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## Guest Editor's Introduction

# WOMEN'S RIGHTS AND TRADITIONAL LAW: A CONFLICT

Penelope E. Andrews\*

The idea for this volume flowed from INTWORLSA's workshop entitled *Traditional Law and Gender Equality* held in Orlando, Florida in January 1994, and is a compilation of many of the papers presented at the workshop.

The purpose of the volume is to continue the global and cross-cultural conversation about the quest for women's equality, and the enforcement of women's rights. Although there is an emerging scholarship on feminist issues in international human rights law,<sup>1</sup> and increasingly effective lobbying by women's activists, as evidenced by the Fourth World Conference on Women in Beijing in September 1995, there is limited consensus as to the most appropriate means of attaining gender equality, or indeed, a vision of a world liberated from the stranglehold of gender oppression. These differing visions are inevitable in a world divided by economic status, political systems, ethnicity, cultures, and religions.

But there exists a unifying consensus, albeit fragile, about a universal set of human rights principles which are embodied in the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It is this consensus which has spurred women's activists and which provides the foundation on which to focus, and to elaborate, the need for a recognition of women's rights for its particularity.

In this pursuit, a constellation of obstacles to the attainment of women's equality has been targeted by feminist scholars and activists.<sup>2</sup>

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<sup>1</sup> The pioneering article in this respect is Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). See also Rebecca Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 857 (1992).

<sup>2</sup> REBECCA COOK (ED.), *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* (1994).

Traditional law<sup>3</sup> has been a recurrent site of contention and has been highlighted as a significant impediment to the goal of equality.<sup>4</sup> The chapters in this volume elucidate the contours of the debate focusing on the theoretical underpinnings, and on regional case studies where traditional principles have been incorporated into national laws and policies.

In many ways, it is a tragedy that the focus on traditional law has so polarized women's rights advocates, so that often the crucial questions that need to be addressed are lost in a quagmire of condemnations, accusations and justifications. Consequently, the nuances of the relationship between an individual and her cultural milieu is lost; so too the richness and fluidity of cultural practices and norms and their interaction with or *raison d'être* for the relevant community is ignored.<sup>5</sup>

In this volume, we aim to pursue a dialogue which reflects the complexities of pursuing a goal (gender equality) in tandem with other goals (cultural dignity and autonomy). These goals are not mutually exclusive, but they often demand contradictory approaches towards their attainment; interweaving and interconnected on the one hand, and independent on the other. In other words, women are often engaged in struggles which beckon their loyalties to community (cultural and/or ethnic), or which confront their role or status as women.<sup>6</sup>

<sup>3</sup> By traditional law I include what is referred to as customary or indigenous law, and religious law.

<sup>4</sup> There is an important and often emotional debate about the status and role of women under traditional law. Regrettably, the debate has often centered around female genital surgery, seen as the most visible and abhorrent traditional practice against women. For an interesting perspective on the debate about traditional law and gender equality using the practice of female genital surgery as a vehicle, see Isabell Gunning, *Arrogant Perception: World Traveling and Multi-Cultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); see also Catherine Harris, *Daughters of Other Peoples: International Feminism Meets Ugandan Law and Custom*, 25 COLUM. HUM. RTS. L. REV. 49 (1994). Kay Bouleware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985).

<sup>5</sup> For an informative discussion on the necessity to incorporate the totality of the cultural experience in academic and legal discourse, see Jean Zorn, *Lawyers, Anthropologists, and the Study Law: Encounters in the New Guinea Highlands*, 15 L. & SOC. INQUIRY 271 (1990).

<sup>6</sup> I do not wish to simplify the existential reality, and attempts to change that reality, of women trapped in economic or social hardships. The point is that very often the struggles of those women against socio-economic conditions resulting from discriminatory laws, policies, and structures, where gender status is but one variable in the equation. For a thoughtful perspective on this issue, see Radhi Coorasswamy, *To Bellow Like a Cow: Women, and Ethnicity, and the Discourse of Rights* in Rebec Cook (ed.), *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note

The volume commences with some theoretical perspectives by Hilary Charlesworth. She details the current and continuing criticism by feminist legal scholars of the "liberal" international legal system's inability to confront and rectify the essentially male cast of international law. She applauds the continuing deconstruction, and more important, the reconstruction of international law into a more truly human system. Charlesworth comments on the need for feminist scholars to find a productive path between tensions arising from the choice between engaging in "privileged male structured debate" or seeking suitable political change.

She explores the uneasy union of these two goals of feminist theory as they surface in two critiques:

(1) the incoherence critique, wherein feminist scholarship is assaulted for its refusal to operate within a distortingly narrow range of voice and reference;

(2) the essentialist critique, wherein she outlines some limitations of gender essentialism, but stresses the need to avoid theory based inactivity that some forms of it may induce.

She explores this path in her critique of the critiques of female genital surgeries. In violence against women, for example, she finds sufficient commonalities to call for a redefinition and re-invigoration of feminist legal theory aimed at challenging male dominance.

In the next essay Isabelle Gunning explores the problem of acting against female genital surgeries maintaining a balance between recognition of differences and affirmation of connections.

She points to the difficulties inherent in current Western discussion of female genital surgeries. To this end she analyzes three recent excursions by the American media: A New York Time article by A.M. Rosenthal, Alice Walker's film and book on the subject, and the A.B.C. Network's program, *Day One*.

Each of these she finds constrained, to varying degrees, by cultural insensitivity which leads both to the undervaluing of the perspectives and efforts of those intimately involved, and to the risk of reinforcing the destructive stereotype of civilized us—barbaric them.

Against the background of proposed American law (Female

Genital Mutilation Act), she explores the pitfalls of such legal intervention. Detailing the debate surrounding the French legal experience, she points to the danger of law in the name of liberating women, trying and imprisoning them, as well as bolstering those elements which more widely support this system. Predictably, the French debate rages inside the dichotomised structures of cultural relativism and universalism; theoretical purity and pragmatism.

Gunning stresses the need to construct a vision of events, programs of education and patterns of language and imagery that enable us to act for the good without reinforcing degrading stereotypes.

Thandabantu Nhlapo addresses the possible conflict between cultural rights and the right to equality as outlined in the transitional constitution in South Africa, and urges women rights advocates and non-racist advocates to deal constructively with this volatile issue.

He details the history of neglect and marginalization of African customary law in South Africa's dual legal system, with the former being relegated an inferior status vis-a-vis Roman-Dutch and British common law. He describes attempts by successive South African administrations to consolidate customary law, culminating in the Native Administration Act of 1927, which set up a system of Native Commissioner's Courts, and imbued the Governor-General with the status of Supreme Chief of all Natives in the (then) Union of South Africa.

This set the stage for the subsequent conflict between African urban elites, mostly aligned with the liberation organizations, and the rural chiefs, seen as puppets of the apartheid government, and which evinced a protracted political struggle during the constitutional negotiations. In addition, women's rights advocates lobbied vigorously for constitutional guarantees that would discontinue traditional laws and practices which rendered women perpetual minors.

Nhlapo provides a thoughtful perspective which attempts to diffuse the bi-polar approach of customary law versus women's equality, and offers an analysis which incorporates the historical denigration and distortion of traditional law as part of the process of transforming South Africa into a non-racist and non-sexist society. His analysis also includes an exposé of the communitarian imperatives which bear on traditional institutions such as marriage, and how that contrasts with the individualistic approach in Western society.

Sami A. Aldeeb Abu-Sahlieh's essay consists of a brief cataloging of contemporary Muslim opinion on the advisability, or otherwise, of religious circumcision—both male and female. This essay includes analytical references to written Muslim law from both religious and lay perspectives. In this essay he attempts clear and useful distinctions among the various forms of circumcision and outlines recent political intervention, particularly in Egypt.

Focusing on the Oguta in Nigeria, Leslye Amede Obiora explores local attitudes to gender inequalities and knowledge of their associated legal entitlements. She finds community attitudes to litigation as a mechanism for recompense and/or social change is generally one of suspicion and avoidance.

Noting that the existence of law alone is of limited use, she argues that the widespread discrimination against women points to the need for aggressive and autonomous measures. Social change requires the demystification of conservative forces, including at times the distorted versions of traditional law. Only through successful encouragement of critical consciousness can law function as an effective agent of change.

In the following essay Adrien Wing and Shobhana Kasturi explore the Palestinian movement towards autonomy in the West Bank and Gaza focusing upon the gains made by women's rights advocates and the threat posed to these advocates by interest groups such as Hamas (Islamic Resistance Movement).

They detail how customary and religious law have curtailed the role of Palestinian women, according them very limited public freedoms, confining them largely to the private sphere as the custodians of family honor.

Through political activism, women gradually established and elaborated roles beyond the domestic realm. During the Intifada these roles were further entrenched and to a limited extent encoded in the 1994 Draft Basic Law for the National Authority in the Transitional period—a probationary and provisional document.

Wing and Kasturi critically detail the document, pointing clearly to its shortcomings in the area of women's rights. They conclude that despite its advances, it assists in the preservation of traditional customs and practices which dictate a subservient role for women.

Wing and Kasturi outline the subsequent drafting by women's

groups of a Document of Principles of Women's Rights (Women's Charter), which they test against philosophical, legal and political difficulties.

They end their essay by listing five proposals for enhancing the status of women. These, too, they subject to philosophic and particularly interesting pragmatic scrutiny.

Jean Zorn details two cases where the 1975 Papua New Guinea Constitution's guarantee of equality for women allowed its National Court to overturn a village court's imprisonment of Highland Village women for adultery.

These confrontations between centralized and village justice, between the Constitution and customary law, between the old and the new, the village and the city, serve as a focus for a detailed exploration of the nature, causes and solutions to the inherent inequality of women in Papua New Guinea today.

Pushing beyond easy answers, Zorn's essay comments on the problems of recognizing and defining discrimination, on the risk of ethnocentrism in evaluating customs such as polygamy, bride price, and the traditional division of labor. The issue most provocatively teased out is the difficulty of knowing, defining and implementing customary law, let alone structuring its co-existence with a centralized authority. This is most apparent in Zorn's discussion of the state's awkward intervention in traditional arrangements such as marriage.

In her analysis she explores possible combinations, contradictions and interpretations of the various sources of law—modern and traditional—drawn upon to determine the legal treatment of women in the recently independent and high volatile economically modernized Papua New Guinea.

Takyiwaah Manuh focuses on the Women, Law and Development in Africa movement and its challenge to customary law and practices which subordinate women.

She engages in an extensive analysis of the nature of law and power, and elaborates post-modern discourse on legal pluralism. She subjects the legal duality and hierarchy typical of colonial and post-colonial societies to intense theoretical scrutiny, and highlights the manipulation of customary law by different and often opposing forces.

She contextualizes customary law, both as a creation and perpetuation of colonial rule, and as a manipulable tool by the

emerging elite staking out their claims for self-government and independence. She cautions against law reform attempts which do not recognize the impact of processes and institutions other than legal ones which impact on women, and instead calls for legal reforms which embrace these extra-legal dynamics.

Sandy Liebenberg concludes the volume with a compelling argument about the need to include social, economic and cultural rights in the final constitution in South Africa. She locates this necessity in a comprehensive strategy to overcome the structural disadvantage of most Black women in South Africa.

She situates her argument in the liberation struggle in South Africa, with its history of incorporation of social and economic rights as evidenced by the demands in the Freedom Charter. She also references international documents which increasingly recognize the systemic nature of discrimination that women suffer.

She calls for an assertive use of legal and constitutional mechanisms to pursue rights, whilst recognizing that legal change does not translate into economic or social change. But she appreciates both the symbolic role and substantive possibilities that constitutional protections offer.

Her essay neatly wraps up the volume with her analysis and articulation of gender inequality as part and parcel of the structural inequality that plague communities with limited personal and national resources. These communities overwhelmingly consist of women.

The momentum generated by lobbying and other efforts prior to the Beijing Women's Conference, and commitments undertaken at the conference will, no doubt, provide the space for women's rights to be further debated and acted upon.<sup>7</sup> Arguably, the transformative agenda for women is now unstoppable.

We hope this collection of essays become part of the discussion and transformative project, and will contribute to a greater understanding of the difficult questions highlighted in the following essays.

It has been both an honour and a pleasure to edit this collection. In this endeavor, I wish to thank the following individuals: Prof.

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<sup>7</sup> The latest contribution to these endeavors can be found in *FEMINISM/POSTMODERNISM/DEVELOPMENT* (Marianne H. Marchard and Jane L. Parpart eds. 1995).

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