

LECTURES

WOMEN'S HUMAN RIGHTS AND THE CONVERSATION ACROSS CULTURES

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I. INTRODUCTION

My presentation will examine the vision of women's rights and equality as outlined in the Convention on the Elimination of All Forms of Discrimination Against Women, "CEDAW".¹ The presentation will raise some of the possibilities and limitations associated with universalizing legal norms in a context of enormous global disparities, particularly in material and cultural terms. My friend and colleague, Professor Thandabantu Nhlapo, has raised some of these points in his presentation. I have chosen four issues to illustrate the possibilities and limitations of CEDAW's reach.²

First, the limitations of universalizing legal norms are apparent in societies that confront legacies of war, dislocation, and dispossession. Much of Africa, for example, is currently experiencing the consequences of war, dislocation, and dispossession. There are other parts of the world, such as Afghanistan, that are also experiencing the ravages of war and

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¹ G.A. Res. 180, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/180 (1980), *reprinted in* 19 I.L.M. 33 (1980), *available at* <http://www.un.org/womenwatch/daw/cedaw> [hereinafter CEDAW].

² For an analysis of CEDAW, see Laura Reanda, *The Commission on the Status of Women, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 283, 286–88 (Philip Alston ed., 1992). See also Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 189, 212–13 (Rebecca J. Cook ed. 1994) (recognizing the importance of CEDAW in at least addressing the need for individual complaint procedures as part of the treaty's overall scheme).

dislocation. (I shall address the situation of Afghanistan later in this discussion.) Second, legal strategies adopted to achieve equality under the CEDAW model are premised on liberal assumptions that do not exist in large parts of the globe. Third, CEDAW advances a secular vision of individual rights enforcement and as a result could be limited in contexts of deeply entrenched cultural and religious mores. Finally, although CEDAW recognizes collective rights, it does not adequately address the contradictions inherent in the individual rights enforcement project within communitarian imperatives. In other words, CEDAW does not provide clear guidance in balancing individual rights with community needs in societies in which the interplay of individual rights and community concerns are constantly negotiated. Professor Nhlapo referred to these questions in his comments, and he has written extensively on these issues.³

Our panel is focused specifically on how CEDAW operates in the advancement of human rights outside of Judeo-Christian contexts. These contexts, as exemplified by the four issues highlighted above, require innovative approaches to the implementation of rights. For the most part, the implementation of CEDAW will occur within societies with extremely limited resources and in those where there has been a breakdown of the formal institutions of the society. For women who have to survive in these contexts, culture is largely negotiated through economic considerations, which raise complicated and sensitive questions.

When CEDAW was promulgated in the 1970s, the framework of international law, politics, and economics was clearly different from that which pertains today. The parameters and the human rights imagination of the globe was confined to demarcated boundaries—first world and third world, east and west, developed and underdeveloped—and the ravages of this contemporary period of globalization, and particularly the structural adjustment initiatives of the 1970s, had really not yet been fully experienced and appreciated.⁴

³ See, e.g., Thandabantu Nhlapo, *African Customary Law in the interim Constitution*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE* 157, 159–63 (Sandra Liebenberg ed. 1995) (showing some of the deeply entrenched cultural norms which may conflict with CEDAW principles in certain male-dominated African societies); see also Thandabantu Nhlapo, *Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate*, 9 *INT'L J.L. & FAM.* 208, 214–15 (1995) (suggesting that many in Africa continue to think of themselves in the collective despite the individualistic influences of Westernization).

⁴ The impact of globalization has been documented in great detail. See, e.g., TYLER

It is arguable that the adoption of CEDAW was an indication of a universal consensus (albeit uneven) about the possibilities of legal processes in changing people's lives. The subsequent levels of local and global dislocation, violence, and lawlessness could not have been predicted. Nor could it have been predicted that the implementation of rights would still, thirty years later, be predicated on questions of daily survival. So too, this historical global juncture, described as one of the *clash of cultures* involving the Islamic world on the one hand, and the Judeo-Christian world on the other, was not contemplated.

II. "CLASH OF CULTURES": THE UNIVERSALITY OF HUMAN RIGHTS NORMS

While preparing my comments for this panel, I was playing in my mind some vignettes that I wanted to share with you which underscore the issue of "culture" in various contexts. I have chosen four:

Vignette 1: I do not know if any of you have read Barbara Kingsolver's book, *The Poisonwood Bible*,⁵ which was set in the Congo in the early 1960's. There is a wonderful scene in the book in which one of the protagonists—an overly zealous preacher from the South of the United States—comes to *christianize* and *civilize* the locals. In this endeavor, he has to introduce both the New Testament and ideas of Western democracy. The village is self-sufficient; politically, economically, and culturally. The American preacher encourages people to come to church on Sundays, but the villagers have their own religion and the chief of the village is opposed to the activities of the preacher. One scene in the book highlights the contestation of the two cultures. The villagers decide that they will attend church services, but since they also have the right to vote, they will use their vote to determine whether Jesus does exist.⁶ Of course democracy is a good thing; so too is Christianity. But the Christian faith does not allow for discussion and debate about the existence of Jesus. This farcical process—in

COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES 93–95 (2002) (presenting both Hollywood movies and McDonald's as cultural exports which increase America's influence abroad); SURJIT S. BHALLA, IMAGINE THERE'S NO COUNTRY: POVERTY, INEQUALITY AND GROWTH IN THE ERA OF GLOBALIZATION 201–02 (2002) (positing that globalization actually has had a positive effect on the world's poor). *See generally* ANTHONY GIDDENS, RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES (2000).

⁵ BARBARA KINGSOLVER, *THE POISONWOOD BIBLE* 327 (1999).

⁶ *Id.* at 327–34.

which the villagers exercise their democratic rights to allow Christianity in the village—plays out in very funny ways and some scenes are quite hysterical.

Vignette 2: Last year, my visit to Sydney Law School coincided with the Miss World contest which was being held in Nigeria. The ostensible purpose for holding the Miss World contest there was to give international publicity to the death sentence which had been imposed on a Muslim woman in the North for committing adultery. This case had indeed received widespread international attention. Most feminists would argue that beauty competitions—including the Miss World Beauty Pageant—negatively impact women's rights and equality. I recall watching a television interview with the current Miss Australia, perfectly made up and extremely elegant, discussing the case and mouthing feminist rhetoric—the likes of which even Catharine MacKinnon would be proud.⁷ What I witnessed was a Western beauty queen expressing a deep desire for the liberation of the downtrodden, indeed condemned, African woman.

Vignette 3: I read a story in the New York Times in which a gathering of women from Ethiopia had outlawed the practice of female genital surgeries. Part of the discussion revolved around the best ways of dealing with the abolition of the practice. The question was a choice between a punitive approach, which focused on the perpetrators, or an educational approach, which would incorporate rewards for compliance. Illustrative of the second approach, I recall the granting of the Reebok Human Rights Award some years back to a group of chiefs in Uganda who had banished the practice of female genital mutilation in their village.

Vignette 4: I remember hearing a report on one of the television networks in New York City claiming that Tupperware parties had been replaced by Botox parties as the preferred weekend afternoon pastime of middle-class, middle-aged women: specifically those who find the physical effects of aging burdensome and who may be able to superficially alter these effects. This report made me consider how a society so liberated, with so many options for women, and which in many ways was a leader in the struggle for women's rights,

⁷ Catharine A. MacKinnon is a professor of law at the University of Michigan Law School who is recognized as a leading scholar on the issue of sex equality. She has written numerous books on the subject, and co-directs The Lawyers Alliance for Women (LAW) Project of Equality Now, a group promoting rights for women around the world. The University of Michigan Law School, *Catharine A. MacKinnon*, at http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=219 (last visited Oct. 20, 2003).

could so willingly acquiesce in this collective obsession with youth—which largely has a deleterious impact on women.

I mention these vignettes for a few reasons. First, when we think of culture, we always think of culture *out there*. We have become inured to ways of exoticising culture so that it involves only those who are not part of the mainstream in our society. This approach therefore robs us of the ability to turn the spotlight on our own culture and the ways that it may demean women, or even further the cause of women's liberation.

The second reason why I mention these vignettes is because cultural contexts raise all kinds of contradictions. Because of our varied experiences, and because globally, women have so many cultural templates to work from, we either fail to see the contradictions, or simply accept them as *natural* or immutable. This inability to confront our own culture's contradictions, and to concentrate only on those of the *other*, obscure our ability to appreciate the interplay of culture with human rights and to engage in a fruitful dialogue about the implementation and enforcement of rights globally.

Very often when we talk about a particular cultural practice that is offensive to our sensibilities, the impetus for us as human rights activists is either to *liberate* the affected community or to eliminate the particular practice. In our ardor, what often happens is that two important questions fail to be addressed: First, which other forces are we liberating; and second, which other constraints are being discarded? Failing to raise these important questions results in a focus on the immediate cultural practice and ignorance of the larger cultural picture.

Religious, nationalist, or cultural considerations have always influenced the substance of human rights. They have generated substantial debates about the universality of human rights norms, and have formed the basis for the ample reservations state actors have with the international human rights treaties they may have signed; particularly as they pertain to women. In fact, the parameters of the discussion—that is, secularism versus religion or culture—are somewhat artificial. Although the collection of international instruments and custom that we now recognize as the body of international human rights law exists as an entirely secular construct, they represent to a greater or lesser degree the embodiment of various religious or cultural traditions. Many principles of international human rights law coincide very clearly

with religious principles.⁸

III. PUBLIC AND PRIVATE SPHERES OF GENDER INEQUALITY

In order to avoid the pitfalls of the binary of *us* and *the other*, we may think about dealing with the issue of sex discrimination or gender equality on two levels. The first focuses on the seemingly unproblematic outward manifestations of gender equality. For example, the rights of women to be free from violence in both the public and private sphere; to secure access to education, healthcare, and employment on a nondiscriminatory basis; to participate in elections and governance at both the local and national level in the same manner as men; and to obtain custody of their children in the same way as men. These are general propositions that do not lend themselves to disagreement by governments who are committed to the principle of gender equality.

The second level, however, is more complex, requiring a more nuanced approach. This level involves private choices and group imperatives more prone to disagreement as to their discriminatory basis. For example, the issues of polygamy, beauty competitions, or women choosing to cover their heads in public cannot clearly be said to be problematic manifestations of gender inequality. These are broader cultural questions implicating women's choices and options, and their interplay with cultural expectations and values.

For the purposes of legal reform, the appropriate focus should be the first level, that is, the outward manifestations of discrimination against women. The second level, involving private choices within particular cultural contexts is more vexing, and therefore less adaptable to legal reform. It is at this level, however, that the dialogue amongst women requires not only candor, but the basic acknowledgment that for the majority of women in the world, particularly in the developing countries, life is not a series of choices but rather a predestined set of arrangements based on, for example, geographical location, family status, ethnic community, and family expectations. Women's rights proponents may insist on a series of

⁸ Shaheen Sardar Ali argues for example that women's human rights in Islam "are not entirely irreconcilable with current formulations of international human rights instruments". See SHAHEEN SARDAR ALI, *GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN?* 3 (2000); see also Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 *LAW & SOC'Y REV.* 39, 40 (2001) (positing that competing models of social justice—such as the competition between "religious" based models and "secular" models—are fundamental problems faced in the struggle for women's human rights).

seemingly rational choices to advance women's rights, but these choices cannot be viewed in isolation. Rather, these choices must be contextualized in the life mosaic in which all choices are interrelated.

Largely because I grew up in apartheid South Africa, I have actively chosen to tailor my personal and professional commitments to the causes of non-racism and anti-sexism. I have lived a very privileged life for several reasons, but most specifically because I have been able to see my country transform itself from a pariah nation-of-the-world, to one that stands as a model of democracy and human rights—at least formally. It has also been a privilege to see how the South African Constitution and specifically its expansive Bill of Rights have been interpreted in such an innovative way by the South African Constitutional Court. This court has eschewed mere formal equality for a jurisprudence embracing substantive equality and incorporating the concept of dignity as linked to equality.⁹ But the existence of these formal rights raises many contradictions in a society that is one of the most unequal in the world, and one that is particularly hostile to women. This inequality and hostility are evidenced by the alarming statistics on violence against women, and the appalling conditions in which the majority of South African women, particularly black women, live.¹⁰

I have become interested in the situation of Afghanistan lately because some aspects of Afghanistan's history and traditions parallel that of South Africa, invoking similar contradictions and raising similar questions. Both South Africa and Afghanistan are immersed in political transitions, confronting—albeit to vastly differing degrees—legacies of war, economic disparities, gender inequities, violence, and upheaval.

Afghanistan embodies the tensions between secularism and religion most acutely.¹¹ South Africa's negotiated journey towards a

⁹ See *President of the Republic of S. Afr. v. Hugo*, 1997 (6) BCLR 708 (CC), available at 1997 SACLR LEXIS 91, at *81–82 (affirming the authority of South Africa's President to pardon groups of prisoners when to do so would be to the public's benefit, and denying that the President discriminated on the basis of gender when he released all female prisoners with children under the age of twelve because it would benefit the children and society); see also *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC), available at 1995 SACLR LEXIS 218, at *175–79 (invalidating all South African legislation sanctioning capital punishment because such legislation is counter to Constitutional notions of human life and dignity).

¹⁰ See Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 444–45 (1999) (suggesting that, even in the absence of formal statistics on violence against women in South Africa, rape and domestic violence particularly have reached epidemic proportions).

¹¹ See Shannon A. Middleton, *Women's Rights Unveiled: Taliban's Treatment of Women in*

constitutional dispensation required a careful balancing of individual rights and communitarian approaches.¹² But of course it is disingenuous to draw simplistic analogies between the countries. South Africa and Afghanistan are vastly different in terms of their histories, demographics, political cultures, and legal systems. One very significant difference exists in that law and legalism were always intrinsic to the maintenance of apartheid in South Africa. Afghanistan, on the other hand, has for decades been typified as a society plagued by lawlessness. There are also many other differences which I shall not explore here.

Indeed, South Africa and Afghanistan were in many ways the sites of global struggle. The United Nations declared apartheid a “crime against humanity,”¹³ and global feminists continuously referred to the Taliban’s treatment of women as “gender apartheid.”¹⁴ It is the conflict between the *modern* and the *traditional* that is worth exploring. The purpose of utilizing South Africa and Afghanistan as counterpoints is to elicit the dominant themes and tensions around women’s rights—and to raise some possible suggestions for engaging with them in order to universalize women’s human rights effectively.

Afghanistan, 11 IND. INT’L & COMP. L. REV. 421 (2001) (providing a discussion of the tensions between women’s rights and Islam).

¹² See ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA’S ROAD TO CHANGE 120–32 (1995) (detailing the beginning of the negotiations to end apartheid in South Africa).

¹³ See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT’L L.J. 1464, 1488 n.96 (1996) (quoting G.A. Res. 2671F, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/2671 (1970), the United Nations resolution in opposition to apartheid).

¹⁴ *Afghan Apartheid*, 11 THE WOMEN’S WATCH 2, (Sept. 1997), at <http://iwwraw.igc.org/publications/womenswatch/vol%2011-2%20Septmeber%201997.htm>.