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From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights (2012)

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Chapter 1

Setting the Stage:
Transforming Women’s Lives

The head-to-toe robe that women in Afghanistan are compelled to wear by the Taliban regime is to many the most overtly sinister symbol of the absolute subjugation of that country’s women. It restricts air supply, shuts out the light, inhibits movement, and snuffs out individuality.¹

The current reality of many South African Muslim women is merely a dream for many of their international counterparts .... They have the right to vote ... an official identity—they own passports .... Their voices can and are being heard ....²

South Africa and Afghanistan in Contrast

Contrasting fortunes between women in Afghanistan and women in South Africa have intrigued me for almost a decade. As the two quotations above suggest, the two countries, and the women in them, seemingly have little in common. It is, however, the transition in South Africa, from the release of Nelson Mandela in 1990, to the first democratic elections in 1994, and the transition in Afghanistan, from the NATO invasion in 2002, to the Bonn Agreement later that year, that provides for a review and analysis of the trajectory of gender equality.

Afghanistan, a nation of almost 30 million people, is beset by civil war and foreign occupation. South Africa, with a population of 49 million, is at peace, independent, and for over a decade and a half has made great strides under its new constitution in healing the wounds of war and establishing the rule of law. Moreover, Afghanistan economically is a very poor country, one of the poorest in Asia, with estimated budgetary expenditures in 2010 of approximately $3.3 billion, whereas South Africa is a relatively rich nation, one of the richest in Africa, with estimated budgetary expenditure in 2010 of $126.2 billion.

An estimated 28.1% of the population of Afghanistan is literate (male 43.1% and female 12.6%) but in South Africa approximately 86.0% of the population is literate (male 87.0% and female 85.7%). Differences in religion also seem

extreme. In Afghanistan, 99% of the population is Muslim (Sunni Muslim 80%, Shia Muslim 19%), and ethnically the population is 42% Pashtun, 27% Tajik, 9% Hazara, 9% Uzbek, 4% Aimak, 3% Turkmen, 2% Baloch, and the remainder 4%. In South Africa, the ethnic population is 79.0% Black, 9.6% White, 8.9% Colored, and 2.5% Indian/Asian. Christianity is the dominant religion at 78.0%, with Islam and Hinduism at 1.5% and 1.2% respectively, Judaism at .02%, and 15% of the country claiming to have no religion.

Lastly, South Africa is much more urbanized than Afghanistan, with 62% of its population residing in urban areas, while Afghanistan only has 23% of its population living in urban areas. These differences, though significant, do not tell the whole story. For example, many of the people in both countries are poor. In Afghanistan, the CIA World Factbook lists 36% of the population as below the poverty line, while the corresponding figure for South Africa is 50%. Both, of course, are too high and as these statistics show, large segments of the populations of both countries live in poverty. This fact of poverty is not insignificant with respect to the subject matter of this book, namely women’s rights and gender equality. Poverty profoundly impacts the range of options available to women, and severely constrains the ability of poor women to avail themselves comprehensively of a range of legal, social, economic, and political benefits available to women who are affluent or even relatively well-off financially.

Both developing nations are in transition. South Africa is in transition under the impulse for reform generated by the first democratically elected government since 1994 and its constitution. Afghanistan is in transition resulting from pressures for reform generated from the country being under occupation by Western armies, by the need to secure peace internally amongst warring groups and tribes, and by being under a form of superintendence by the United States.

In South Africa, issues of women rights and gender equality came to the fore during the struggle to end the apartheid regime, in drafting a new constitution and creating a representative government, and in efforts to ensure that the

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3 Both Shia and Sunni Muslims share the fundamental beliefs and basic tenets of Islam, but political differences in the two sects have evolved over time. These differences include those of religious leadership and interpretation of religious texts and practices. Sunni Muslims make up the majority of Muslims globally, but significant minorities may be found in Iran and Iraq. For an explanation see: http://www.bbc.co.uk/religion/religions/islam/subdivisions/sunnishia_1.shtml. See also Dr. Paul Sullivan, Who Are the Shia?, HISTORY NEWS NETWORK, April 12, 2004 at: http://hnn.us/articles/1455.html.


5 See SOUTHAFRICA.INFO at: http://www.southafrica.info/about/people/population.htm#religions.

6 See THE CIA WORLD FACTBOOK, supra Note 4.

7 Ibid.
promises of the new constitution are kept. In Afghanistan, issues of women’s rights first received world attention because of the brutal actions of the prior Taliban government in depriving women of their rights and in taking steps, such as denying them education, that would ensure they would be permanently locked into an inferior status in society, with few or no rights of equality.

Women’s rights are in the spotlight in Afghanistan today. In part, this is because Western military intervention in Afghanistan has to some extent created a barrier to the restoration of Taliban excesses against women. In part, it is because United Nations involvement and those of many human rights organizations and other non-governmental organizations are positively motivated to bring Afghanistan into compliance with international norms that further human rights generally and women’s rights in particular. And, in part, because consciousness of the wide divide between Afghanistan’s recognition and protection of women’s rights and that of major developed and developing nations, has spurred homegrown movements in the country that are attempting to ensure that the eventual establishment of peace and end of military occupation will inaugurate a regime in which women’s rights are created and protected under the rule of law. Both local groups and international groups are likely to take active roles in monitoring Afghanistan’s success in the enforcement of the rights of women.

A Personal Journey and the Subject Matter of This Book

Although born, raised, educated, and trained as a lawyer in South Africa, I have taught law in the last several decades in the United States, Europe, South Africa, Canada, and Australia, as well as presenting lectures and seminars in many other parts of the world. The primary subjects of my lectures and seminars and teaching have been constitutional and human rights law, with special emphasis upon women’s rights and the rights of indigenous peoples. The experience I gained in South Africa during the late 1970s and early 1980s in representing victims of apartheid has been invaluable for my teaching, research, and scholarship. As an undergraduate I worked at one of the first legal aid clinics established in South Africa by the pioneering legal aid advocate, Professor David McQuoid Mason. After I graduated I worked at the Legal Resources Center, which was directed by South Africa’s pre-eminent public interest lawyer, Arthur Chaskalson, who became the first President of South Africa’s Constitutional Court, and later the Chief Justice. The work carried out at the Legal Resources Center was modeled after the pioneering work in civil rights law in the United States of the NAACP Legal Defense and Educational Fund, and other civil rights organizations in the United States.

During that period, legal representation of victims of apartheid and racial discrimination in South Africa was enormously challenging and complicated because there was no constitution at the time guaranteeing equal rights, or protecting against racial, gender, or ethnic discrimination. South Africa, however,
had a legal system which, despite overt hostility emanating from most of the judges and outright opposition from government officials, allowed me and my colleagues to obtain significant protection for our clients in the interstices of the law. Individual legal victories were important because they provided building blocks that allowed lawyers, through judicial precedents, to extend the reach of one case to others similarly situated. Even small individual legal victories were an encouragement to a population suffering from apartheid and, along with political actions taken by various opposition groups, churches, and trade unions in South Africa, helped to legitimate the political aspirations of the great majority of the people whose rights were then being denied, and perhaps to indicate the importance of using law to protect the human rights of both the majority and the minority.

It was not merely my past in providing legal representation in South Africa that pushed me into this life-long service of human rights teaching, scholarship, and activism. Just as important, if not far more so, were three other experiences. One was living in South Africa under apartheid and personally experiencing and witnessing the daily humiliation, degradation, suffering, and mistreatment inflicted upon people solely because they were not white and under the political and legal domination of a white ruling class.

A second causative event was witnessing the downfall of the apartheid regime and being friends, colleagues, or acquaintances of some who helped spearhead that effort, and who worked frantically to ensure that the new government would be one of inclusion and based upon a constitution in which the protection of human rights and dignity was firmly embedded. The third cause has been observing over the years how relatively successful the new government, particularly the Mandela government, and the constitution have been in the protection of fundamental human rights for all people and the acclaim South Africa has received for this achievement.

Women and Transition: Raising the Questions

This book will examine the project of gender equality in two very different societies that are pursuing political transformation, but in which both the pursuit of and the meanings of gender equality are highly contested. This book will therefore raise some familiar questions about women's rights and equality. First, how does a society envision and commence the project of gender equality after a brutal history of conflict, dislocation, dispossession, exclusion, distinction, and discrimination? Second, how are the foundations laid, and strategies, particularly legal strategies, adopted and cultivated to best achieve the stated goal of equality? Third, what is the interplay of legal processes with other societal processes, such

8 South Africa saw itself as a member of the community of Western legal systems, so the veneer of legality was very important. For a compelling analysis of legal victories under apartheid, see RICHARD ABEL, POLITICS BY OTHER MEANS (2002).
as education and culture, in the “gender transformation project”? Fourth, how does a society balance what is perceived as the secular nature of rights enforcement, within a context of deeply entrenched religious mores or “customary norms”? Lastly, how does a society pursue women’s rights in the face of enormous economic inequalities, social upheaval, and cultural contestations? Ultimately, this book will consider a central dilemma: the persistence of subordination, disadvantage, and discrimination despite the existence of constitutional and legal protections for women.

This book will draw on the theoretical approaches of feminist and other critical legal schools. It intends to celebrate the many ways in which the feminist legal project has substantially improved the lives of women. This improvement is most pronounced in the more affluent societies, but not entirely so. A cursory glance at both statutory and case law will illustrate the influence of feminist legal theory. But this book will also lament some of the disappointments of the feminist project, most significantly, the failure to capture its truly transformative potential.

The central thesis of this book is to suggest an approach that utilizes conditional interdependence as a conceptual tool to analyze and pursue the rights of women. This approach is predicated on the idea that it is an opportune time to reconsider the way that women’s advocates articulate and strive for the human rights of women. This global moment of unprecedented political, social and economic change provides the discursive space for building and expanding upon the achievements of feminist legal advocates, while also considering different and imaginative ways of addressing women's human rights. This may involve the need to rethink widely held truisms, and to jettison some trusted beliefs. For example, even though women’s autonomy is highly praised in feminist theory and advocacy, autonomy may not be so treasured in societies where the cultural, religious, economic, and social conditions dictate a great measure of interdependence. In those societies, autonomy as a value may be foreign, even considered hostile, as familial and friendship networks generate considerable reliance on these networks. Similarly, even though reproductive rights, and particularly the right to safe abortions are arguably indispensable to a women’s sense of autonomy, freedom, and security, in societies where children are seen as a source of wealth, and where poverty is the national currency, reproductive rights may take on a different flavor.

For the purposes of my central thesis I have coined the term “conditional interdependence” to argue that the way we consider notions of autonomy in the pursuit of women’s rights in the affluent countries, mostly in the global north, and also within the elites of the global south, may not be an appropriate paradigm within which to frame women’s issues. Instead, I am going to suggest that an approach underpinned by the idea of conditional interdependence is in fact more likely to gain traction and reap greater opportunities for women’s rights because

such interdependence is based on the communitarian values that underpin societies like South Africa and Afghanistan. In this book I intend to theorize and develop this idea of conditional interdependence more clearly and expansively.

The perspective of this book is not that all the insights and strategies of feminist advocates be discarded or modified. Rather I argue that in the face of contested approaches to, and interpretations of, women’s equality, and especially in the face of cultural uncertainties and entrenched economic, political, and legal inequalities, we rethink what we regard as universal. This requires a reconsideration of not only how we synthesize universal strategies with local needs, but also how local strategies and approaches may influence our conceptions of the universals.

This is not a novel task. These issues have been, and continue to be explored and interrogated by a range of feminist advocates and scholars more talented and thoughtful than I. I am drawing upon my reflections and experience as both a participant in, and an observer of, the political transformation in South Africa since the release of President Mandela in 1990. My observations are also based on my many years as an expatriate in Australia, engaging with the harsh realities of Aboriginal Australians, and particularly Aboriginal women. And they are also premised on my experiences as a long time resident of the United States, where all these questions frequently collide in a society absolutely committed to formal equality, yet riddled with contradictions. In this, my adopted country, where until recently the Speaker of the House was a woman and the Secretary of State is a women, disturbing numbers of women who, in the pursuit of “beauty,” choose to mutilate themselves in order to conform to the cultural imperatives of youth and a threadlike slenderness unachievable for the majority female population.

In this book I utilize the South African project of legal transformation as a model for exploring questions of women’s rights and equality, and applying them to another contemporary context of transformation, namely, Afghanistan. I suggest that because there has been a formal recognition that women’s right to equality has to become part of the democratic constitutional arrangement, South Africa’s starting point is a solid one, and that the formal legal arrangements at least ought to be emulated on some level in places like Afghanistan. Certainly as a matter of constitutionalism, formal law, and state policy, this approach might be useful.10

10 My book attempts to explore the project of gender equality in the two societies through the prism of constitutional drafting, text and interpretation. Its interest lies in exploring what constitutionalism and legal equality may mean for women in the wake of authoritarianism, subjugation and violence. There are other vehicles through which to explore these questions, including comparative analyses of transitional projects through transitional justice mechanisms, or United Nations-sponsored interventions in transitions. Indeed, for a compelling account of transitional societies and gender, see ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS (Fionnuala Ni Aolain et al. eds. (2011). My focus is on legal transition and the role of constitutionalism and formal legal processes that might lead to equality.
In addition to exploring the questions articulated earlier, this book aims to analyze the tensions between the formal declarations of commitment to gender equality and their ambivalent and lackluster pursuit by newly elected democratic governments. I focus on transitional and newly elected democratic governments because they provide fertile opportunities for assessing and analyzing issues of women's equality and the eradication of all forms of discrimination against women. I center the role of governments not because I believe that only governments can advance the women's rights agenda, but because newly elected governments, in the process of political and legal transformation, are primarily responsible for ensuring the implementation and enforcement of rights.

In many of these “new” democracies, a confluence of factors have created the theoretical and practical spaces for a thorough assessment of rights. Obviously the primary factor is the determination by the citizenry at large, including women, that the old political and legal order should be demolished. In addition, there are external factors, for example, global human rights advocates who have increasingly made the link between human rights and democracy. A significant external factor with respect to women’s human rights has been the increasing influence of women’s rights activists at the United Nations and other international fora, in which they have placed women’s rights on the global human rights agenda.11

The issues in this book are analyzed within the context of a wider global debate about women’s rights as human rights that crystallized during the last decades of the last century, specifically during the United Nations Decade for Women, from 1975 to 1985, as well as the Fourth World Conference on Women held in Beijing in 1994, the Vienna Conference and the subsequent United Nations Declaration on Violence against Women, and the Beijing Plus 5 and Beijing Plus 10 Program of Action. The Fourth World Conference was by far the most significant United Nations conference for women and indeed one of the most successful United Nations conferences ever, with over 140 governments, regional commissions and associations, United Nations agencies, intergovernmental organizations, and non-governmental organizations in attendance.12 Women lobbied the governmental delegations extensively and organized a parallel non-governmental conference to coincide with the formal proceedings. The conference produced the Beijing Declaration and Program of Action, a comprehensive global plan to eradicate discrimination against women.13 At the 1993 Human Rights Conference in

11 See RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda G. Dallmeyer Ed. 1993); see also VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW (Alice Edwards ed. 2011) and FEMINISM AND ANTIRACISM: INTERNATIONAL STRUGGLES FOR JUSTICE (France Winddance Twine and Kathleen M. Blee eds. 2001).


Vienna, women activists lobbied extensively in favor of recognizing that violence against women is a violation of human rights. The conference culminated in the Declaration on the Elimination of Violence Against Women—a global blueprint for eradicating violence against women.\(^{14}\)

This book intends to examine these contradictions and limitations, but it also will pursue the tremendous possibilities for women generated by South Africa's political and legal transformation. Women in transitional societies like Afghanistan may find much that is useful in the South African experience. Indeed, it is arguable that the South African constitutional project may provide some useful pointers to women in an advanced constitutional democracy like the United States, or democracies without Bills of Rights like Australia and New Zealand. In this global interconnected world, as women's rights advocates pursue the goals of gender equality, legal or jurisprudential borrowing becomes an effective strategy.\(^{15}\) The South African Constitution in fact incorporates this approach by mandating courts to consider international and foreign law in their deliberations.

**Structure and Organization of this Book**

This book contains seven chapters. In Chapter 2 I elaborate on my approach to reconsidering women's human rights including a consideration of some legal approaches that have been effective in eradicating discrimination against women. This chapter ventures a reconceptualization of theories and approaches that aim to transform women's lives from that steeped in disadvantage and subordination to one premised on equality. In Chapter 3 I outline the global campaign for women's rights commencing in the 1970s and culminating in significant formal legal and policy victories on both national and global fronts. In this chapter I explore the strategies adopted by women's advocates to move women's rights from the margins of political discourse to a central place in law and politics where women's demands for human rights and equality could no longer be ignored.

In Chapter 4 I examine a continuing theme in women's rights advocacy: that of the apparent conflict between harmful and discriminatory cultural norms and practices and the principle of gender equality. The purpose of this chapter is not to recite a litany of the crushing burden of cultural practices in most societies that

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14 Adopted by the General Assembly in December 1993, GA Resolution 48/104. This Declaration has been implemented on a regional basis as well. See DECLARATION OF VIOLENCE AGAINST WOMEN IN THE ASEAN REGION (June 30, 2004) at: http://www.asean.org/16189.htm.

continue to plague women, but to suggest a comprehensive approach that may lead to the global eradication of cultural practices that continue to discriminate against and harm women.

In Chapter 5 I outline the major features of South Africa’s expansive Bill of Rights, demonstrating how this document in effect vindicates fifty years of global human rights activism. South Africans were fortunate to benefit from these decades of human rights developments—both as markers of possibilities as well as cautionary tales. In other words, South Africans were in the enviable position of selecting what was beneficial from human rights achievements elsewhere, but could also avoid the pitfalls of experiences in other societies. This chapter also traces how South Africa’s Constitutional Court is giving effect to the spirit and substance of the Bill of Rights by generating an equality jurisprudence that has increasingly become a model for those pursuing rights for women and other disadvantaged communities and individuals elsewhere.

In Chapter 6 I survey the transformation process in Afghanistan and the attempts by women both inside and outside of Afghanistan to put women’s issues on the national agenda. I examine the Afghan Constitution and the possibilities for gender equality incorporated in that constitution, as well as the societal obstacles to attaining equality. Chapter 7 provides a short discussion about moving forward, and the possibilities and obstacles to the pursuit of women’s human rights and equality in the twenty-first century.

This book, because of its thematic approach, sweeps with a broad brush. But despite the many generalizations, I hope it captures the complex and multi-layered aspects of women’s lives. Ultimately, the purpose for writing this book arises from a need to celebrate women’s achievements, however uneven, but also to lament how women continue to labor under disadvantages and discrimination that can be eradicated. By comparing and highlighting the experiences of political and legal transformation in South Africa and Afghanistan, two very different societies, I hope to generate challenging and complex questions regarding the attainment of gender equality. In addition to the questions raised in this book, I have many observations, but no absolute answers, only tentative ones, offered in the spirit of dialogue and engagement.