

## Edward A. Smith Lecture

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### *Reinventing International Law: Women's Rights as Human Rights in the International Community*

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**The Edward A. Smith Visiting Lecturer**

**Human Rights Program**

**Harvard Law School**

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## *Preface*

Harvard Law School and its Human Rights Program have benefited from a generous gift to the school by Edward A. Smith of the Class of 1942. The gift is to be used to bring to the School for several days visiting lecturers whose commitments and experience speak to issues of social responsibility and to the moral dilemmas facing the legal profession.

Each of the Edward A. Smith Visiting Lecturers invited by the Human Rights Program has amply met these criteria. All have been prominent in the human rights movement's efforts to develop and protect international human rights. All

have been people of deep commitment, moral vision and personal courage. All have "made a difference." The past lecturers were Neelan Tiruchelvam from Sri Lanka, Dumisa Ntsebesa from South Africa, Tania Petovar from Yugoslavia, Asma Jahangir from Pakistan, Ian Martin from the United Kingdom, Gay McDougall from the United States, and Louis Sohn from the United States. The Program remembers Mr. Smith with deep thanks for making possible this fruitful series of talks.

The Program's most recent Edward A. Smith Visiting Lecturer was Radhika Coomaraswamy from Sri Lanka. This publication grows out of the lecture that she delivered at Harvard Law School on March 12, 1996. Her distinguished career includes her present positions as United Nations Special Rapporteur on Violence against Women and Director of the International Centre for Ethnic Studies in Colombo. The Human Rights Program is publishing this lecture in order to make it available to a larger audience concerned with women's human rights.

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**The Harvard Law School Human Rights Program**, founded in 1984, fosters coursework; the participation of students in human rights activities through practical involvement as well as scholarly research and writing; and assistance to the worldwide human rights community. The Program forges cooperative links with a range of human rights workers, scholars and organizations from all parts of the world, through its student summer internships with nongovernmental organizations, its visiting fellows (scholars and activists) who spend from two to twelve months with the Program, its visiting speakers, its applied research, and its clinical work. HRP also plans and directs discussions and conferences on human rights issues, and publishes the related reports and analyses. A brochure describing HRP's activities, as well as a newsletter on the Program's current involvements, are available on request.

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## *Introduction*

I am pleased to be at Harvard Law School, where I was once a graduate student, to deliver another in the series of Edward A. Smith Lectures and, by doing so, to join a distinguished group of human rights activists and scholars. My topic, the innovative paths by which women's rights have become human rights, highlights the transformation of some vital aspects of international law.

As of January 1996, 121 nations had ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, or the Women's Convention).<sup>1</sup> Although it enjoys the privilege of having this exceptionally large membership, CEDAW is also the human rights convention with the largest number of state reservations. This says much about the international community and the question of women. In some ways, women's rights are the most popular of international initiatives, but they stir the most profound disagreements. Relative to other fields, they are more fragile, have weaker implementation procedures, and suffer from inadequate financial support from the United Nations.

Both in Vienna at the World Conference on Human Rights in 1993 and in Beijing at the 1995 World Conference on Women, women's rights were recognized as human rights. For the first time their articulation was accepted as an aspect of international human rights law. This acceptance would give women's rights discourse a special trajectory, facilitating its emergence as a major innovation of human rights policy within the framework of international law.

Before we analyze the discussion of women's rights as human rights, we must meet the argument challenging the very premise of the debate. Many scholars from the third world argue that human rights discourse is not universal but a product of the European Enlightenment and its particular cultural development. This view is often underscored by many third world governments with particular respect to women's rights. Women are often seen as the symbol of a particular cultural order, as icons of cultural purity. Critics argue that to grant universality to a strong set of women's rights might undermine the cultural framework of a particular society.

When it comes to issues such as female genital mutilation, *sati* (widow burning), punishment according to *Shari'a* law and other practices that are particular to certain cultural communities, this argument is made even more forcefully by those who believe that many human rights values are culturally specific. It is therefore necessary to underscore the

universality of human rights as an essential first step in the recognition of human rights as women's rights.

In many ways the privileged personality of international human rights law is the so-called Enlightenment personality -- a man, endowed with reason, unfettered and equal to other men. This construction of the world underpins most of the instruments on international human rights law. What is now called liberal feminism is keen on extending these postulates to women, who should also be recognized as endowed with reason and unfettered in spirit. This project to extend the Enlightenment ideal to women received widespread support from all sectors of the women's movement as an important starting point for the discussion of women's rights, especially at the international level. However, to accept such postulates in many parts of the world is also to acknowledge the cultural victory of Enlightenment Europe, an acknowledgment that is often unpalatable in the non-western world.

### *Universal Legitimacy of Human Rights as Women's Rights*

I would like to deal preliminarily with the question of the universal legitimacy of women's rights as human rights. If human rights doctrine has its origins in Enlightenment Europe and in North America, should women everywhere work toward its universalization? The dilemma is a real one for academics who are concerned with the development of political values in the non-western world.

On the one hand, there is the intellectual quest to understand and to criticize the colonial experience, including absorbing the structure of the Enlightenment as a colonial subject. Throughout my academic career, I have agreed with thinkers like Foucault that there was a need to demystify the Enlightenment project. In addition, Partha Chatterjee and Ronald Inden have shown the negative aspect of this project in the colonial world.<sup>2</sup> The colonial venture, imbued by the philosophy of the Enlightenment, led to the morbid structures and developments in post-colonial societies. Many scholars, including Sri Lanka's Gananath Obeyesekere, have described these structures and their contradictions in clear and unambiguous terms.<sup>3</sup>

I too have strong reservations about the ways that certain Enlightenment ideas served to define, classify and exclude large segments of the world's population. Nonetheless, I recognize that I serve in some sense as an active instrument of the Enlightenment, promoting international human rights standards and urging people to discipline and punish the violators of those standards, especially those who perpetrate violence against women.

How does one resolve this dilemma -- to remain a critic of the negative aspects of the Enlightenment while being a fervent believer in human rights? Even though human rights may be a product of the Enlightenment, it has a separate history. Human rights has become universal in its scope and application. First, the separate project of human rights provides us in many important contexts with a framework to deal not only with brutality and violence, but also with arbitrariness and injustice that must necessarily shock the conscience. This has made it a potent discourse, especially after the experience of World War II. The need for a common discourse against brutality was a legacy of that period, and that legacy has acquired a certain universality of spirit. Second, human rights and their postulates, such as the equal dignity of human beings, resonate in all the cultural traditions of the world. In that sense, there is sufficient basis in every cultural tradition to foster and promote the value of human rights. Though its exact articulation in terms of rights of individuals and duties of the state is an Enlightenment formulation, the spirit of human rights may be said to be present in all cultural systems and to have universal appeal.

Many political thinkers in the third world have shown how indigenous concepts and processes, such as those involving issues of violence and injustice, are animated by a commitment to the ideals of human rights. I refer to the writings of Ashis Nandy, Veena Das, and Chandra Muzaffer among others.<sup>4</sup> Thus human rights discourse has resonance in the everyday experiences of individuals. Otherwise it would not have developed so dynamically and have become used by such different groups throughout the world. In other words -- yes, perhaps human rights in its present day incarnation is a product of the Enlightenment, but its general thrust has resonance in diverse spiritual and cultural experiences. In terms of political values like the concept of democracy, it is an important step forward for all human beings and all cultures.

The problem of women's equality and empowerment was not always framed in terms of international human rights. The 1980s saw this major transformation in the articulation of women's grievances. There are historical reasons why the claim that women's rights are human rights has gained ascendancy in the world today. "Rights discourse offers a recognized vocabulary to frame political and social wrongs."<sup>5</sup> The availability of human rights discourse for the translation of women's rights into internationally acceptable norms allows for a greater visibility. In addition, the diverse machinery set up at the international level for the promotion of human rights becomes available to women's rights activists. This access to international institutions is an important development in the search for equality.

In earlier times the relationship between international human rights law and women's issues was not a happy one.

International law was, after all, state-centered and individualistic in content. Its thrust was basically toward male subjects with only passing reference to women's inequality. It was most important, however, that international law reinforced the division between the public world and private life. By insulating vital aspects of private life such as the family from scrutiny, it ensured that community and private life were not subject to international standards. International human rights law assumed a public sphere where the state and the international system could intervene and a private sphere where state intervention and international scrutiny were prohibited. It was assumed that privacy was a neutral realm of human experience, and that there was no power hierarchy within the private space of the family that affected state interests. As critics have argued, the absence of legal intervention to protect women in the community and in the home devalued women and kept intact the traditional male-dominated hierarchy of the family.

The founding theorists of international law were all male and ignored the unequal distribution of power in family life and the political nature of family relationships.<sup>6</sup> In international law, as in political life generally, much depends on who controls the influential discourses.<sup>7</sup> Men formulated and to date actually control international mechanisms of implementation. The discourse and machinery of human rights were therefore insensitive to the demands of women that often stemmed from conduct within community and private life rather than from the state-authored conduct stressed by international law.

This state-centeredness of international law grew in part out of liberal theories of social contract that privileged the negative minimalist state over the interventionist one. As a consequence, matters outside minimal state functions didn't concern international law. In addition, the rise of totalitarianism in Europe in the forms of fascism and communism led many to seek out a realm beyond the reach of the state. That realm was private life, within which people hoped to be secure. Carving out a special area, exempt from state interference, for private expression was a necessary safeguard aimed at preventing the totalitarian state from destroying the dignity of human beings. Thus the liberal safety of the minimalist state and a fear of state monopoly of private life contributed to the rigid dichotomy between the public and the private, a dichotomy that until recently was the unshakable foundation of international law in general and international human rights in particular.

A revolution has taken place in the last decade. Women's rights have been catapulted onto the human rights agenda with a speed and determination that has rarely been matched in international law. There are two aspects to this process: first, the attempt to make mainstream human rights responsive to women's concerns; and second, the conceptualization of certain gender-specific violations as human rights violations. These developments may have far reaching implications for the theory and practice of human rights in the United Nations system.

### *Violence against Women: The Process of International Norm Creation*

Let us begin to consider these implications by taking the issue of violence against women as a case study of women's rights emerging as a major concern at the international level. How and why did such violence recently emerge as an international issue? What have been the implications of its emergence for international law doctrine and practice?

In the 1970s, the most prominent women's issues related to discrimination against women in the public sphere and the need to ensure equitable participation of women in the development process. In the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>8</sup> which came into force in 1981, explicit prohibition of violence against women is singularly absent. Except for prohibitions against trafficking and prostitution, there is no mention of the subject. Until the 1980s, the issue of violence against women was invisible from the international perspective.

The Third UN World Conference on Women in Nairobi in July 1985, which was called to mark the end of the UN Decade for Women, concentrated on themes of equality, development and peace. The Nairobi Forward-Looking Strategies agreed to by the Member States at that conference do mention violence against women, but as a side issue to discrimination and development.<sup>9</sup> As a result of this formulation, there were a number of *ad hoc* initiatives in the UN system. By 1990, violence against women was on the international agenda, but as a narrowly construed issue of women's rights and crime prevention rather than an issue of human rights in a broad sense.

In 1991, both the UN Economic and Social Council and the Commission on the Status of Women decided that the problem of violence against women was important enough to warrant the development of further international measures. Following these decisions, a group of experts recommended that violence against women be included in the reporting under the Women's Convention, that a special rapporteur on violence against women be appointed, and that a Declaration on Violence Against Women be drafted. As a consequence, the CEDAW Committee in 1992 issued General Recommendation No. 19, which states that gender-based violence is an issue of gender discrimination and that states should comment on this matter in their reports to the CEDAW Committee.<sup>10</sup> The Commission on the Status of Women began to formulate a draft Declaration on Violence Against Women which was ready by the summer of 1993.

The major turning point, however, was the Vienna Conference on Human Rights in 1993. The women's lobby at this conference made an important impact. More importantly, women's groups were determined to make women's rights human rights. Their lobbying effort succeeded. Article 18 of the Vienna Declaration and Programme of Action states:

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 human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.<sup>11</sup>

The Vienna Declaration and Programme of Action also called for the appointment of a special rapporteur on violence against women by the UN Human Rights Commission as well as the adoption of the Declaration on the Elimination of Violence Against Women (DEVAW). In December 1993, the UN General Assembly adopted the Declaration<sup>12</sup> and in February 1995 appointed a Special Rapporteur on Violence against Women. Within a year the women's lobby had won a major victory. Women's rights were recognized as human rights and two UN mechanisms were in place to deal specifically with violence against women.

The victories achieved in this period were consolidated at the UN Conference on Population and Development in Cairo, and the Fourth World Conference on Women in Beijing. In spite of attempts to roll back the clock, the Beijing Declaration contains a special section on violence against women, which draws extensively from DEVAW.<sup>13</sup> In fact, as one commentator points out, the sections on violence against women are more specific on the steps that need to be taken and on the international norms that are applicable. Governments therefore have a better understanding of, and are more comfortable with, their obligations concerning violence against women than with women's human rights obligations in general.<sup>14</sup> It was also a major victory in Beijing when rape during time of armed conflict was recognized as a war crime, with victims having a right to compensation.

The language at these international conferences points to the near-universal acceptance of DEVAW. This declaration provides the normative framework for all international action in the field of violence against women. Article 1 defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life." Violence includes, but is not limited to, physical, sexual and psychological violence in the family such as battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women. The Declaration also calls on states to condemn and eliminate all forms of violence against women in the general community. These include rape, sexual abuse, sexual harassment and intimidation whether at work, in educational institutions or elsewhere, as well as trafficking and forced prostitution.<sup>15</sup> Finally it recognizes that violence can be perpetrated as well as condoned by the state. The definition of violence is broad and all-inclusive and acquires a certain transformative character. This breadth of scope and vision is reiterated in the mandate of the Special Rapporteur, where there is a call for the elimination of violence against women in the family, in the community and by the state.

What are the implications for international law in general and human rights in particular of including such non-state subjects within the purview of international human rights? Traditional human rights scholars and activists claim that this breadth of scope in the women's human rights movement will destroy human rights and its meaning in the world today. An angry human rights activist once told me, "Now human rights is the kitchen sink." Others such as myself argue that the women's question enriches human rights and is an important part of the flexibility and adaptability of the human rights paradigm to meet new challenges.

## NGOs and International Civil Society

A vital topic that interests me with respect to the issue of violence against women is the process by which it became such an important part of international human rights, and the active role that NGOs played in this process. It is no secret that certain international women's groups lobbied governments heavily to place this issue on the international agenda. The Global Tribunal on Violence against Women in Vienna, which was sponsored by a women's nongovernmental organization (NGO), made a powerful impact on the international community. Women's groups also took part in expert group meetings and helped draft many of the resolutions and declarations that began to take shape at international fora. The women's lobby is now requesting that there be an optional protocol to CEDAW that would permit communications by individuals to be filed against a state.<sup>16</sup> They are also lobbying for an international convention on violence against women which, unlike DEVAW which is a General Assembly resolution, will bind its parties.

This striking growth of the women's movement is an important factor in international politics today. It points to the significance of what is called international civil society as an initiator of programmes and mechanisms in the UN system. What is the nature of this women's lobby and why was it so successful? It is made up of an international coalition of women's groups that have focused their energies and efforts on violence against women. Distinct lobbies address different women's issues.

Initially there was the humanitarian women's lobby -- those interested in the problems of violence against women in armed conflict. The mass rapes and killings in Bosnia Herzegovina influenced this process. The lobby also included East Asian groups working with "comfort women" who had been victims of the Japanese military's sexual slavery in the Second World War.

A second lobby of African and Asian women was interested in health and traditional practices such as female genital mutilation, dowry deaths, *sati* and customary practices that were violent toward women. These issues had previously been brought before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in reports and through working groups relating to traditional practices that are harmful to women.

The third lobby of North American, European and Latin American women was interested in the issues of domestic violence, rape and sexual harassment. These groups, the most active and best coordinated, had a measure of influence over their governments. They relied on alliances with third world coalitions. However, at Beijing, perhaps for the first time, a certain resentment was articulated and expressed at the Western dominance of the women's lobby, especially in connection with United Nations bodies. There were arguments that UN procedures should be relaxed in order to permit more NGOs from the third world to attend UN meetings as accredited observers to the UN Economic and Social Council.

Another lobby playing a major part in these international initiatives was Women Living Under Muslim Laws, which made a strong case for including the violation of women's rights resulting from religious extremism as a major area of concern. Because of the lobbying efforts of this group, the mandate of the Special Rapporteur refers to religious extremism as one of the causes of violence against women. Finally, a lobby from Southeast and East Asia dealt with the problem of trafficking in women and girls and forced prostitution. This lobby has been very active at both the regional and national level; one of its demands has been that there be special mechanisms to deal with trafficking and forced prostitution.

NGO lobbies have truly assisted the United Nations' value formation. Many of the concerns of the Human Rights Commission and Sub-commission are animated by the international NGO movement. This activist role for organizations of international civil society marks a major step forward in the process of creating normative international standards. The victories at Vienna and Beijing are largely attributable to the consistent pressure of these NGOs.

However, the dominance of NGOs in the international process has not been accepted by all parties. Many states have NGO "phobia" and feel that the role of NGOs has to be curtailed. In addition they point out that many of the accredited NGOs are from the developed west and exert disproportionate influence and power. But whatever the sensitivities of certain governments, the NGOs have not only consolidated their presence but are in the process of lobbying for greater representation in UN functions and conferences. They have become an important part of the international process relating to human rights. Entrenching the prohibition on violence against women in international law is their special victory.

## The Nation State

This victory has wide reaching implications. Respect for international human rights is increasingly viewed as a constitutive element of the state and, through its international structures, human rights law offers advocates avenues of appeal that transcend the state itself. Governments that control states are no longer the only focus of women's pressure. Although they have not yet begun to exploit all of the avenues open to them, women are now in a position to demand direct participation in the supra-national bodies that oversee the enforcement of human rights.<sup>17</sup> Many international activities are becoming transnational and groups take normative initiatives without waiting for state authorization.

Transcending national boundaries in search of international protection involves not only women, but has parallel developments in other areas of human rights. The dynamic growth of human rights law in the past two decades has challenged the hegemony of the nation state and the sanctity of sovereign borders. The internal practices of a state have become an important concern of the international community. The Montevideo Convention on the Rights and Duties of States contains the classical requirements for state recognition: a permanent population, a defined territory, a government and the capacity to enter into relations with other states.<sup>18</sup> But the recent European Community guidelines

with regard to the recognition of the states of the former Soviet Union and the Yugoslav Republic have a different content. They speak of the need for respect for the UN Charter, the rule of law, democracy and human rights. They also make reference to guarantees of the rights of ethnic and national groups and minorities.<sup>19</sup> They do not as yet speak specifically of women's rights.

The important development is that human rights law has moved a long way toward becoming an integral part of what constitutes a state and its ability to conduct international relations. For some commentators, the state itself has been radically reconstructed to absorb human rights at its core, at least at the normative level. The applications of these principles have generated a host of criticism, and the European Community has been accused of applying the principles in an arbitrary manner. But it is important to realize that human rights have moved from the periphery to the center of international law. By articulating women's rights as human rights, women's issues therefore receive the benefits of the space created by recent developments in international human rights law theory and practice.

## State Responsibility for Conduct of Non-State Actors

While human rights doctrine in itself has led to greater scrutiny of state action, the women's movement has moved the very frontiers of this scrutiny. State action now includes even the failure of the state to prevent violence in the marital home. This is a profound change though one that resulted from an incremental process. The process began with CEDAW which places affirmative duties on the state to prevent discrimination, even by private actors. It is in the area of preventing violence against women, however, that states become responsible for conduct of private actors even in what was considered the most sacred and distinct private space -- the home.

The forerunners of this development are the Latin American cases on disappearances, which make state actors responsible in some circumstances for violence in the community perpetrated by non-state actors.<sup>20</sup> In *Velásquez Rodríguez vs. Honduras*, the Inter-American Court of Human Rights required states to make good faith efforts to prevent disappearances and to investigate them, as well as good faith efforts to determine, apprehend and prosecute the violators. The UN documents incorporate this standard and extend its reach. In article 4, DEVAW requires the state to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women."<sup>21</sup> This violence may be by the state but it may also include violence in the community and in the family.

In addition to the due diligence standard employed by the UN documents, other theories have been articulated to ensure state accountability for the violation of the rights of women. Scholars and human rights groups have argued that a state's failure to prosecute individuals who are violent against women constitutes a violation of equal protection in the implementation of laws. Research suggests that investigation, prosecution and sentencing for crimes relating to domestic violence are less frequent than for other crimes.<sup>22</sup> Wife murderers receive greatly reduced sentences. Domestic battery is rarely investigated, and rape frequently goes unpunished. This inequality of treatment can be verified by data, as Human Rights Watch demonstrated in the case of Brazil to show inequality in the administration of justice.<sup>23</sup>

The doctrine of state responsibility is then in the throes of a revolution. The family has come to be seen as a political unit which may entertain power hierarchies that use their power arbitrarily and violently. Intimacy and privacy are no longer justifications for the non-intrusion of the state. It is important that hierarchy within the family be challenged and equalized, and that victims of violence within the home be given access to redress.

This discussion on state responsibility must give us pause to consider the construct of the state as envisioned by women's rights activists. On the one hand, there is the view of the state as the perpetrator of violence or as in complicity with those who commit violence. At the same time there is the view of the state with what I have called "a Scandinavian aura": an activist and interventionist state extending protection to the battered, violated woman. These views only prove the ambivalence we have toward the state and how, despite our many attempts to bypass its tangled web, there is no escape. Women must necessarily rely on the very state apparatus for protection against non-state violence. The Janus face of the state poses its own dilemma. This duality is a theme which runs through many of the writings of women experts on this subject.

## *Reinterpretation of Human Rights Doctrine from a Gender Perspective*

Not only the basic tenets of international law such as state responsibility but also human rights doctrine is being

transformed by the discourse of women's rights. It is often said that the first generation of human rights was civil and political rights; that the second generation is economic, social and cultural rights; and the third generation is considered to be group rights and the right to self-determination. It may be argued that women's rights is the fourth generation -- pushing for new rights like the rights of sexual autonomy, and transforming human rights doctrine through a radical reinterpretation of the earlier generation of rights to meet the concerns of women.

The right to life and freedom from torture are examples of rights subjected to reexamination and reinterpretation in light of violence against women. Rhonda Copelon has put forward the interesting idea that torture should include violence against women in the home.<sup>24</sup> In international instruments, torture requires severe physical and/or mental harm and suffering that is intentionally afflicted for a specific purpose by a person with some form of official involvement. Copelon stresses the official involvement through state inaction, and the victim's inability to get redress. Though this view is considered a radical reformulation of the notion of "official torture," there are many women's groups which have accepted it as one way to analyze violence against women as a human rights violation.

Another strand of feminist writing examines the question of equality, a cardinal principle of human rights and the first step in the recognition of women's rights. The principle of non-discrimination against women is firmly entrenched in international law. It is the anchor of all women's rights and the core subject of the Women's Convention. But feminist writings have experimented with the concept to bring in the issue of "difference" -- the special quality of being female as an aspect that should be respected by the principle.<sup>25</sup> In other words they want the human rights concept of equality to be reimaged to include and understand gender difference.

In the past, for example, equality has meant women's access to places and positions that were traditionally male. But how then do we treat pregnant women, violence against women and other gender-specific issues? It is argued that the burdens and threats of sex-specific situations and violations must be explicitly taken into account when determining what constitutes equal protection under international law. Programs for affirmative action would be more firmly rooted if such burdens were accepted and recognized. In addition, third world women argue that difference in culture and lifestyle should also be accepted, albeit within the general framework of equality. Finally commentators like Martha Minow have argued that masculine and feminine are differences that require analysis and conceptualization without making them hierarchical.<sup>26</sup> Women's experiences are different and women's rights should learn to express these differences without resorting to male privilege.<sup>27</sup>

Although some feminists have attempted to go "beyond equality" to a deeper analysis of what it means to say that men and women are equal, a few state actors in the international arena such as Sudan, have taken a different direction, one that threatens to restrict women's rights. They argue that the word "equality" be replaced with the word "equity" with respect to gender-based issues. Equality is not seen as desirable. Rather, equity and fairness, as more abstract and flexible provisions that could readily depart from the principle of formal equality, should guide state action toward women. Of course, such provisions would likely draw on contextual mores and particular traditions to develop their meaning and guide their applications.

## *Pluralism and Women's Rights*

Another aspect of human rights doctrine that is challenged by the women's rights movement is the right to self-determination of peoples, one powerful statement of which is contained in the first article of both the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. It is our commitment to self-determination in multicultural societies that is the ultimate basis of pluralism in the world today. We have learned through it to respect the rights of communities to speak their own language, practice their own religion and to live their own lifestyle. But what if these cultures violate the rights of women? Here lies perhaps the most controversial aspect of women's rights. The right to self-determination is pitted against the CEDAW articles that oblige the state to correct any inconsistency between international human rights law and the religious and customary laws operating within its territory.<sup>28</sup>

The dilemma extends to issues such as female genital mutilation and Shari'a-type punishment. Many states fail to end such practices because they do not want to antagonize their minorities (or, in some case, majorities) This is particularly true in the multi-ethnic states of Asia where a pattern of "live and let live" has come to guide communal action. As a result, the applicable personal law differs for women depending on the community to which they belong. Marriage, divorce, custody of children, inheritance, maintenance and so on are decided by that community, not by national status. Many of these personal laws violate basic tenets of the Women's Convention. India, for example, made a reservation when it signed CEDAW because it wanted to maintain the personal law of Muslims and other minorities.

Consider the *Shah Bano* case in India where a Muslim woman sued for maintenance under the criminal procedure law, relying on a provision against destitution.<sup>29</sup> In India, Muslim men do not have to pay maintenance under personal law.

But drawing on the criminal law provision, instead of Muslim personal law, the Supreme Court of India ruled in favor of the woman. This led to a major uproar and to outbursts of rioting in the major cities of India. Rajiv Gandhi, the then prime minister, had to amend the criminal law to appease an angry Muslim minority. Shah Bano denounced the judgment of the court under pressure from her community. The arguments put forward by the Muslim minority concerned the right to self-determination, pluralism and diversity. Given the political contours of India, women's rights had to give way to the realities of pluralism.

As this case demonstrates, unless there are bottom-line standards, pluralism in many societies will be achieved at the expense of women and their bodies; female genital mutilation, *Sati*, punishment by stoning and inequity in the personal law will prevail over universal standards. Women's groups argue that pluralism is necessary but must be built on a firm foundation of human rights. Surprisingly, this view is not universally accepted.

The debate came to the fore at the Beijing Conference, where the universality clause of human rights for women was debated until the eleventh hour. The final formulation was an important victory for the rights activists. It read, "The universal nature of these rights and freedoms is beyond question."<sup>30</sup>

For women's groups, it is perhaps most difficult to accept that pluralism means that diverse standards for the private lives of women will prevail. If all women are equal, then why do Muslim women have different rights from Hindu women, or Malay women from Chinese women? A solution may lie in the possibility of voluntary choice. Women's groups have come forward with alternative formulations of pluralism that rely on the notion of consent. Women and men should be given the right to choose which law should govern their private lives. If they wish to be governed by Muslim law, that is their prerogative. But if they wish to be guided by general secular law, that choice should also be a right granted to the individual.

This notion of choice is integral to a human rights understanding of the issue of cultural pluralism. Many feel that women's attitude toward cultural diversity should be conditioned by protecting such choice. Cultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily. By protecting choice, voluntariness and the integrity of female decision-making, we may be able to reconcile the dilemma between cultural diversity and the need for the protection of women's human rights.

### *Articulation of New Norms -- Sexual Rights*

As I mentioned earlier, there is a case for calling women's rights the fourth generation of human rights. The movement is not only generating new interpretations of existing human rights doctrine -- whether it is the right to be free from torture, to enjoy equality, or to limit the right to self-determination -- but it is also generating new rights. The most controversial is the issue of sexual rights, which refers generally to a woman's control over her sexuality and her access to primary and secondary health care and reproductive technologies. It concerns the international recognition of the rights of women over their bodies and their sexuality. The attempt to apply the human rights framework to reproductive health is an important innovation. The recent world conferences have been a major landmark in this field. The Declaration and Programme of Action of the International Conference on Population and Development states "Reproductive health ... implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and freedom to decide, if, when and how often to do so."<sup>31</sup>

Paragraph 96 of the *Beijing Platform for Action* also states that "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence."<sup>32</sup> Though the term "sexual rights" was included in the draft Platform of Action, it was omitted from the final version, an omission indicating the controversial nature of this suggestion. It must also be noted that the formulation falls short of the right to abortion and sexual preference, an important demand of women's groups and the gay movement. Nonetheless, the inclusion of the paragraph even in this truncated form, and its accompanying vision of sexual autonomy and freedom of choice, are important developments in international human rights discourse.

### *Conclusion*

Human rights discourse is a powerful tool with which to criticize states. Nonetheless, insofar as it concerns a woman's private life, it is actually in many societies quite a weak discourse, particularly in the context of family and community relations. While international human rights law moves forward to meet the demands of the international women's

movement, the reality in many societies is that women's rights are under challenge from alternative cultural expressions.

This phenomenon is deeply troubling. Regardless of all the international standards and accompanying national legislation, unless there is resonance in national civil society, there is little scope for real transformation. Although international civil society has been active in the field of women's rights, at the national level, when it comes to family and community in many countries, civil society is far more conservative.

Women's groups working at the national level in many Asian and African countries are facing innumerable obstacles. In this regard, I would like to dedicate this talk to Asthma Jehangir and Hina Jilani, Pakistani human rights activists, who have had to face armed thugs in their houses and the threat of death for fighting for women's rights in the national context. This national struggle is the difficult fight, not the international one. Unless human rights discourse finds legitimacy in these areas of a country's national life, women's rights and human rights will remain mere words on paper.

In Asia especially, this is the paradox that we have to face. International standards of women's rights, which are at the frontier of human rights development, collide with cultural movements at the national level that question the very articulation of women's concerns in human rights terms. This very contradiction provides the women's movement with the promise of ultimate liberation. But it also contains the darker possibility that women's rights may be subsumed by national upheavals that have little respect for the international formulations.

The next decade will witness this confrontation. One can only hope that the common values of human dignity and freedom will triumph over parochial forces attempting to confine women to the home. Only then will we be able to celebrate the true victory of women's rights recognized as fundamental human rights.

## Endnotes

1. Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, entered into force 3 Sept. 1981, G.A. Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), 1249 U.N.T.S. 14 (*hereinafter* CEDAW). [BACK TO TEXT](#)
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3. *See* Gannath Obeyesekere, *The Apotheosis of Captain Cook: European Mythmaking in the Pacific* (Princeton University Press) (1992). [BACK TO TEXT](#)
4. *See, e.g.*, Veena Das, *Critical Events: An Anthropological Perspective on Contemporary India* (Oxford University Press) (1995) and A. Nandy, *At the Edge of Psychology*, Oxford University Press: New Delhi (1980). [BACK TO TEXT](#)
5. Hilary Charlesworth, "What are Women's International Human Rights?," in Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives* 58, 61 (University of Pennsylvania Press) (1994) (*hereinafter*, R. Cook). [BACK TO TEXT](#)
6. Celina Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction," in R. Cook, *supra* note 5 at 85, 94. [BACK TO TEXT](#)
7. *See generally* Romany, *supra* note 6. [BACK TO TEXT](#)
8. CEDAW, *supra* note 1. [BACK TO TEXT](#)
9. *See* The Nairobi Forward Looking Strategies for the Advancement of Women, adopted by the World Conference to Review and Appraise the Achievements of the U.N. Decade for Women, Nairobi, Kenya, July 15-27, 1985 (Para. 28 'Abused Women') (Foreign & Commonwealth Office, London SW1). [BACK TO TEXT](#)
10. Committee on Elimination of Discrimination Against Women, General Recommendation No. 19 (Eleventh Session, 1992): Violence Against Women, A/47/38. *See especially* paras. 4, 5, 24(n), 24(s), 24(u) and 24(v). [BACK TO TEXT](#)
11. Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, U.N. Doc. A/Conf. 157/24, (1993) Para. 18. [BACK TO TEXT](#)

12. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993). [BACK TO TEXT](#)
13. Fourth World Conference on Women, Beijing China, 4-15 Sept. 1995, Beijing Declaration (para. 29); Beijing Platform for Action (Section D: Violence against Women), U.N. Dept. Of Public Information, United Nations, New York 1996. [BACK TO TEXT](#)
14. Donna Sullivan, "Envisioning Women's Human Rights: What Was Achieved in Beijing?" *China Rights Forum*, 19,21 (Winter 1995). [BACK TO TEXT](#)
15. DEVAW, *supra* note 12, art. 2, 4. [BACK TO TEXT](#)
16. At the time of publication, the draft optional protocol to CEDAW had passed through consideration by a working group of the Committee on the Elimination of Discrimination Against Women. [BACK TO TEXT](#)
17. Karen Knop, "Why Rethinking the Sovereign State Is Important for Women's International Human Rights Law", in R. Cook, *supra*, note 5, 153, 159. [BACK TO TEXT](#)
18. Montevideo Convention on the Rights and Duties of States, December 6, 1933, Art. 1, 49 Stat. 3097, 165 LNTS19. [BACK TO TEXT](#)
19. Knop, *supra* note 17 at 155. [BACK TO TEXT](#)
20. In *Velásquez Rodríguez vs. Honduras*, the Inter-American Court of Human Rights held that Honduras was responsible for politically motivated disappearances even if they were not carried out by government officials. The state has an implicit duty to "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights." See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Ser. C, No. 4 (1988), 28 I.L.M. 294, at 324 (1989). [BACK TO TEXT](#)
21. Article 4, U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 48 U.N. GAOR Suppl. (No. 49) at 217, U.N. Doc. A/48/49 (1993). [BACK TO TEXT](#)
22. Dorothy Q. Thomas and Michiele E. Beasley, "Domestic Violence as a Human Rights Issue, 15 *Human Rights Quarterly* 36 (Number 1, 1993). [BACK TO TEXT](#)
23. Human Rights Watch/Women's Rights Project and Americas Watch, *Criminal Injustice: Violence against Women in Brazil* (1991). [BACK TO TEXT](#)
24. Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in R. Cook, *supra* note 5, 116. [BACK TO TEXT](#)
25. Sunila Abeysekere, *Women's Human Rights, Questions of Equality and Difference*, ISS Working Paper No. 186 (1995). [BACK TO TEXT](#)
26. Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Cornell University Press) (1990). [BACK TO TEXT](#)
27. In the area of violence against women, for example, rape as a gender-related act of sexual violence requires a certain sensitive response from the criminal justice system. The nature of the crime compels a different attitude with regard to the gathering of evidence and the strategy of the prosecution during trial. [BACK TO TEXT](#)
28. CEDAW, *supra* note 1, art 2(f). [BACK TO TEXT](#)
29. *Mohammed Khan vs. Shah Bano Begum and others*, Criminal Appeal No. 103 of 1981, decided on April 23, 1985, 2 Supreme Court Cases 556 (1985). [BACK TO TEXT](#)
30. United Nations, The Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing China, 4-15 Sept. 1995, Platform of Action, Para. 211, U.N. Dept. Of Public Information, United Nations, New York, 1996. [BACK TO TEXT](#)
31. U.N. Population and Development Programme of Action adopted at the International Conference on Population and Development, Cairo 5-13 Sept. 1994, Chapter VII "Reproductive Rights and Reproductive Health", para. 7.2.; U.N. Dept. for Economic and Social Information and Policy Analysis, ST/SEA/SERA/149. [BACK TO TEXT](#)

32. The Beijing Declaration and Platform for Action, *supra* note 30. [BACK TO TEXT](#)

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