC (Const) 699 (CA of Botswana).

23 *R v Rose* [1987] SILR 45, [1988] LRC (Crim) 369 (HC of Solomon Islands). It applied the cases *Tyrer v UK*, European Court of Human Rights, Judgment of 1978, Series A, No 26, (1980) 2 EHRR 1, and *State v Petrus*. The High Court held that corporal punishment is not inherently inhuman but could become so by the manner of its execution.

persuasive value of the international principles on human rights as found in the European Convention on Human Rights and in a number of the decisions of the European Court of Human Rights.

Conclusion

There has been very little by way of cases coming before the courts in Solomon Islands dealing with issues directly on the women's human rights as such. Perhaps the time has not yet arrived. However, the courts have already had occasions to consider cases involving breaches of constitutional rights and freedoms, and in some of those cases persuasive values of international principles on human rights have been applied. The approach taken by the courts in Solomon Islands in enforcing human rights provisions under the Constitution will, on the whole, be applicable as well to enforcing women's human rights principles.

The conflicts, as I have already mentioned earlier in this paper, will however remain. This is because custom will always play an important role in a traditionally based society like Solomon Islands. It will be for the courts to play an important and decisive role in the midst of this conflict, with a view to ensure that human rights, be they those of men or women, are respected and are not allowed to suffer or be sacrificed by reason of differences in sex or gender.

LITIGATION RAISING ISSUES RELATING TO WOMEN'S HUMAN RIGHTS IN THE ASIA-PACIFIC REGION: THE EXPERIENCE OF KIRIBATI

◆

The Hon Justice R B Lussick,
Chief Justice of the Republic of Kiribati[*]

This paper has been prepared for a panel discussion of the above-mentioned topic. If the paper confined literally to the terms of the heading, then it would of necessity, be extremely brief because so far there has been no such litigation in Kiribati. Not only there has been no local case in which a court has used international standards to determine women's human rights, but to my knowledge, nowhere in the Pacific region has a court used an international convention for such a purpose.

Kiribati has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)[1] and so its provisions have not been incorporated into the domestic law.

The present position in Kiribati is that if a case arises with women's human rights as the issue, the court's decision would be more likely based upon the Constitution rather than on international convention.

The Constitution is the supreme law of Kiribati. It plays a significant role in guaranteeing equality within the social structure and culture of the Republic. In the preamble to the Constitution, the people of Kiribati pledge to uphold the principles of equality and justice and to continue to cherish and uphold the customs and traditions of Kiribati.

Unfortunately, the pledge to uphold the principles of equality and justice does not seem to be consistent with some of the provisions of the Constitution, in view of the present day attitudes to the equal rights of men and women. In fact, it can be said that the Constitution, because of its omissions rather than its provisions, discriminates against women.

Section 3 of the Constitution guarantees to every person in Kiribati the fundamental rights and freedoms of the individual regardless of race, place of origin, political opinion, colour, creed or sex, subject to respect for the rights and freedoms of others and for the public interest. Those fundamental rights and freedoms are expressed to be:

(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation.

* I am grateful for the many helpful suggestions offered by members of the Office for Development Assistance's Pacific Regional Human Rights Education Resource Team.

1 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

Unfortunately, the Constitution, having guaranteed to women the fundamental rights and freedoms of the individual, does not go on to protect them from discrimination purely based on the fact that they are women.

Section 15 forbids the making of any law that is discriminatory either of itself or in its effect; in other words it is forbidden for a law to be directly or indirectly discriminatory.[2] However, section 15 defines discriminatory as meaning

> "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."[3]

One class of discrimination which is notably missing from this definition is sexual discrimination.

The result is that the constitutional guarantee to women of the fundamental rights and freedoms of the individual loses much of its significance when it is realised that a provision of any law which is prejudicial to the rights of women purely on the basis of their sex is not considered to be discriminatory and is therefore not unlawful.

The citizenship provisions of the Constitution also fail to take the rights of women into account. Sections 21 and 25 deal with children of I-Kiribati descent born overseas. Such a child has a right to citizenship if his or her father is I-Kiribati. But a child has no such right if it is the mother who is I-Kiribati and not the father.[4]

[2] Section 15(1) states: "Subject to the provisions of subsections (4), (5), and (8) of this section, no law shall make any provision that is discriminatory either of itself or in its effect."

[3] Section 15(3).

[4] Section 21 relates to persons born outside Kiribati before Independence Day. It states:

"(1) Every person of I-Kiribati descent who having been born outside Kiribati is on the day prior to Independence Day a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death or renunciation of his citizenship of the United Kingdom and Colonies have become a citizen of Kiribati by virtue of subsection (1) or (3) of the preceding section, become a citizen of Kiribati on Independence Day.

(2) Every person not of I-Kiribati descent who having been born outside Kiribati is an eligible person shall, if his father becomes or would but for his death have become a citizen of Kiribati by virtue of subsection (2) or (3) of the preceding section, become a citizen of Kiribati on Independence Day."

Section 25 relates to persons born after the day prior to Independence Day. It states:

"(1) Every person born in Kiribati after the day prior to Independence Day shall become a citizen of Kiribati at the date of his birth unless on that date, not being a person of I-Kiribati descent or a person whose father is a citizen of Kiribati, he becomes a citizen of some other country: Provided that a person shall not become a citizen of Kiribati by virtue of this subsection if at the time of his birth —

(a) his father possesses such immunity from suit and legal process as is accorded to any envoy of a foreign sovereign power accredited to Kiribati and neither of his parents is a citizen of Kiribati; or

Under sections 22 and 26, a foreign woman who marries an I-Kiribati man has a right to citizenship. However, a foreign man who marries an I-Kiribati woman has no corresponding right. In such a case one can imagine the hardship this kind of discrimination can cause. The husband, even though married to an I-Kiribati, does not thereby acquire any right to stay in the country and if he cannot obtain the necessary work permit — which is by no means guaranteed solely because of his marriage — the I-Kiribati wife would be forced to leave the country of her birth in order to remain with her husband.[5]

Recently, the Government requested the Office for Development Assistance's Pacific Regional Human Rights Education Resource Team to facilitate a workshop in response to the need to increase the general understanding of I-Kiribati women on the Constitution and how the particular clauses in the Constitution discriminate against women. The result of that workshop was the submission of a resolution by the leaders of women non-governmental organisations to the Constitutional Review Committee expressing the urgent need to amend the following provisions of the Constitution:

> Section 15 — to include "sex" as a ground of discrimination
>
> Sections 21, 22, 25 and 26 — to include "mother", "women", "husband" in each section so as to be in conformity with the rest of the Constitution and maintain equality throughout the Constitution.

The resolution also requested the Select Committee to ask the Government (inter alia) to incorporate in the Constitution a provision allowing affirmative action in respect of women and other disadvantaged groups and, further, to ratify the Women's Convention.

Thus, while the Women's Convention has not yet been used in the courts in Kiribati it has been used to lobby for policy changes. The Convention is also useful in addressing problem areas regarding women's

(b) his father is a citizen of a country with which Kiribati is at war and the birth occurs in a place then under occupation of such country.

(2) Every person born outside Kiribati after the day prior to Independence Day shall become a citizen of Kiribati at the date of his birth if at that date his father is, or would but for his death have been, a citizen of Kiribati."

[5] Section 22 relates to wives of persons who become citizens on Independence Day. It states:

"Every woman who, having been married to a person who becomes, or would but for his death or renunciation of his citizenship of the United Kingdom and Colonies have become, a citizen of Kiribati by virtue of section 20 or 21 of this Constitution, acquired the status of citizen of the United Kingdom and Colonies, automatically or by registration, on the grounds of that marriage and who possesses that status on the day prior to Independence Day, shall become a citizen of Kiribati on Independence Day."

Section 26 relates to marriage to citizens of Kiribati. It states:

"Any woman who after the day prior to Independence Day marries a person who is or becomes a citizen of Kiribati shall be entitled, upon making application in such manner as may be prescribed, to be registered as a citizen of Kiribati."

rights not only from the constitutional aspect but also in respect to land rights, sexual offences and domestic violence.

This last-mentioned problem area, ie domestic violence, is an additional problem faced by I-Kiribati women. There is little data on the incidence of wife beating and other forms of abuse, but women attending the national conference on children rated domestic violence, often associated with alcohol abuse, as an extremely serious problem. The problem seems to be more common in urban South Tarawa than in rural areas, but this may be due to an increased willingness to discuss the problem. Domestic violence is covered under general assault laws, but police are reluctant to interfere even when complaints are made.[6]

In fact, much of women's experiences of human rights violations occur in the private sphere at the hands of private individuals. The Women's Convention does not attach responsibility to States parties for violations in the private sphere or at the hands of private individuals. However, the Declaration on the Elimination of Violence against Women (the Violence Declaration)[7] adopted by the General Assembly of the United Nations by consensus in December 1993 imposes specific obligations on the States and on the United Nations. The Declaration concerns physical, sexual and psychological violence occurring in the family, the community and at the hands of, or with condonation of the State.[8] States are obliged to condemn violence against women and not to invoke any custom, tradition, or religious consideration to avoid this obligation and to take all appropriate measures to eliminate violence against women.[9] The Declaration was joined in March 1994 by another mechanism to confront violence against women — the Special Rapporteur on Violence against Women who was appointed by the Commission on Human Rights.[10] Both the Declaration and the appointment of the Special Rapporteur recognise that violence against women violates the fundamental human rights of women, and accordingly, States have an obligation to eliminate this violence. Insofar as domestic litigation is concerned, the standards set in the Declaration that constitute the framework of the work of the Special Rapporteur may be relevant in the interpretation of national laws.[11]

However, I am afraid that the time is still some way off when the courts in Kiribati will use the Women's Convention and other international standards to decide questions of women's human rights. The starting point, of course, will be ratification by the government of the Women's Convention.

6 Government of Kiribati and UNICEF, *The Situation of Children and Women in Kiribati*, 1991.

7 GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.

8 For details, see Violence Declaration, articles 1 and 2.

9 For details, see Violence Declaration, article 4.

10 The mandate of the Special Rapporteur on Violence against Women, Its Causes and Consequences was established by Resolution 1994/45 of the United Nations Commission on Human Rights: CHR Res 1994/45 (4 March 1994).

11 Speech by Florence Butegwa at Judicial Colloquium on Promoting the Human Rights of Women, Victoria Falls, 1994.

Custom is another obstacle to women realising equality in Kiribati, although the same may be said of other Pacific island nations.

Custom in Kiribati has a strong influence in qualifying a woman's role in society and of perpetuating the traditional concept of an I-Kiribati woman and her place in the scheme of things. There are many aspects of custom which are discriminatory in the sense that they reflect an ideology based on the notion that women are inferior to men.

Traditionally, the position of women was to be at home and to care for their families, to prepare food and to look after all the members, both young and old. Their lives were focused on fulfilling the role of mother, wife and daughter. The husband was officially head of the household, but the wife was the most important single figure in the family because she dealt with all the problems. While the husband was the main provider of food through fishing and planting babai (swamp taro), he would have taken very little interest in the day-to-day happenings within the family. Politics, however, was officially men's work. The unimane, or elder men, discussed and debated in the maneaba and made all important decisions for the community. Though women were present in the maneaba, traditionally they did not speak, but sat behind the men and whispered what they thought. They were expected, however, to participate in activities associated with the maneaba, contributing their efforts and skills in communal work and at times of celebration.[12]

Customary law has been granted legal recognition in Kiribati. It is defined in section 5 of the Laws of Kiribati Act 1989 as comprising the customs, and usage existing from time to time of the natives of Kiribati and is part of the laws of Kiribati unless inconsistent with legislation.

In practice, customary law tends to be recognised and applied primarily in relation to criminal defences, land, marriage, succession, adoption, and personal law generally.[13] With very few exceptions, it can be described as patriarchal.

Nowadays, things have begun to change, but very slowly. In the outer islands women still defer to men on political matters, but they have begun to take a more prominent role in organisations which deal specifically with women's affairs, such as women's associations and youth groups. The degree to which a woman is able to participate more actively outside the family in community affairs depends a great deal on how understanding the husband is. Considerable effort is going into educating women these days, which hopefully will give them the confidence to participate more and more in modern Kiribati, but there are still many aspects of traditional society which work against the progress of women.[14]

[12] Taboneao Ngaebi, Tekarei Russell and Fenua Tamuera, "The Status of Women" in Howard Van Trease (ed), *Atoll Politics: the Republic of Kiribati* (Christchurch, Macmillan Brown Centre for Pacific Studies, 1993) 266.

[13] Martin Tsamenyi, "Kiribati" in M A Ntumy (ed), *South Pacific Islands Legal Systems* (Honolulu, University of Hawaii Press, 1993).

[14] "The Status of Women", *supra* note 12.

This problem might well be solved upon ratification of the Women's Convention. The Government would thereby be obliged to modify social and cultural patterns of behaviour so as to eliminate customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[15] The resultant laws would of course be interpreted by the courts in accordance with the intentions of the Convention.

At present, there is no basis for the courts in Kiribati to use the Women's Convention in the interpretation of existing laws. However, ratification would inevitably lead to the provisions of the Convention being incorporated into the laws of Kiribati. The Convention would then prove useful in litigation and decision-making in the following ways:

(1) Judges would adopt a more progressive interpretation of the domestic law, according women equality with men before the law in accordance with article 15 of the Convention.
(2) Where judicial discretion existed, a judge would have a responsibility to abide by the principles of non-discrimination as outlined in the Convention in exercising that discretion. This would have considerable impact where the applicable legislation was gender-neutral, but judicial interpretation had in the past discriminated against women.
(3) Where there was a conflict of legislation, the interpretation would be in accordance with the Convention.
(4) Customary laws and practices discriminating against women would henceforth be interpreted in the light of the Convention.

In conclusion, I wish to emphasise that the question of the ratification of the Women's Convention is one for the executive, and that what I have said is not to be regarded in any way as an attempt to encroach upon that role. I am able to make the observation, however, that the present Government of the Republic of Kiribati is a progressive government which has already shown its support for women's rights and would not be likely to make a decision contrary to the interests of women in Kiribati.

[15] Article 5(a) states "States Parties shall take all appropriate measures...to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

LITIGATION RAISING ISSUES RELATING TO WOMEN'S HUMAN RIGHTS: INTERNATIONAL AND REGIONAL STANDARDS — THE PAPUA NEW GUINEA EXPERIENCE

◆

Justice Tracy Doherty
Supreme Court and National Court, Papua New Guinea

Papua New Guinea is a party to several international conventions dealing with human rights including a number particularly relevant to women's rights.[1] Obviously it is also a signatory to various important maritime treaties and other international conventions. Papua New Guinea was a recent signatory to the Lomé Convention in the Pacific and the most relevant recent convention dealing with the status of women it has ratified or acceded to is the Convention on the Elimination of All Forms of Discrimination against Women 1979 (Women's Convention).[2] Pacific nations including Papua New Guinea participated in a United Nations sponsored regional meeting on Status of Women at Rarotonga in 1991 to discuss the Convention.[3] Most were slow in signing after that meeting and Papua New Guinea did not accede until 1995, in contrast to many European countries which became parties more than a decade ago. However to many women leaders in Papua New Guinea this was a welcome development. Although it has been ratified, the Women's Convention has not as yet been implemented as part of the domestic law.

To fully appreciate the adoption of international and regional standards within Papua New Guinea's judicial system, it may be easiest to outline the constitutional and legal provisions which provide for domestic human rights.

Prior to independence in September 1975 the former House of Assembly had set up a Constitutional Planning Committee. At a recent

[1] These include: Convention Concerning Employment Policy (ILO No 122), 569 UNTS 65, adopted on 9 July 1964, entered into force 15 July 1966 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Abolition of Forced Labour (ILO No 105), 320 UNTS 291, adopted on 25 June 1957, entered into force 17 January 1959 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ILO No 98), 96 UNTS 257, adopted on 1 July 1949, entered into force 18 July 1951 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds (ILO No 45), 40 UNTS 63, adopted on 21 June 1935, entered into force 30 May 1937 (ratified by Papua New Guinea on 1 May 1976); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 9 December 1948, entered into force 12 January 1951 (accession by Papua New Guinea on 27 January 1982); Convention on the Political Rights of Women, 193 UNTS 135, adopted on 20 December 1952, entered into force 7 July 1954 (accession by Papua New Guinea on 27 January 1982); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 75 UNTS 287, adopted on 12 August 1949, entered into force 21 October 1950 (succession by Papua New Guinea on 26 May 1976).

[2] 1249 UNTS 13. Papua New Guinea acceded to the Convention on 12 January 1995.

[3] *South Pacific Regional Seminar on the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, held at Cook Islands on 18-21 March 1991.

constitutional seminar to mark the 20th Anniversary of the Constitution, Sir Michael Somare, a former Prime Minister and Chief Minister prior to independence, spoke of the work of the Committee.[4] They held face-to-face discussions with hundreds of discussion groups involving thousands of people. They also travelled to every subdistrict in the country and talked face-to-face with the population about what they wanted in their constitution. As he said in the seminar, "it was definitely not a constitution thrust upon us by Marlborough House or Canberra". As a result, Papua New Guinea has a very detailed constitution setting up various arms of government — legislative, executive and judicial — and declaring the human and civil rights of its citizens and of all persons within its boundaries.

At the time of independence the Government made a decision not to become a signatory to the United Nations Universal Declaration of Human Rights. The Constitutional Planning Committee noted [that] the Universal Declaration of Human Rights was a statement of accepted rights and freedoms. "The rights and freedoms it sets out are not unlimited — that the protection of the human rights of individuals and groups must be balanced against the interest of the people of a country as a whole" and they considered that the Declaration "makes no reference to the universally recognised distinction between the rights of the citizens of a country as opposed to those of foreign citizens within that country." Applying these considerations, the Constitution made a distinction between basic and qualified rights, which require different percentages of votes in Parliament to be changed or amended. The Committee particularly noted some of the rights in the Universal Declaration of Human Rights and other well-known declarations, citing among others the right to life, the right not to be tortured or made a slave, the right not to be imprisoned without a fair trial, the right to privacy, the right to take part in government and to have an adequate standard of living, health and well-being of the person, and the right to education. When the Constitution was finally drafted and passed, such matters as the rights to education and to marry and form a family were not actually included or referred to.[5]

There has been little debate as to why the right to form a family was not included. Some persons suggest that it may have been to avoid people alleging that it gives a right to polygamous marriages, however there is no real research or information available on this particular point.

[4] Rt Hon Sir Michael Somare, a keynote address at the conference *Twenty Years of the Constitution*, held at Port Moresby, Papua New Guinea, March 1996.

[5] For reference, see Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papau New Guinea* (Port Moresby, University of Papau New Guinea Press, 1984) at 93-96, citing the *Final Report of the Constitutional Planning Committee* (1974), Part I, Chapter 5, at paras 6-26.

The Constitution particularly notes, in section 55, the right to equality regardless of tribe or ethnic background, religion or sex.[6]

Despite this and the implementation of the Convention on the Political Rights of Women,[7] Papua New Guinea does not at present have any elected women members of Parliament. Three women members were elected in the first Parliamentary elections after independence; one became a Minister. No women have been elected subsequently. There has been some media publicity and debate proposing a woman be nominated under a provision in the Constitution which allows for a nominated member, but this has not been implemented and it has not been subject of any litigation before the courts nor has the idea of litigation been mooted. There is no doubt that women stand for elections and do so openly. Women also cast their votes openly. In one disputed return case I heard, more women voted than men in the relevant electorate. The National Court, sitting in its capacity as court of disputed returns, has heard a very large number of cases disputing elections, but it has never been alleged nor inferred that a woman was prevented from voting or ordered to vote in a particular way solely because she was a woman. Similarly it has not been suggested that a woman was prevented from standing merely because she was a woman.

Mrs Josepha Kanawi, formerly the Secretary of the Law Reform Commission and presently the Land Title Commissioner, a senior woman lawyer, stated in a paper presented to the 20th Waigani Seminar and subsequently at the Beijing Forum that the concept of the equality of women was not traditional in most Papua New Guinea societies and that women had a different traditional role, which was recognised and respected.[8] Of course Papua New Guinea is not at all unique in this particular attitude. The concept of equality is comparatively new but then it is only a recent concept in many other jurisdictions also.

Our Constitution has an unusual provision in section 57, stating

> "a right or freedom referred to in this division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully

[6] Section 55 is on equality of citizens. It states:
"(1) Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.
(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.
(3) Subsection (1) does not affect the operation of a pre-Independence law."

[7] 193 UNTS 135, adopted on 20 December 1952, entered into force 7 July 1954. Papua New Guinea acceded to the Convention on 27 January 1982.

[8] Josepha N Kanawi, "Rights of Women in Papua New Guinea".

and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority."

This section has been used to make many applications to the National Court; a simple form has been prepared to initiate applications. To the best of my knowledge, and I have recently reviewed most of our files, none allege a breach of the equality provisions in section 55, although the section has been considered when reviewing imprisonment by village courts for what were, essentially, breaches of custom that might apply only to women.

Of the international conventions and standards to which Papua New Guinea is party, most have been implemented by way of domestic legislation. Sections 97-102 of the Employment Act relate to employment of women and children. Discrimination on the basis of sex and failing to pay a woman employee the same wages as a male employee at the same level are criminal offences. Women are not allowed to be employed underground or in heavy labour, and they may not be employed during the night unless they are in health, welfare or managerial positions. There are provisions for maternity leave and protection of employment during maternity leave and for time off during working hours to feed a nursing baby.

Although I have not been able to find any specific reference to the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds,[9] it appears to me the Employment Act implements the convention in our domestic law. To the best of my knowledge we have not had any case law relating to these or related sections. Legislation in the former Public Service Acts allowing for retrenchment of female married employees before other employees was repealed immediately after independence.

There are no criminal sanctions that provide different scales of punishment for men and women for the same offence (compare with the Philippines' adultery legislation)[10] and a difference allowing women prisoners more remission than their male counterparts was changed to increase remission for men to the same level.

The Constitution does allow for reference to international conventions and standards when the Supreme Court is "determining whether or not any law, matter or thing is reasonably justified in a democratic

[9] ILO No 45, 40 UNTS 63, adopted on 21 June 1935, entered into force 30 May 1937. Papua New Guinea ratified the Convention on 1 May 1976.

[10] Adultery and Enticement Act 1988 (No 5 of 1988) of Papua New Guinea. For details, see Hon Leticia Ramos Shahani, "Women Migrant Workers" in *Proceedings of the Third Biennial Conference: Equality through Law - Commitments to Keep* (Manila, Philippine Women Judges Association, 1996).

society that has a proper regard for the rights and dignity of mankind."[11] In past cases the Supreme Court has considered many different charters and conventions, such as the European Convention for Protection of Human Rights and Fundamental Freedoms,[12] the decisions of the International Court of Justice and the United Nations Charter among others (see for example *Re Minimum Penalties*[13] arguing the constitutionality of the Criminal Code (Amendment) 1983).

However, I have been able to find only one case where an international convention was directly used in interpreting and applying a constitutional provision and enforcing a right. This was in *State v Kule*[14] (a case over which I presided) where a custom of compensation was argued. There a custom of giving a daughter in compensation and reparation for murder to the family of the person murdered was held not enforceable and could not be recognised as it was an institution or practice similar to slavery and therefore contrary to section 253 of the Constitution.[15]

In interpreting the word "slavery" in the Constitution I applied the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[16] the Slavery Convention[17] and the amending Protocol.[18] I applied that Convention because I considered that Papua New Guinea had signed, ratified and

[11] Section 39(3) specifically states "for the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to -
(a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and
(b) the Charter of the United Nations; and
(c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
(d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and
(e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and
(f) previous laws, practices and judicial decisions and opinions in the country; and
(g) laws, practices and judicial decisions and opinions in other countries; and
(h) the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and
(i) declarations by the International Commission of Jurists and other similar organizations; and
(j) any other material that the court considers relevant."

[12] 213 UNTS 221 (1950).

[13] [1984] PNGLR 314.

[14] [1991] PNGLR 404.

[15] Section 253 provides that "slavery, and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited."

[16] 266 UNTS 3, concluded on 7 September 1956, entered into force 30 April 1957.

[17] 60 LNTS 253, concluded on 25 September 1926, entered into force 9 March 1927. Papua New Guinea acceded to the Convention on 27 January 1982.

[18] Protocol Amending the Slavery Convention of September 25, 1926, 212 UNTS 17, concluded on 7 December 1953, entered into force 7 July 1955.

implemented the Convention (by virtue of section 253 of the Constitution) and that the courts were entitled to have regard to the Conventions which the country had ratified or acceded in deciding the meaning of words and expressions used in legislation and in implementing the legislation.

At present Papua New Guinea does not have any legislation directly prohibiting sexual harassment in the workplace or elsewhere. It is only very recently that we have seen any publicity concerning sexual harassment or misuse of sexual favours in the workplace. There were, of course, stories that circulated privately but none were actually the subject of litigation and have only recently been the subject of media reports.

When and how the Women's Convention will be implemented with particular reference to sexual harassment is a political decision which has yet to be made.

I think that I can safely say the greatest concerns to ordinary women in Papua New Guinea are the issues of domestic violence, adultery and polygamy (the line between the latter two is frequently blurred). They are common media subjects but none was alluded to in the Constitution nor specifically referred to in the conventions that we have adopted and actually implemented. A detailed report on domestic violence by the Law Reform Commission was presented to Parliament with recommendations for clearer legislation, easier access to the courts and other remedies sought, but as yet without result despite pressure from women's groups.[19]

Dr Brunton (a former National and Supreme Court Judge) referred to this situation in a paper "Human Rights in Papua New Guinea in 1996" quoting the 1995 *United States Department of State Country Reports on Human Rights Practices on Papua New Guinea*:

> "Violence against women, including domestic violence and gang rape, is a serious and prevalent problem. While ostensibly protected by their families and clans, women are nonetheless often the victims of violence and force. Traditional village deterrents are breaking down, and the number of reported cases of rape in some areas is rising. Although rape is punishable by imprisonment, and sentences are handed out when assailants are found guilty, few assailants are apprehended. Domestic violence such as wife-beating is also common, but is usually viewed by police and citizenry alike as a private family matter."[20]

[19] "Domestic Violence" in Susan Toft (ed) *Papua New Guinea Law Reform Commission Monograph No 3* (1985).

[20] United States Department of State, *Country Reports on Human Rights Practices for 1995*, Papau New Guinea, Section 5.

Dr Brunton went on to say:

> "The law and the court system still need to provide effective remedies for beaten women; the family courts are ineffective; the Port Moresby Family Court is in particular need of attention and institutional renovation. Although National Court judges on circuit do what they can to review Village Court anomalies, most of the worst misery is hidden for the superior courts.
>
> Because we have a Parliament in which all members are male, there is a need for the superior courts to show leadership and to address women's rights; most women's marriages are not legally defined, the concept of customary marriage is unclear and particularly so if parties have different customs. Sentencing patterns would suggest that the judges need to reflect on their policy on battered women syndrome, particularly with the variation we have in Papua New Guinea of deaths arising in the context of polygamous marriages."[21]

There is legislation to restrain aggressive individuals but in general terms and is not directed to the domestic situation, and there is no simple straightforward procedure enabling a woman to quickly seek non-molestation or protection orders for herself and her children. Similarly, there are no provisions in our legislation giving a woman a right to remain in the matrimonial home if she has been the subject of physical or other abuse. This is a particularly difficult situation for women who leave traditional societies to live in the urban area. Similarly there is no legal provision allowing for customary land to be divided on the breakdown of a marriage. Since 97% of all land in Papua New Guinea is subject to customary tenure, this creates great problems for women whose unions come to an end for any reason.

In a report to Parliament the Minister for Justice and State Minister assisting the Prime Minister reported on the agenda of the United Nations Human Rights Commission and a commitment made at the Vienna World Conference in June 1993 by the former Minister of Justice with an undertaking to establish a Human Rights Commission responding to concerns about Papua New Guinea raised by the Commission. That legislation has been drafted and intends to set up a commission so implementing the undertaking to the 51st session of the United Nations Commission on Human Rights in Geneva. Until it is passed and implemented it will not be possible to say if it makes any specific reference to women and their rights and status.[22]

[21] B D Brunton, "Human Rights in Papua New Guinea" in the Conference *Twenty Years of the Constitution* held at Port Moresby, Papua New Guinea in March 1996.

[22] The report is not published. For details, see *Drafting Instructions for the Establishment of a Human Rights Commission for Papua New Guinea.*

LITIGATION RAISING ISSUES RELATING TO WOMEN'S HUMAN RIGHTS IN THE ASIA-PACIFIC REGION: THE SEX DISCRIMINATION ORDINANCE AND DOMESTIC VIOLENCE IN HONG KONG

◆

Judge Wong Hing-Chun
District Court, Hong Kong

Introduction

The provisions of the International Covenant on Economic, Social and Cultural Rights[1] and the International Covenant on Civil and Political Rights[2] are applicable to Hong Kong following the ratification by the United Kingdom of the two covenants in 1976.[3] In June 1994, the Hong Kong Government announced its decision to seek the extension of the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)[4] to Hong Kong and to introduce legislation against sex discrimination. Hong Kong first implemented the two Covenants through existing legislation and policy. Then, in 1991, the Hong Kong Bill of Rights Ordinance was enacted.[5]

The application of the two Covenants to Hong Kong has been preserved by the Basic Law, which will be applicable to Hong Kong after 1 July 1997 when sovereignty over Hong Kong will be resumed by the People's Republic of China.

The extension of the Women's Convention to Hong Kong is now on the agenda of the Sino-British Joint Liaison Group pending the approval of the Chinese Government.[6]

In recent years, local legislation has been undergoing review and amendments in pursuance of the elimination of differential treatment of women and men. These include, for example, amendment of the Inland Revenue Ordinance[7] in 1989 to provide for separate taxation for married women; the Parent and Child Ordinance which was introduced in 1993, and the amendment of the Protection of Women and Juveniles Ordinance in 1993 to the present Protection of Children and Juveniles

1 993 UNTS 3, adopted on 16 December 1966, entered into force 3 January 1976.
2 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.
3 The United Kingdom signed both Covenants on 16 September 1968 and ratified them on 20 May 1976.
4 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981. The United Kingdom signed the Convention on 22 July 1981 and ratified it on 7 April 1986, but it did not extend the Convention to Hong Kong at that time.
5 Hong Kong Bill of Rights Ordinance (Cap 383), reprinted in 1 HKPLR liv-lxviii.
6 The People's Republic of China signed the Convention on 17 July 1980 and ratified it on 4 November 1980. [Eds] The Convention was extended to Hong Kong with effect from 14 October 1996.
7 Inland Revenue Ordinance (Cap 112).

Ordinance.[8] Legislation in the process of amendment include: the Marriage Ordinance,[9] the Matrimonial Causes Ordinance,[10] the Adoption Ordinance,[11] the Affiliation Proceedings Ordinance,[12] and the Separation and Maintenance Orders Ordinance.[13]

More recently, part of the Women's Convention is being introduced locally by the Sex Discrimination Ordinance.[14] The Equal Opportunities Commission is now in the process of being set up. To date, cases under the two new pieces of legislation have yet to come through the judicial process.

Objects of the Sex Discrimination Ordinance

This is an ordinance introduced to render unlawful certain kinds of sex discrimination, discrimination on the ground of marital status or pregnancy, and sexual harassment; to provide for the establishment of a commission with the functions of working towards the elimination of such discrimination and harassment and promoting equality of opportunity between men and women generally; and to provide for matters incidental thereto or connected therewith.

A summary of the Ordinance

Part I sets out the application, interpretation and definitions section. Part II deals with the discrimination against women and men on the ground of sex, and discrimination based on marital status, pregnancy and victimisation. Part III deals with discrimination and sexual harassment in the employment field, which is further divided into the following areas of concern:

- Sections 11-14: discrimination by employers against applicants and employees in the offer and terms of employment, access to opportunities for promotion, training, benefits, facilities and services; and discrimination against contract workers; with the exception where the gender of the person is a genuine occupational qualification.
- Sections 15-20: discrimination by partnerships, trade unions, qualifying bodies, vocational training bodies, employment agencies and commission agents.
- Sections 21-22: deals with discrimination by Government, religious orders etc.

[8] Protection of Children and Juveniles Ordinance (Cap 213).
[9] Marriage Ordinance (Cap 181).
[10] Matrimonial Causes Ordinance (Cap 179).
[11] Adoption Ordinance (Cap 290).
[12] Affiliation Proceedings Ordinance (Cap 183).
[13] Separation and Maintenance Orders Ordinance (Cap 16).
[14] Sex Discrimination Ordinance (Cap 480).

- Section 23: deals with sexual harassment of employees by the principal, or persons in position to offer employment, a fellow worker or fellow contract worker, a partner or fellow partner of a firm, a commission agent or fellow commission agent.
- Section 24: deals with other sexual harassment by member of an organisation of another member or the woman seeking to be a member, member of an authority or woman seeking an authorisation or qualification, training organisations etc.

Part IV deals with discrimination and sexual harassment in other fields such as:

- Sections 25-27: educational establishments, with the exception of single sex education establishments.
- Sections 28-34: deal with persons concerned with the provision of goods, facilities, services and premises such as hotels, banks, schools, restaurants, transport facilities, government departments and public libraries etc., including the occupation of rented premises, with the exception of premises of voluntary bodies, hospitals, religious establishments, and toilets etc.
- Sections 35-39: render it unlawful to discriminate against a woman in her eligibility to vote for and to be elected or appointed to advisory bodies set up under the law, to be offered a pupillage or tenancy or given work in the practice of a barrister, to be admitted as a member of a club, or in the performance of the functions of the government.
- Sections 39-41: deal with sexual harassment of a woman in educational establishments, in premises for occupation etc.

Part V deals with other unlawful acts such as discriminatory practices and advertisements; criminalising actions of instigators and aiders in such unlawful acts and making their principals liable.

Part VI sets out the exceptions such as charities, sport activities, communal accommodations, special training bodies, certain elected bodies or trade unions, including its application to New Territories land under the New Territories Ordinance[15] and the New Territories Leases (Extension) Ordinance.[16]

Part VII establishes the Equal Opportunities Commission, its functions and powers. Part VIII is the enforcement part, which sets out the procedure in bringing a claim under the Ordinance in court, and the assistance the Commission offers to persons suffering from discrimination or sexual harassment in obtaining information, conciliation, advice and legal assistance.

[15] New Territories Ordinance (Cap 97).
[16] New Territories Leases (Extension) Ordinance (Cap 150).

Domestic violence

Domestic violence is an area of particular concern in the context of the Women's Convention. The adoption of the Declaration on the Elimination of Violence against Women (the Violence Declaration) on 20 December 1993 by the United Nations General Assembly is evidence of such concern.[17] The General Assembly recognises in the preamble of the Declaration that:

> "effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination of Violence against Women, set forth in the present resolution, will strengthen and complement that process"[18]

and concerns that:

> "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of their full advancement, and that violence against women is one of the crucial social mechanisms by which Women are forced into a subordinate position compared with men."[19]

and that:

> "violence against women is an obstacle to the achievement of equality, development and peace..."[20]

Role of the judiciary

Article 4 of the Violence Declaration provides:

> "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:
>
> ...
>
> (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

[17] GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.
[18] Violence Declaration, preamble, para 3.
[19] *Id* at para 6.
[20] *Id* at para 4.

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

...

(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, health, and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;

...

(i) Take measures to ensue that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women".

The Victoria Falls Declaration on the Promotion of Human Rights of Women[21] in 1994 confirms the Violence Declaration.[22]

Background

For many years in the past, our community had acted as if domestic violence did not exist. There was a reluctance to do anything about it as it is regarded as interference in private family matters, and if a problem arose, it would have been dealt with as a family law matter. There is now a gradual awareness as to the problems of domestic violence.

Legal solutions come in two forms, namely, criminal law remedies and matrimonial relief.

Prosecutions under criminal law may be brought under legislation such as the Crimes Ordinance,[23] and the Offences Against the Person Ordinance.[24]

[21] See Commonwealth Secretariat, *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994. The Declaration is also reproduced at the beginning of this volume.

[22] Victoria Falls Declaration, paras 13 and 14.

[23] Crimes Ordinance (Cap 200).

[24] Offences Against the Person Ordinance (Cap 212).

Matrimonial relief, such as divorce and ancillary relief, are sought under the Matrimonial Causes Ordinance,[25] the Matrimonial Proceedings and Property Ordinance,[26] the Married Persons Status Ordinance,[27] and the Domestic Violence Ordinance.[28]

Criminal law remedies

This is perhaps the most effective and immediate method to deter further physical violence in the home for most abused women. It is, however, not often pursued further after the initial report to the police. It is also not surprising to find in the courts of Hong Kong, victims are reluctant to give evidence against their abusers who were the husband in a battered wife case or the father in a case involving incest with the female victim.

The victim in a wife abuse case is a competent but not compellable witness in the Hong Kong courts. In a case of incest, where the daughter is both a competent and compellable witness, there have been a number of cases in the last year alone where the victims, who were either a daughter or step-daughter, had turned hostile at the trial. The court in those cases, failing other corroborating or independent evidence, finds itself bound to acquit the offender.

This year, we have seen for the first time, the introduction of the giving of evidence or examination by way of live television links in our courts for vulnerable witnesses. The legislation regulating criminal procedure[29] has been amended to admit evidence on video recorded evidence and from live television-linked rooms in the court building so that young and/or vulnerable victims of cruel or sexual crimes do not have to face the perpetrators in an open court. There is now also a better witness protection programme during the period the victims of violent crimes are giving evidence in court.

In most domestic violence cases, the sentences handed down tended to be non-custodial and less severe than for other violent crimes. Incarceration is usually ordered in the most serious cases of domestic violence. It is certainly a matter of concern to the court that custodial orders often create financial hardship to the victims. There are as yet no compulsory reeducation programmes or counselling available to offenders in cases involving domestic violence. Each prison in Hong Kong has a resident psychologist. These psychologists, however, are not required to provide specially designed rehabilitation programmes, treatment programmes, training or reeducation for offenders of domestic violence. The work on reeducating the offenders is placed on the probation officers for those who are put on probation or the supervising officers for those who have served a custodial term in prison.

[25] Matrimonial Causes Ordinance (Cap 179).
[26] Matrimonial Proceedings and Property Ordinance (Cap 192).
[27] Married Persons Status Ordinance (Cap 182).
[28] Domestic Violence Ordinance (Cap 189).
[29] Criminal Procedure Ordinance (Cap 221).

Remedies under matrimonial law

These are the most common remedies sought by abused women who are either married to or have a long-term cohabitation relationship with the abusers.

These remedies include divorce and separation orders (for those who are married), and injunctions and non-molestation or eviction orders against the abusers.

Up until the 1980s, domestic violence injunctions were obtained under the inherent jurisdiction of the court. The criteria for the granting of restraining orders depended on the facts of each individual case. An application for a restraining order can only be made in cases where the abuser and the abused were legally married to each other and divorce proceedings had commenced or were about to commence. This was changed by the Domestic Violence Ordinance introduced in 1986. That legislation has made it possible for the abused woman to obtain an injunction restraining the husband or the cohabitant from further molestation or to restrain the abuser from entering the matrimonial home or from a particular part of the matrimonial home. Such applications can be made independently of any other legal action. Furthermore, under this Ordinance, the police can arrest the abuser without a warrant in cases where he is found acting in defiance of the order of the court.

In the year 1994, 2,736 divorce petitions were filed in the divorce registry in Hong Kong applying for divorce on the ground of irretrievable breakdown of marriage due to "unreasonable behaviour" (under which domestic violence is classified). The figure for 1995 was 3,048 out of 10,292 divorce petitions. There were 13 applications for orders under the Domestic Violence Ordinance not made in the course of divorce proceedings in 1994, and a total of 16 applications in 1995.

The courts in Hong Kong often find that the abused person would come back for an extension after the initial 3 months granted for the non-molestation injunctions. Such injunctions, however, cannot be extended beyond a total period of 6 months. Furthermore, under the Domestic Violence Ordinance, women who are divorced and/or living apart from their husbands or abusers are not entitled to apply for an injunction or to ask for it to be continued.

Another area of difficulty found in the family court in Hong Kong is the housing problem of the litigants. Private housing is expensive for most people in Hong Kong. Over 50% of the local population live in public housing. In applying for public housing, a family applies as a unit and usually the husband, as head of the household, is the registered tenant. Consequently, the Housing Department of the Hong Kong Government as the landlord finds the ouster injunctions to exclude the wife-battering husbands from the Housing Department unit difficult to enforce. As a result, abused women who are reluctant to return to their husbands have resorted to applying for compassionate rehousing which has become available in recent years after years of complaints from

victims of domestic violence. Those living in privately purchased homes in joint names may find themselves living under the same roof as their husbands long after the parties' divorce, in spite of histories of domestic violence.

There are as yet no available remedies provided in our legislation for children who are witnesses of domestic violence, who may have developed behavioural and emotional adjustment problems due to the impact of growing up in an environment of domestic violence.

Further, Hong Kong courts do not have jurisdiction to compensate victims of domestic violence for the pain they suffered, as is the case in some other jurisdictions in the Commonwealth.

Domestic violence is not just a legal problem, it is a social problem. Education may be the primary medicine. The community's attitude towards the role of women must also change if domestic violence is to be eliminated. Legal solutions such as injunctions, divorce and criminal prosecutions can only provide temporary relief and prohibit physical violence or harassment, applying punishment as a deterrent when victims approach for help, but for those who prefer to suffer in silence, the court can provide no solutions.

WOMEN AND HUMAN RIGHTS IN THE ASIA/PACIFIC REGION: A PERSPECTIVE FROM SOUTH ASIA

◆

Justice Khalida Rachid
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Introduction

The process of protecting the rights of minority groups started some time way back just after the First World War, but no protection of individuals generally on a natural law or other basis was attempted. By the 19th century, most European writers recognised an exception in the case of humanitarian intervention. Events in Europe in the 1930s and in the Second World War focused attention upon this wider question, and the guarantee of human rights became one of the purposes for which the Allied Powers fought. It was therefore no surprise when the realisation and protection of human rights became one of the purposes of the United Nations and when the Charter imposed obligations upon members to this end. The Charter was followed by the Universal Declaration on Human Rights 1948[1] and a still growing number of multilateral treaties concluded through the United Nations on this subject. At a regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,[2] the European Social Charter[3] and the American Convention on Human Rights[4] have been adopted and all are in force. There are also over hundred international labour conventions in force, some dating from before 1945, and the four Geneva Conventions of 1949 dealing with protection in armed conflicts.[5] In addition, the Helsinki Final Act of the Conference on Security and Cooperation in Europe 1975 has important sections on human rights.[6]

1 GA Res 217A(III), adopted on 10 December 1948.

2 213 UNTS 221, adopted on 4 November 1950, entered into force 3 September 1953, new text and protocols 1-11, 15 HRLJ 102.

3 529 UNTS 89, ETS 25, adopted on 18 October 1961, entered into force 26 February 1965.

4 'Pact of San Jose, Costa Rica', 1144 UNTS 123, adopted on 22 November 1969, entered into force 18 July 1978.

5 They are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, Geneva Convention for the Amelioration of the Coniditon of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85, Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287. All of these conventions were adopted on 12 August 1949 and entered into force on 21 October 1950.

6 Final Act of the Conference on Security and Co-operation in Europe, reprinted in (1975) 14 ILM 1292.

Human rights guarantees and the enjoyment by women of human rights

The International Bill of Human Rights lays down a comprehensive set of rights to which all persons, including women, are entitled. Though equality is the cornerstone of every democratic society which aspires to social justice and human rights, the women are subject to inequalities in law and practice. Discrimination against women is widespread. Such discrimination is protected by the survival of stereotypes and of traditional culture and religious practices and beliefs detrimental to women. There exist alarming gaps between men and women on the economic and social side. Women are the majority of the world's poor and the number of women living in rural poverty has increased by 50 per cent since 1975. Women are the majority of the world's illiterate and the number rose from 543 million to 597 million between 1970 and 1985. Women in Asia and Africa work 13 hours a week more than men and are mostly unpaid. Worldwide, women earn 30 to 40 percent less than men for doing equal work. Women hold between 10 and 20 percent of managerial and administrative jobs worldwide and less than 20 percent of jobs in manufacturing. Women make up less than 3 percent of the world's head of State. Women's unpaid housework and family labour, if counted as productive output in national account, would increase measures of global output by 25 to 30 percent.[7]

The International Bill of Human Rights lays down a comprehensive set of rights to which all persons, including women are entitled. Despite equal rights given by the charters, traditionally women have been subdued and given inferior status in almost all cultures and almost all part of the world. In some societies, she has been described as main cause of spreading evils. Though woman is respected as mother in some of the cultures but her sexuality has posed a great threat to all religious cultures. A woman's sexuality is threatening to her parents and other family members, including her brothers, because men in the family often find their honour bound up with her sexual behaviour. The entire family are relieved when she is married, irrespective of the suitability of the match, as then she becomes the responsibility of the husband. She is considered to be a follower of her husband rather than to be a partner. In the past almost all cultures had very strange definitions to describe women, for example one Russian proverb stated that ten women have one soul. In some cultures she is compared with horse, they would say that horse needs a spur and woman needs a stroke to be under control. In Spain they recommend that one [ie men] escape from a bad woman but not trust a good one.

[7] United Nations, *The World's Women 1970-1990: Trends and Statics* (New York, United Nations, 1991).

Living in such an hostile environment, naturally women had to do something, so they turned towards feminism. Today word "feminism" covers a much bigger spectrum than when it was first used in the 17th century. In South Asia (Bangladesh, India, Nepal, Pakistan and Sri Lanka) feminism is defined as "an awareness of women's oppression and exploitation in society, at work and within the family, and conscious action by women and men to change this situation" in a recent South Asian Workshop.

Feminist struggle is two-fold; the earlier struggle was for the democratic rights of women. It included the right to education and employment, the right to own property, the right to vote, the right to enter parliament, the right to birth control, and the right to divorce. These struggles were outside the home and the family, and were struggles to bring about legal and political reforms. After achieving some success in legal reform, the efforts turned towards ending discrimination, towards the emancipation of women. More recent struggles have been against women's subordination to men within the home, against their exploitation in the family, against their continuing low status at work in society and in the culture and backward traditions in society, against their burden of production and reproduction. In the essence today's South Asian women is struggling for the achievement of women's equality, dignity, and freedom of choice to control the lives and bodies within and outside the home.

An overview of the Convention on the Elimination of All Forms of Discrimination against Women

Equality of rights for women is a basic principle of the United Nations. The Preamble to the Charter of the United Nations sets as a basic goal "to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal right of men and women."[9]

Discrimination against women was so extensive that additional means for protecting the human rights of women were seen necessary. On 18 December 1979 the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force on 3 September 1981 after the twentieth country had ratified it. Now, over 150 countries are parties to the Convention, thereby agreeing to be bound by its provisions.

Before going into the issues relating to women's human rights in the Asian/Pacific Region, let us have a look at the provisions of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention is in four parts and comprises thirty articles, some of which are reproduced below:

[8] Preamble, para 2.

Article 1: Defining discrimination
Article 1 provides a comprehensive definition of discrimination which is then applicable to all provisions of the Convention. It also gives a detailed explanation of the specific meaning of discrimination against women.

Article 2: Obligations of States parties
This article establishes, in a general way, the obligations of a State party under the Convention and the policy to be followed in eliminating discrimination against women.

Article 3: Appropriate measures
Article 3 defines the appropriate measures in all fields which should be taken to implement the policies set out in article 2.

Article 4: Temporary special measures to combat discrimination
States are allowed to use special remedies to accelerate women's actual equality in society and workplace to ensure that *de jure* equality also brings about *de facto* equality.

Article 5: Modifying social and cultural Patterns
This article recognizes that States should strive to remove the social, cultural, and traditional patterns which perpetuate gender-role stereotypes and to create an overall framework in society that promotes the full realization of women's full right,

Article 6: Suppressing exploitation of women
This article urges States to take all appropriate measures to combat traffic in women and exploitative prostitution.

Article 7: Equality in political and public life at the national level
The article urges States to recognise the women's right to vote anonymously and they are to be provided with the opportunity to be elected to public offices and hold positions in non-governmental organisations.

Article 8: Equality in political and public life at the international level
By this article it is made essential that women are adequately represented in international fore as members of government delegations and as employees of international organisations.

Article 9: Equality in national laws
The laws of nationality/citizenship must be changed to provide same rights as men to acquire, change, or retain their nationality and also to extend to women the same rights as men regarding the nationality of their children.

Article 10: Equality in education
There should be equal opportunities for women to get education in all walks of life.

Article 11: Equality in employment and work
Article 11 builds upon and consolidates many of the rights claimed for women by the International Labour Organisation.

Article 12: Equality in access to health facilities
State parties undertake to ensure the equality of women and men in access to health care services. This requires the removal of any legal and social barriers which may operate to prevent or discourage women from making full use of available health care services.

Article 13: Finance and social security
Women's financial independence is guaranteed in this article without which they will not have equality with men.

Article 14: Rural women
Article 14 requires States parties to eliminate discrimination against women in rural areas, to implement their right to adequate living conditions, and to take special measures to ensure them, on a basis of equality with men, the same participation in and benefits of rural development.

Article 15: Equality in legal and civil matters
Women should be afforded equality with men before the law, especially in areas of civil law where they are mostly subject to discrimination.

Article 16: Equality in family law
Article 16 addresses the problem which women face in family law, concerning arranged marriages, child marriages etc.

Women and human rights in South Asia

South Asian countries share a very rich ethnic and religious mix. Almost all religious beliefs exist in South Asia, there are Hindus, believers in Jainism, Buddhism, Judaism, Christianity and Islam.

A major problem in South Asia is the religious influence on the society, especially on the lives of rural women. Set out in the following paragraphs are a selection from different religions of views that have been expressed about women.

Hinduism describes the women by saying:

> "falsehood, vain, boldness, graphicness, stupidity, impatience, over greediness, impurity, and hardens are the natural qualities of women."[9]

> "The slave, the son, and the wife, (these three) are always dependent. they have no wealth, for whatever they posses belong to their master."[10]

Early Buddhist influence on the position of women was historically progressive. The Buddhists and their contemporaries, the Jains were the first Indian mendicant orders to admit women, and this greatly expended women's social options. Women in 500 BC India had no property rights, no control over their household affairs or choice of husband, and from 500 AD until the 1900s widows were sacrificed on their husband's funeral pyres. The Brahmanic caste system was strongly patriarchal.[11]

Early Judaism and Christianity contain some what contradictory image of women, though in the absence of any available data on uniform image of women, one can safely conclude that women did not enjoy equality with man and was in general relegated to an inferior position.

Women in various Muslim countries are being treated differently. In some countries, such as Turkey, Egypt, Tunis, Libya, Algeria and Morocco, they enjoy equal rights and have the freedom to go out of their homes and adopt any profession they like. However, in most of the Muslim countries the practice is different, women in these countries are mostly confined to their homes and are not allowed to go out except in exceptional cases and then they have to cover themselves in a veil. Restrictions on women are more severe in rural villages.

The Holy Quran is the major source of Islamic Law. It recognises the position of women to be the same as that of man. In Surah Al-Imran, it has been made clear that good deeds bring the same reward to both the male and the female. In the words of the Holy Quran:

> "I will not suffer the work of worker among you to be lost, whether male or female, the one of you being from the other."[12]

The Holy Quran, on more than one occasion, makes it clear that both men and women equally posses all the good qualities of life, following verse removes any kind of misunderstanding or misgiving.

[9] devil Bhagvata. 1.5.83, Vijayananda; p 17 (Kwmari, p 5).
[10] Mahabharata, Sabha Prava 2.71.2; Dute, II, 94.
[11] "Early Buddhist Feminism" in *Women and Buddhism* (1986), at 59.
[12] Al-Quran, Surrah Al-Imran-194.

> "Surely the men who submit and the women who submit and the believing men and the believing women and the obeying men and the obeying women and the truthful men and the truthful women and the patient men and the patient women, and the humble men and the humble women, and the charitable men and the charitable women and the fasting men and the fasting women and the men who guard their chastity and the women who guard and the men who remember. Allah has prepared for them forgiveness and a mighty reward."[13]
>
> And "women have rights similar to their obligations in a just manner".[14]

Islam granted equal rights to women which were enjoyed in the early period of Islamic history. But unfortunately these rights has been denied to the Muslim women of later ages and there is a great need for legislation to restore these rights to them. All the rights given to a woman by Islam should be restored in the field of marriage, child marriages should be brought into line with Islamic law, contradictions between laws and customs should be brought into line with justice, the meaning of dowry should be reinterpreted, and the dowry and bridal gift act should be Islamicised, the right of women to divorce should be fully implemented, and the Islamic law on polygamy should be reinterpreted.

Conclusion

Women are being discriminated against all over the world irrespective of region. In the Asia and Pacific the problems are similar to those in any other part of the world. The only difference is that these regions are more backward because of lack of education; the situation will change with the increase of education. In order to achieve these there is a real need to ensure that the provisions of the Women's Convention are implemented.

The following are some of the issues which need attention:

- women's rights as human rights
- the right to inherit
- reviewing laws on illegal abortion
- the role of the family
- legislation against rape and prosecution of rape as a war crime.

[13] Al-Quran, Surah Al-Ahzab-35.
[14] Al-Quran, Surah Al-baqrah-228.

THE PROTECTION OF THE RIGHTS OF REFUGEE WOMEN

◆

Ms Ranjit Jayanti, Focal Point for Women,
Office of the United Nations High Commissioner for Refugees,
Hong Kong

Introduction

We wish to thank the organisers of this Colloquium for inviting the Office of United Nations High Commissioner for Refugees (UNHCR) to participate in it. The Office of the United Nations High Commissioner for Refugees is mandated to provide international protection and assistance for refugees and to seek permanent solutions to their problems. The promotion and dissemination of refugee law and protection principles and provision of humanitarian assistance to people of concern to UNHCR are integral parts of this responsibility. This forum provides us the opportunity to share with those members of the judiciary and public present here our concerns on human rights and protection of refugee women. As many of you may know, there are over 27 million refugees and internally displaced persons of concern to UNHCR and more than half of these numbers are women and children. The majority suffer in silence.

Refugee women constitute a special group. Persecution of refugee women takes many forms. They are invariably in vulnerable circumstances, having lost their traditional family and community support, and possessions upon fleeing from their homes in areas of conflict. The causes of their persecution include not only the traditionally recognised causes relating to race, nationality, religion or political opinions but also their gender. Gender-based persecution includes sexual harassment, exploitation and sexual favours by camp authorities and by camp inmates. Refugee women are subject to domestic violence, physical mutilation, rape, torture and persecution for transgression of mores.

Background

By way of background, apart from the 1951 Convention relating to the Status of Refugees (the 1951 Convention)[1] and the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol),[2] I reiterate some of the basic principles and resolutions expressed in recent years in the various international fora and by UNHCR in particular, relevant to rights of refugee women.

[1] 189 UNTS 137, adopted on 28 July 1951, entered into force 22 April 1954.
[2] 606 UNTS 267. GA Res 21/2198 (1966), entered into force 4 October 1967.

We have all agreed that human rights are women's rights. As Jane Connors pointed out,[3] several Governments that were participants in the Vienna Conference in 1993 declared that "the human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights."[4] This was endorsed again at the Fourth World Conference on Women in Beijing last year.

Refugee women have been categorised as a particular social group for purposes of refugee status determination. As far back as 1984, the European Parliament determined that women fearing cruel or inhuman treatment as a result of seeming to have transgressed social mores should be considered a "social group" within the meaning of the Refugee Convention.[5] In 1985 the Executive Committee of the High Commissioner's Programme (EXCOM) specifically acknowledged that, in appropriate circumstances, women may be considered a "particular social group" within the scope of the refugee definition and adopted the following resolution:

> "... States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of article 1A(2) of the 1951 United Nations Refugee Convention."[6]

As has been mentioned earlier by other distinguished participants here, in 1993 the General Assembly of the United Nations in New York adopted, by consensus, the Declaration on the Elimination of Violence against Women.[7] It explicitly targets "violence in public or private life", and calls on States to take measures to eradicate violence against women. In 1994, the Commission on Human Rights appointed a Special Rapporteur on Violence against Women.[8] Most recently, the General Conclusion on International Protection adopted in October last year by the Executive Committee of the High Commissioner's programme:

> "Call[s] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States' initiatives to develop

[3] Jane Connors, "General Human Rights Instruments and their Relevance to Women", in this volume, *supra*, p 27.

[4] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24, para 18 (1993).

[5] Resolution on the application of the 1951 United Nations Refugee Convention adopted by the European Parliament on 13 April 1984.

[6] Conclusion No 39 (1985), *Refugee Women and International Protection*, para (k).

[7] GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHRR 329.

[8] The mandate of the Special Rapporteur on Violence against Women, Its Causes and Consequences was established by Resolution 1994/45 of the United Nations Commission on Human Rights, CHR Res 1994/45 (4 March 1994).

> such criteria and guidelines, and by monitoring to ensure their fair and consistent application. In accordance with the principle that women's rights are human rights, these guidelines should recognise as refugees those women whose claim to refugee status is based upon well-founded fear and persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, *including persecution through sexual violence or other gender-related persecution.*"[9]

The first countries to have applied this new criteria in refugee status determination have been Canada and the United States. In March 1993, the Canadian Immigration and Refugee Board drew up guidelines on women refugee claimants fearing gender related persecution.[10] In 1995, the US Immigration and Naturalization Service issued guidelines for asylum officers adjudicating asylum claims of women.[11]

These are both wide-ranging and precise because they have codified a uniform and coherent approach to a difficult and complex subject.

When cases related to refugees come before the judiciary, judges can make a difference. The case of Fauziya Kasinga, who fled forced polygamous marriage and genibal multilation facing her in Togo is a stark example.[12]

UNHCR's action to promote rights of refugee women

Refugee women need special legal and physical protection. UNHCR has addressed these needs in a variety of ways, both within the refugee camps and amongst the relevant authorities of asylum-granting countries. UNHCR aims to ensure that judicial bodies, for instance, are better able to address gender issues by providing appropriate training to prosecutors, judges and other officials in handling cases involving rape, forced pregnancy in situations of armed conflict, indecent assault and other forms of violence against refugee women.

In February 1996 a Symposium on Gender-based Persecution was organised by UNHCR, bringing together policy-makers and adjudicators from 16 governments: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and USA.

The Symposium focused on developing criteria for guidelines based on the nature of persecution and procedural methodology. For instance, to take the issue of procedural methodology — amongst many cultures,

[9] Conclusion No 77 (1995), *General Conclusion on International Protection*, para (g), with emphasis added.

[10] *Guidelines Issued by the Chairperson Pursuant to Section 65(B) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Immigration and Refugee Board, 1993).

[11] Phyllis Coven, *Considerations for Asylum Officers Adjudicating Claims From Women* (United States Department of Justice, 1995).

[12] See "When Judges Fail", *Washington Post*, 19 January 1996.

refugee women may only be interviewed by female officers. They also may need the privacy to conduct their interview without the presence of male relatives.

It is hoped that this group of governments may form the critical mass to activate the special consideration of cases relating to women in refugee-like situations and seeking refugee status.

The following recommendations were proposed at the symposium:

- exchange of personnel in training programmes
- sharing of training on interview techniques
- development of training videos
- ensure training is funded
- recommend that gender analysis be part of legal training
- further consultations during EXCOM/standing committee meetings networking through e-mail
- UNHCR's assistance in developing guidelines with interested countries

UNHCR has also plans to promote refugee-related legal literacy among concerned officials and members of the judiciary.

In 1991 UNHCR prepared *Guidelines on the Protection of Refugee Women.*[13] In 1995, *Sexual Violence Against Refugees — Guidelines on Prevention and Response*[14] followed. These guidelines have served as a useful tool to everyone dealing with refugee women from our implementing partners, non-governmental organisations, to governments and inter-governmental organisations. "A framework for people-oriented planning taking account of women, men and children" has also been disseminated by UNHCR.[15] A training module on human rights and refugee protection is available and covers, inter alia "women in international refugee law and international human rights law and women in regional human rights instruments."[16]

In order for refugee women to fully benefit from their rights, the Division of International Protection is developing a module on rights awareness training for refugee women. The rights most frequently violated include the following:

- the right to life, liberty and security of person
- the right to freedom of movement

[13] *Guidelines on the Protection of Refugee Women* (Geneva, UNHCR, 1991).

[14] *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (Geneva, UNHCR, 1995).

[15] Mary B Anderson, Ann M Howarth and Catherine Overholt, *A Framework for People-Oriented Planning in Refugee Situations Taking Account of Women, Men and Children: A Practical Planning Tool for Refugee Workers* (Geneva, UNHCR, 1992).

[16] Training Module RLD 5, *Human Rights and Refugee Protection, Part I: General Introducation* (Geneva, UNHCR, 1995) and *Human Rights and Refugee Protection, Part II: Specific Issues* (Geneva, UNHCR, 1996).

- the right to work
- the right to education
- the right to return to her country.

We hope that all of you judges and those present here will assist UNHCR in protecting and promoting these rights of refugees through your judgments, advocacy and interaction with others.

CLOSING ADDRESS

◆

Mr Daniel R Fung, QC, JP,
Solicitor General of Hong Kong

Justice Cartwright, Chief Justice Bhagwati, distinguished judges, Ms. Stamiris, Ms. Chin, honoured guests, ladies and gentlemen:

I am honoured and privileged to be invited to give the closing address at this important colloquium and to such a distinguished galaxy of stars plucked from around the Commonwealth's judicial firmament. The holding of this colloquium and the others before it is living testimony to the crucial role played by the Commonwealth Secretariat in the promotion and internationalisation of human rights norms the world over.

I think it might be useful to take a few minutes before we say goodbye to each other to place this colloquium in its true historical perspective by relating it to those that have preceded it and to identify certain recurring themes which, I feel confident, will continue to resonate both within and without the Commonwealth in the coming new century which is just peeping over our horizon.

The historical genesis was the First Commonwealth Judicial Colloquium focusing on the Domestic Application of International Human Rights Norms held in Bangalore, India, in February 1988. Out of that meeting emerged the *Bangalore Principles* which provided, among other things, that:

> "It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."[1]

But the *Principles* also recognised that:

> "It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the

[1] *The Bangalore Principles* (1988), para 7, in *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992) at 1 [hereinafter *Judicial Colloquia Conclusions*].

[2] *Bangalore Principles*, *id* at 3, para 8.

> remarkable and comprehensive developments of statements of international human rights norms."[2]

The Second Commonwealth Judicial Colloquium was held in Harare, Zimbabwe in April 1989. It produced the *Harare Declaration of Human Rights* which contained the reminder that:

> "... fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts."[3]

The Third Commonwealth Judicial Colloquium meeting took place in Banjul, The Gambia in November 1990. The resulting *Banjul Affirmation* reaffirmed the *Bangalore Principles* and the *Harare Declaration* and, among other things,

> "... called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws".[4]

The Fourth Commonwealth Judicial Colloquium was held at Abuja, Nigeria in December 1991. At the end of the meeting, the judges adopted the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*. By this, they reaffirmed the principles stated in Bangalore, in particular, the role of the courts in giving effect to international human rights norms, wherever possible.[5]

The Fifth Commonwealth Judicial Colloquium took place at Balliol College, Oxford in England in September 1992. The resulting *Balliol Statement* noted that:

> "The international human rights instruments and their developing jurisprudence enshrine values and principles long recognised by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth.... They reflect international law and principles and are of particular importance as aids to

[3] *Harare Declaration of Human Rights*, para 10(c), in *Judicial Colloquia Conclusion, supra* note 1, at 7.
[4] *The Banjul Affirmation*, para 9, in *Judicial Colloquia Conclusion, supra* note 1, at 12.
[5] For details, see the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*, para 14, in *Judicial Colloquia Conclusion, supra* note 1, at 19.

> interpretation and in helping courts to make choices between competing interests."[6]

The Sixth Commonwealth Judicial Colloquium was held in Bloemfontein, South Africa, in September 1993 and the resulting *Bloemfontein Statement*, among other things:

> "... affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law."[7]

The Seventh Commonwealth Judicial Colloquium and the first to be wholly concerned with the human rights of women was held at Victoria Falls, Zimbabwe in August 1994. The *Victoria Falls Declaration* reaffirmed the principles stated at the previous meetings, which

> "reflect the universality of human rights — inherent in men and women — and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ."[8]

The *Declaration* went on to refer to the

> "... need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women."[9]

In this respect, the *Declaration* made particular reference to the United Nations Convention on the Elimination of All Forms of Discrimination against Women.[10] Judges should, said the Declaration, be guided by the Convention

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6 *The Balliol Statement* (1992), in *Judicial Colloquia Conclusion, supra* note 1, at 27, para 5.

7 *The Bloemfontein Statement*, in *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norm* (London, Commonwealth Secretariat, 1995) at viii, para 8.

8 Commonwealth Secretariat, *Victoria Falls Declaration on the Promotion of the Human Rights of Women* (Victoria Falls Declaration), in *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994, at 8, para 1 .

9 *Id* at 10, para 15.

10 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

> "... when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions".[11]

These themes were repeated in the Second Colloquium devoted to the Human Rights of Women, held in Beijing in September 1995 as part of the Fourth World Conference on Women.

The present Colloquium has maintained the high standards set by its distinguished predecessors. A number of the themes of previous meetings have reemerged. One of them is that, wherever possible, judges in national courts should have regard to international human rights norms, including those relevant to women's human rights. The holding of meetings such as this one are an effective way of acquainting judges, not least those of the host country or territory, with these international norms.

But it is not only judges who should become acquainted with international human rights norms. Lawyers in the private sector should also do so in order that they may bring these norms to the attention of judges where relevant in litigation with which they are involved. So far as concern lawyers in the public sector, I can tell you that the drawing on of international human rights norms and jurisprudence in the course of giving advice to government departments is a daily occurrence on the part of officers of the Human Rights Unit in the Attorney General's Chambers in Hong Kong.

This is particularly so when advising on the compatibility of pre-existing legislation with the Hong Kong Bill of Rights Ordinance enacted in 1991.[12] This Ordinance is unique not just in the Hong Kong context insofar as it provides us for the first time with a statutory bill of rights complementing and, in certain circumstances, superseding the common law. The Ordinance is also unique the world over in that it incorporates verbatim into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR)[13] as applied to Hong Kong, including of course article 26 which guarantees equality before the law and prohibits discrimination on the basis of, among other factors, sex.

Of the 130 signatories to the ICCPR, only Hong Kong has in that sense fully domesticated the provisions of the Covenant. And because we have done so in a common law context, the Ordinance becomes a source of living law as our courts extrapolate from and interpolate into the statute, drawing on home-grown experience as well as precedents within and without the common law world including decisions of the House of

[11] *Victoria Falls Declaration*, *supra* note 8, at 10, para 11.
[12] Hong Kong Bill of Rights Ordinance (Cap 383), reprinted in 1 HKPLR pp liv-lxviii.
[13] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

Lords in England, the Privy Council, the High Court of Australia, the New Zealand Court of Appeal, the Supreme Court of Canada, the United States Supreme Court, the European Court of Human Rights in Strasbourg and the United Nations Human Rights Committee, to give but a few examples drawn from the more prominent sources of our inspiration. The growing corpus of jurisprudence we have built up over the past five years results from a unique synthesis of local and international judicial creativity and has aroused interest, so we are told, the world over.

The Covenant is also important in relation to legislation enacted after the commencement of the Bill of Rights Ordinance, since under Hong Kong's present constitution, the Letters Patent, no law can be made which restricts rights in a manner inconsistent with the Covenant as applied to Hong Kong. A similar provision in Hong Kong's future constitution, the Basic Law, specifically article 39 thereof, will restrict the enactment of laws that are inconsistent with the Covenant after 30 June 1997.[14] So the Covenant, and the human rights principles that it espouses, are and will remain an important component of Hong Kong's legal and constitutional fabric.

Although I have not been present throughout your deliberations, I know that you have been treated to a collection of excellent presentations. I do not intend to refer to them all but there are some that caught my attention. Justice Silvia Cartwright's paper entitled "The Relevance of International Standards to Domestic Litigation: the Case of New Zealand" is one of them. In it, she noted that while judges and the courts have an important role to play in the protection of women's rights, in reality the opportunity does not arise all that frequently. It is in the making of policy, or in the work of tribunals and government agencies such as the police and the social welfare department that women's human rights will be implemented or frustrated, as the case may be. Few women would think first of going to the courts as a means of changing the structural factors which are the real barriers to achieving equality with men. That said, however, Justice Cartwright made an eloquent plea for judges to examine their own beliefs and prejudices and to lead the way in the attempt to eliminate bias in the court system towards women.

In a paper delivered this morning entitled "Personal/Common Law Conflicts and Women's Rights in the South Pacific: the Solomon Islands Experience", Sir John Muria dealt with the problem of reconciling traditional customary law as it relates to women with introduced legal

[14] Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, reprinted in (1990) 29 ILM 1511. Article 39 states:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

norms, particularly those of the common law. This problem was also touched on by Chief Justice Lussick of Kiribati and Justice Doherty of Papua New Guinea in their papers delivered in the session on "Litigation Raising Issues Relating to Women's Human Rights in the Asia/Pacific Region". I understand that this morning's session included a stimulating discussion on the interface between international human rights norms and customary law and practices which forms, of course, the cutting edge of development in this field.

One thing which struck me from these and other papers delivered here is how little litigation there has been involving the interpretation or application of human rights norms pertaining to women, except in the context of anti-discrimination legislation. This has been true of the Hong Kong experience as well. Another important point was made by Justice Cartwright, namely, that conferring jurisdiction to determine human rights disputes on tribunals that operate in a semi-private manner outside the central court system results in a lack of judicial examination by the higher courts of such disputes and a low level of impact on policy makers and the public generally. Fortunately, I can predict with some confidence that this problem will not arise in Hong Kong, since the recently enacted Sex Discrimination Ordinance provides that claims of discrimination may be made the subject of civil proceedings in the District Court, in like manner as any other claim in tort.[15]

In conclusion, let me say that Hong Kong has been honoured to host this important Colloquium. The timing has been auspicious as well as historic. Auspicious since the Equal Opportunities Commission, established under the Sex Discrimination Ordinance, commenced work this past Monday, 20 May 1996. The publicity given to both events will give a much needed boost to the cause of protecting and promoting women's rights, both in Hong Kong and the region. Historic, since this will be the last time that Hong Kong will host a Commonwealth judicial colloquium, but hopefully, not the last time that we will host a common law colloquium. Whilst we are poised to depart from the Commonwealth at the stroke of midnight on 30 June 1997, our common law links are guaranteed for at least another fifty years thereafter by international treaty registered with the United Nations, the Sino-British Joint Declaration,[16] and by our future mini-constitution, the Basic Law, specifically article 8 thereof.[17]

Ladies and gentlemen, thank you once again for coming to Hong Kong and giving so generously of your time and wisdom to this Colloquium, which I now officially declare closed.

[15] Sex Discrimination Ordinance (Cap 480).

[16] For details, see *China and United Kingdom of Great Britain and Northern Ireland: Joint Declaration on the Question of Hong Kong (with annexes)*, 1399 UNTS 36, reprinted in (1984) 23 ILM 1366.

[17] Article 8 states

> "The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

ANNEXES

◆

Guide to Human Rights Sources

Many of the documents referred to in the chapters in this compilation are available in both hard copy and electronic format (including on the Internet). The following list of sources and resources is intended to provide an indication of some of the principal sources of information, and does not purport to be exhaustive.

General guides to source material

Frank Newman and David Weissbrodt, *Selected International Human Rights Instruments and Bibliography for Research on International Human Rights Law* (Cincinnati, Anderson Publishing Co, 2nd ed 1996) (supplement to Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy and Process*, 2nd ed 1996): contains a detailed listing of human rights materials, including a good guide to on-line sources.

Rebecca Cook and Valerie Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429-1471. This bibliography is updated and made available on-line through the Internet by the Bora Laskin Law Library at the University of Toronto. The URL is http://www.law.utoronto.ca/pubs/h_rghts.htm.

United Nations, Centre for Human Rights, *Human Rights on CD-ROM: Bibliographical database for United Nations documents and publications 1980-1994* (Geneva, United Nations, 1995)

Women, Law & Development International and Human Rights Watch/Women's Rights Project, *Women's Human Rights Step by Step: A Practical Guide to Using International Human Rights Law and Mechanisms to Defend Women's Human Rights* (Washington, DC, Women, Law & Development International, 1997): contains a list of useful resources relating to women's human rights. For details, see http://www.wld.org or contact WLDI on email wld@wld.org or fax (202) 463 7480

Collections of human rights instruments and documents

United Nations, *Human Rights: A Compilation of International Instruments* (New York, United Nations 1993), 2 vols: contains human rights instruments (treaties as well as other instruments) adopted by United Nations bodies.

United Nations, *The United Nations and Human Rights 1945-1995*, The United Nations Blue Books Series, vol VII (New York, United Nations, 1995): contains many important United Nations documents, including the major treaties and the Vienna Declaration and Programme for Action.

United Nations, *The United Nations and the Advancement of Women 1945-1996*, The United Nations Blue Books Series, vol VI (New York, United Nations, rev ed 1996): contains many important United Nations documents, the revised edition of 1996 also contains the Beijing Declaration and Platform for Action.

Council of Europe, *Human Rights in International Law* (Brussels, Council of Europe Press, 1995): contains human rights treaties adopted by the United Nations bodies and regional organisations, including the Council of Europe, the Organization of American States, the Organization of African Unity and the Organization for Security and Co-operation in Europe.

Organization of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 1996)* (Washington, DC, General Secretariat, Organization of American States, 1996): contains human rights treaties adopted by the Organization of American States, with information about signatures and ratifications.

Electronic/on-line resources

United Nations High Commissioner for Refugees, Refworld (Geneva, UNHCR)
This is a CD-ROM issued every 6 months to subscribers. In addition to material related to refugees, it contains a wealth of general human rights material, including the general comments and recommendations of the treaty bodies, recent documents of the Commission on Human Rights (including the reports of thematic rapporteurs such as the Special Rapporteur on Vioelence against Women) and Sub-Commission on Prevention of Discrimination and Protection of Minorities. Part of this material, as well as other material is also available at the United Nations High Commissioner for Refugees website — http://www.unhcr.ch/

United Nations High Commissioner for Human Rights website
http://www.unhchr.ch/ or http://193.135.156.15

University of Minnesota Human Rights Library
This contains a wealth of United Nations and regional human rights material. In addition to the texts of the major international and regional treaties, it contains the general comments and general recommendations

of the treaty bodies, and the decisions and views of the Human Rights Committee under the first Optional Protocol since the forty-third session — http://www.umn.edu/humanrts/

United Nations Division for the Advancement of Women website
This contains material relating to the work of the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women — http://www.un.org/DPCSD/daw/

Council of Europe website
This contains general information of the Council of Europe — http://www.coe.fr/

For information on the European Court of Human Rights in particular, including its judgments — http://www.dhcour.coe.fr/

Organization of American States website
This contains general information on the Organization of American States — http://www.oas.org/

For the decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, refer to the University of Minnesota Human Rights Library (above).

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* Justice Rachid was unable to attend the Colloquium, but submitted a paper which appears in this volume.

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Supreme Court
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