

THE ADVANCEMENT OF WOMEN'S RIGHTS

Paper 16

by Judge Navanethem Pillay

Centre for Human Rights

University of Pretoria

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I feel deeply honoured to be awarded the 2002 Woman in Law Award from the Gender Unit of the Centre for Human Rights, and the University of Pretoria. I particularly appreciate receiving the award before this illustrious audience of judges, academics, human rights activists and students.

My speech today is a journey, a trip that we, as participants in the advancement of women's international human rights, are taking through regions that are diverse and distant, but not any the less similar in their acute need for gender justice and women's representation in the law. I am referring to the deep patterns of inequality that extend beyond geographical borders as well as the disparate application of the law to women in nearly every society in the world.

Despite numerous international conventions and laws, the response of both national and international communities to the rights of women has repeatedly been marked by tolerance of impunity rather than enforcement of the law. That is until recently.

And it is this very recent history - of changing law and gender relations and of the influence of women's representation in the law both internationally and domestically in South Africa - which is the focus of my address.

During World War II, rape and other forms of sexual assault not only occurred with deliberation and regularity, but also were "given license, either as an encouragement for soldiers or as an instrument of policy." ¹ While the international community was aware of the sexual assaults taking place, little, if anything, was done to prevent such atrocities or to punish those guilty of committing them. This inexcusable failure to act continued after the war ended – an even greater injustice to women in view of the fact that as the war came to an end, the Nuremberg and Tokyo War Crimes Tribunals were established to address war crimes, of which women were direct victims. ²

It was not until fewer than ten years ago, with the creation of the International Criminal Tribunal for the former Yugoslavia (the ICTY), and a year later, the International Criminal Tribunal for Rwanda (the ICTR), in which I serve as the President, that significant advances were made in the recognition of gender-based violence. These tribunals are not flawless, but they have given birth to new jurisprudence, thus increasing the likelihood that wartime abuses against women will henceforth be rigorously prohibited, prosecuted and punished.

The conflicts in Yugoslavia and Rwanda engendered a new breed of war crimes. Although rape has historically been used as a weapon of war to terrify, humiliate, degrade, destroy and subordinate, the rapes committed during these conflicts allegedly went one step further. In 1994 in Rwanda women were allegedly subjected to brutal forms of sexual violence as part of a massive attempt to destroy the Tutsi population. While the ICTR has prosecuted few cases of sexual violence, the judgment against Jean-Paul Akayesu rendered on 2 September 1998 by Trial Chamber I, on which I sit, has greatly expanded the international community's

ability to prosecute gender-based war crimes. [3](#) Akayesu, mayor of Taba commune in Rwanda, was the first war criminal to be tried and convicted of genocide since the adoption of the Genocide Convention in 1949. [4](#) His genocide conviction explicitly recognized that rape resulted in the “destruction of the spirit, of the will to live, and of life itself.” [5](#) The jurisprudence on gender issues emanating from the ICTR and from cases before the ICTY provides a precedent in the ways in which international and regional bodies view and treat sexual violence. It has been said that the painfully graphic evidence of the crimes emerging in trials before the ICTR and the ICTY horrified the international community -- in part because of successful lobbying and pressure exerted by the women’s Caucus and other human rights advocates – and played a pivotal role in influencing the Statute for the International Criminal Court, signed in Rome in July 1998. [6](#)

As a consequence of these commingling of influences, the Statute of the ICC is the first international treaty to recognize a range of acts of sexual and gender violence as among the most serious crimes under international law. Most of these crimes had never before been explicitly articulated as crimes in any international instrument or domestic criminal code. Thus, it is hopeful that the extensive development of gender related crimes in the contemporary war crimes tribunals will likely continue to have a significant impact on other judicial and non-judicial endeavors, including Truth Commissions and educational and legal literacy programmes, which seek to end the historical impunity for sex crimes.

The voices raised throughout the world to articulate international human rights standards are growing in number and frequency. This, I believe, is testimony to the increasing influence of women’s participation in the legal profession, in NGOs and in policy-making positions. Of course, the process of bringing about gender equality -- legally, socially and economically -- is complex and uneven.

Following the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 by the UN General Assembly, the issue of gender has moved to centre stage in the debate about the future of customary laws and of plural systems of law. CEDAW has laid the foundation for women’s international human rights laws, transcending national, religious and customary laws. To address the legal, social and economic structures at the root of women’s weak position in law and society, CEDAW requires States to undertake constitutional, legislative, and socio-economic reform aiming at the elimination of discrimination against women in the private as well as in the public sphere. Yet, in most societies there still exist extensive gaps between principles of gender-equality and self-determination, and the local traditions and customs which govern women’s everyday lives.

One recent, poignant illustration of the disparity between human rights principles and customary law is the case reported by the press which occurred on 22 June of this year in the Pakistan province of Punjab. In this case, a village court sentenced a thirty-year-old woman to be forcibly raped as punishment for her twelve-year old brother’s alleged illicit affair with a woman of a more powerful tribe. The sentence was carried out before hundreds of witnesses by four men who raped the woman for more than an hour. [7](#)

Another illustration of the disparity between human rights principles and traditional law is the Nigerian case decided on 19 August of this year. In that case, to the chants of a largely male audience, the President of an Islamic Appeals Court in northern Nigeria, applying Sharia law, sentenced a woman to death by stoning for having a child outside wedlock.

A further widespread example is that of female genital mutilation (FGM). In many States, in spite of laws prohibiting FGM, customary traditions allow a young woman no choice in this intimate, personal matter, unless she is prepared to be expelled from her community.

Indeed in many countries women do not even have the equal legal rights of men. For instance, women in Kuwait do not have the right to vote.

What is the everyday reality for the majority of women in South Africa? In just under a decade, the transition from apartheid to democracy has led to a commitment to gender equality as incorporated in the South African Constitution. In 1991, at the outset of the constitution-building process in our country, the Women's National Coalition identified issues that the new South African Constitution and its legal framework should address. It called for these new mechanisms to guarantee social justice, to protect and celebrate the diversity that had formerly been the source of discrimination, and to build a nation in which power is equally shared, and men and women can both experience the full range of human alternatives.

Despite impressive gains, however, the struggle for gender equality will require constant attention and vigilance. While women have gained greater representation on South Africa's political stage, yet their larger numbers have not directly translated into an equal increase in political and economic power.

Many women also point to a number of areas where gender inequities persist in daily life. Among these areas of concern are poverty, economic and educational deprivation, violence against women, and customary practices -- which remain significant obstacles to women's equality.

Although accurate statistics are unavailable, both research and anecdotal evidence suggest that violence against women in South Africa has reached epidemic proportions. It has been estimated that one in every four adult women is regularly assaulted by her partner, that one in two South African women is raped in her lifetime, and that the rape rate for black women is three times higher than it is for white women. Arguably, violence against women has always been a serious problem; the distortions of apartheid merely rendered domestic violence either a private issue or one confined to black residential areas and therefore of no concern to the authorities. However, the new political atmosphere of transformation has resulted in greater recognition of and exposure to the problem of violence against women.

Great resources will be required to overcome the obstacles -- legal, social and economic -- to bring about gender equality in South Africa, and in the world. Yet South African women have valuable human resources at their disposal. Firstly, the concerns of women are now being pursued in a society already amenable to legal and political change. Women's groups in the past existed largely to further the racial struggle; yet women acquired excellent organisational and political skills in the process -- skills that may be harnessed to lobby for women's rights today.

Secondly, insofar as gender equality has been incorporated in law and policy, the government cannot long refuse to respond to women's representation of their rights.

Thirdly, there is a close connection, on a local and national level, between the situation of

women and the situation of South African people as a whole. For example, a programme of land redistribution cannot fail to recognize the role that women play in the agricultural sphere; so, too, access to housing requires recognition of the large number of households headed by women. Women's struggles revolve around basic issues, such as food, shelter, health, education and physical security. The more focus there is on the legal aspects of these fundamental issues, the more support and commitment there will be from society as a whole.

Within the last decade, women -- in South Africa, in other countries of the world, and on the international stage -- have played a crucial role in the articulation and development of human and gender rights jurisprudence and legislation. History has proven that attention to human rights violations, including gender crimes, does not come without accountability and struggle and that complacency abounds once vigilance is relaxed. Today there is great need for increased participation by women on the legal stage, domestically and internationally, to offer the perspective of women's experiences in the interpretation, enactment, and reformation of the law.

Because of my role as a judge in an international criminal tribunal, I am particularly aware of the difficulties faced in assuring women's representation in the law on the international stage. Of sixteen trial and appeal judges at the ICTY, there is only one woman, Judge Florence Mumba of Zambia, who in fact was elected only on the seventh ballot and after the protests of a number of NGOs.

Another challenge facing women's representation on the international stage will be the forthcoming election of judges to the new International Criminal Court.

Whether the stage is international or domestic, there are serious roles for far more women to play in the development and implementation of women's fundamental human rights. Legally, women have made dramatic progress in the last decade, through international and national statutory provisions and jurisprudence. Yet we have a long journey before us to transform legal principle into social and economic reality. The majority of women in South Africa, and in the world, still live in harsh poverty and lack education, dignified work, adequate health care, and social assistance. Rape and other forms of sexual violence are more than mere infringements upon the honor of the victim; they are a denial of women's fundamental human rights.

We, as participants in the advancement of women's rights, must continue the progress that recently has been achieved in law. It is time that we use the legal mechanisms established and the international support now available to redress social and economic gender inequalities in South Africa and elsewhere. Only through full recognition of gender equality in relation to socio-economic issues, along with vigorous legal advocacy, will the human rights of women be fully protected and enjoyed.

1.Theodor Meron 'Rape as a crime under international humanitarian law (1993) 87 *American Journal of International Law* 424

2.Kelly Dawn Askin *War crimes against women: Prosecution in international war crimes tribunals* (1997) 27.

3.Kelly Dawn Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status (1999) 93 *American Journal of International Law* 101.

4. *Prosecutor v Akayesu* Case No ICTR-96-4-T (Trial Chamber I, 2 September 1998)
5. As above, 289 (English version).
6. Kelly Dawn Askin 'International redress for gender related crimes: A jurisprudential explosion, but resistance abounds, presentation given before ICTR Chambers Seminar, 13 July 2002.
7. The four men and two jurists were subsequently sentenced to death in the Pakistan Court Report *The Mercury* 2002-09-02 4.