FEMINIST LAW BULLETIN
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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- *Identifies when feminist issues arise in policy, legislative proposals, and the practice of law;*
- *Provides an opportunity for exploration and discussion of some of these issues;*
- *Enables a general readership to gain an introduction to feminist analysis of the law.*

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Broken Homes, Broken Bones

By Wendy Parker, School of Social Policy and Social Work, Massey University

Recent cases have highlighted the inadequacy of our matrimonial property law to effectively recognise family violence. Progressive, pro-women ideas of the 1970s, such as the presumption of equal sharing and the removal of fault have not worked in women's favour in this area of property division.

In 1980, with the introduction of the Family Proceedings Act, we moved to a system of no-fault divorce. The focus shifted away from marital misconduct. At that time family violence was more of a hidden phenomenon, but ironically the lingering effect of this shift has been to make it harder to make violence count in property division.

The Matrimonial Property Act 1976 (MPA) continued the no-fault trend into post-divorce property settlement. It created presumptions of equal sharing and centred on contributions to the marriage partnership, rather than to the property of the marriage.

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However the notion that fault was entirely removed from the MPA is erroneous. Relevant misconduct was greatly narrowed, with an emphasis on misconduct that directly affected property. Certain kinds of misconduct remained, such as fraud, possibly because of its direct economic impact.

Accounting for violence in property settlement is not easy. The technical detail of the MPA presents many hurdles for victims of violence. For women arguing that violence has either increased their contribution or detracted from that of their violent ex-spouse, the presumptions of equal sharing are firmly entrenched and difficult to displace. Because contributions are considered globally, a violent partner can 'make up' for their behavioural deficits in this area by contributing in others.

This happened in *S v S* (District Court, Whangarei, FP 888/218/82, 22 April 1991, Judge Robinson) where the fact that the husband had been "a good provider, a hard worker and a good father" meant that he got half the property. This was despite evidence of serious assault, drink-drive offences and a final protection order in favour of the wife.

To rebut the presumption of equal sharing of the house and chattels under s 14, 'extraordinary circumstances repugnant to justice' must be established. While there should be few problems establishing that family violence is repugnant to justice, having to prove it is an extraordinary (i.e. rare) phenomenon is preposterous.

The test for misconduct is also problematic. The MPA (s 18(3)) specifically directs judges to take misconduct into account only if it has been 'gross and palpable *and* has significantly affected the extent or value of the property'. Thus the violence must affect the property, while the effect on the innocent spouse is not considered.

Therefore, where violence is concerned, the causal link to property remains, taking us back to the principles of the 1963 Act, supposedly discarded in 1976.

The causal link required is a strong one. A 'significant' effect on property is necessary. In *Wright v Graham* (District Court, Wellington, FP 558/92, 16 August 1995, Judge Moss) the wife's health deteriorated to the point where she was forced to give up work. There was also evidence of substantial expenditure on alcohol by the husband. However, equal sharing was ordered, there being insufficient evidence of the link between the violence and the couple's property.

The gross and palpable limb of the test again poses problems. In *Wright v Graham*, the judge said that 'palpable' meant that the violence must be "readily perceived or evident", clearly difficult in a domestic situation and clearly inappropriate given the private nature of the crime.

For all of these reasons (and more) the MPA does not deal adequately with family violence. The statute does not meet the needs of those suffering inter-spousal violence and presents too many barriers to equitable outcomes. The law as it stands protects men from the effects of their violence. An amendment specifically directed at this issue is required.

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Feminist Legal Research

Legal research methodologies are often criticised by feminists as being too narrowly focused and as incapable of placing women's experiences before the courts. Most traditional legal research involves consideration of precedents (cases already decided) to find authority for a client's case. The highest (or strongest) authority usually prevails (such as a Court of Appeal decision).

Cases which fall outside these precedents or which do not fit neatly are often difficult to pursue. For example, feminist analysis of the concepts of "provocation" and "self defence" has lead to suggestions that these legal concepts should be more broadly defined to include "provocation" as this may be experienced by women. This approach is a liberal one, seeking to make changes within the narrow definition of existing law, which is already based on precedents set in a conservative legal framework.

In contrast to traditional legal research, feminist legal research does not adopt the "might is right" approach to precedent. In general terms, a feminist research methodology is research based on women's experiences *as told by women*. A feminist *legal* research methodology seeks to bring those experiences to court cases, legal analysis, interpretation, and policy and law making.

While feminists and feminist legal research methodologies vary widely, there are some key elements that are common to each. In New Zealand some of the features of a feminist legal research methodology include:

1. Compliance with the Treaty of Waitangi: for example, in the way in which research is designed, how research is collected, by whom the research is carried out and to whom the research belongs.
2. Research is carried out in women's own social and cultural context: this may involve, for example, conducting research where women are (such as women's centres or other community groups). A more qualitative research method may be needed, namely, one which allows women to articulate and question their own experiences. In contrast a quantitative research method which takes a sample of responses to a pre-determined set of questions may limit women's expression of their experiences.
3. Clarity on the part of researchers about their own feminist analysis and of their social and cultural context.
4. Women's experience is central to the research. Women's subjective experience should be valued and respected in the research.
5. Research is based on the premise of action towards change.
6. Feminist legal literature is cited and employed in carrying out the research.
7. The research respects the multiplicity of women's experiences.
8. Findings and analysis are shared with any participants for input and feedback.
9. Comprehensible language is used in the process and analysis to ensure the research is accessible.
10. Where appropriate, the research is a two way process, for researchers and any participants.

A feminist legal research methodology generally reveals differences in the way in which diverse women experience the law and the way in which the law categorises or defines that experience.

There are many options for how to use feminist legal research as action for change. One option is to seek to use the research in individual cases to try extend or develop existing law to reflect women's diverse circumstances. This approach has been used in a number of cases in New Zealand involving "battered women's syndrome", with varying degrees of success.

A second option is to do away with the precedent or 'bad law' altogether. This can be done either by trying to have an earlier court decision overturned, by enacting new legislation to overturn it, or by repealing out of date legislation. A recent example of this approach is the proposed changes to matrimonial property law. However many women's groups have argued the matrimonial property Bill is far too weak and does not accurately reflect women's experiences of marital breakdown.

A third option is to develop new laws that more accurately reflect diverse women's different experiences. The Domestic Violence Act 1995 is a recent example of this approach (the policy for which was largely influenced by feminist research in the early 1990's).

Further reading:

Feminist Voices Women's Studies Texts for Aotearoa/New Zealand Edited by Rosemary Du Plessis, Oxford University Press, 1992

The Hidden Gender of Law Regina Graycar and Jenny Morgan, Federation Press, New South Wales, Australia, 1990

Protection from Family Violence: A Study of Protection Orders Under The Domestic Protection Act 1981, Ruth Busch et al, Report to the Victims Task Force, New Zealand, (Abridged 1992).

A Chief Justice For Our Times

History was recently made with the celebrated announcement of New Zealand's first ever woman Chief Justice, Justice Sian Elias.

The Chief Justice is the country's top judge and is the official head of the Court of Appeal. The Chief Justice stands in for the Governor-General when he or she is ill or overseas. The Chief Justice also carries out administrative work related to judges and the courts.

Justice Elias is currently a High Court Judge. Her appointment has won widespread support, particularly from Maori and women's lawyers groups.

In addition to her outstanding legal ability, Justice Elias is highly regarded for her links with community law centres and her advocacy for Maori in Treaty claims before she became a judge.

The current Chief Justice, Sir Thomas Eichelbaum, retires in May. Justice Eichelbaum has been a strong supporter of gender equity issues during his term and has worked with others, for example, to introduce gender training for the judiciary and to establish the Judicial Gender Equity Working Party.

The announcement of this appointment comes less than five years after the appointment of New Zealand's first woman High Court judge, Dame Silvia Cartwright.

Justice Elias will take up her appointment in May.

1996 Census Data on Women in New Zealand

The New Zealand Census is conducted once every 5 years with the last in 1996. Statistics New Zealand and the Ministry of Women's Affairs have recently released some of the revised Census data on women. This information is a useful tool for feminists seeking to ensure women's social context is clearly understood (and the different social contexts of different groups of women).

The results show differences for Maori and non-Maori women in New Zealand in the areas of population profile, family and household composition, education, work and income.

83% of New Zealand women identified as European, 15% as Maori, 6% as Pacific Islands, and 5% Asian. Maori and Pacific Islands females have a more youthful profile than Pakeha with median ages of 22 and 21 years respectively compared to a median age of 34 for Pakeha. The median age for Asian women was 28 years.

In general, New Zealand women are becoming more educated, as more women (83%) leave school with a formal qualification than men (78%). Women are also increasing their participation in the labour force (from 53.3% in 1986 to 57.9% in 1996).

However, women are much more likely than men to be in part-time work (36% compared to 12.5%) and continue to be over-represented in "areas which reflect traditional ideas of women's work."

Other differences are that 37% of women worked in community, social and personal service industries compared to 17% of men and 25% of women worked in wholesale, retail trades, restaurants and hotels.

Results also indicate women are less likely to marry than in the past and are delaying marrying and childbearing. 7.8% of women were sole parents (compared to 5.8% in 1986). Women in their 30s are the most likely to be sole parents, reflecting the fact that the majority of sole mothers have previously married.

Women are more likely to have a disability than men are, mainly because women live longer than men do. In 1996, almost one in four women reported at least one disability.

The median income for women in 1996 was $12,600 per year. This is just over half of the median income for men, meaning there has only been a small decline in relative income levels as between women and men in New Zealand.

However, some groups of women are particularly affected by low incomes. The median income for Maori women was $11,200, $10,800 for Pacific Islands women, and $7,100 for Asian women.

There continues to be a gender pay gap whereby women in full-time employment receive lower average weekly earnings from wages and salaries than men (women earn about 85% of what men do).

Copies of *New Zealand Now: Women* are available for $24.50 from Statistics New Zealand and selected bookshops.

Review: Professor Sheilah Martin QC on Gender Bias

Doctor Sheilah Martin is the Dean and Professor of Law at the University of Calgary in Canada. With an extensive background in the study of gender bias in Canada, she recently visited New Zealand to attend the New Zealand Law Society Law Conference in Rotorua.

While here, she took time to make several public lectures, including one at Victoria University in Wellington. In a thought-provoking and articulate address Dr Martin challenged the audience to understand what gender bias is, gave insights into knowing when gender bias is operating, and the sorts of places where gender bias may be found.

Dr Martin began by noting that the focus of discussion on gender bias (or sexism) should be on the attainment of an ideal, namely, justice for all, rather than the practice of inequality. While it was easy to focus on specific cases and the individuals involved, she considered it important to look at the cases in a broader, more systemic way when analysing the issues that were raised.

In looking at that issue, Dr Martin raised the more practical question of how to analyse gender bias. For example, how do you know when gender bias is operating? How do you know when a situation disadvantages or has an adverse impact on women? Dr Martin suggested some useful pointers.

The use of improper and outmoded stereotypes

Dr Martin thought such stereotypes to be problematic as they give an individual characteristics which she is said to have solely because of her relation to some other group. In addition to being a denial of individuality, such stereotypes are also difficult because the group stereotyped rarely gets to choose its own characteristics.

Usually the stereotype is one perpetuated by someone else and really amounts to "labelling." For example, that a woman will complain immediately if she has been sexually assaulted. In fact, most research shows there will be time delays between when a woman is assaulted and when she reports to either family or friends or to the Police.

Use of the male norm to define what is "normal"

A good example is found in the health area. In the traditional medical model male bodies are seen as the "norm" and women's bodies as male bodies with "extra bits." This model had been applied in one Canadian case to justify discrimination between "pregnant people" and "non-pregnant people" without any regard for the fact that only women can be pregnant.

The degree of sensitivity to the perspectives of others

Dr Martin gave a short, useful test: she asked everyone to list 5 things they do each day to keep themselves safe from sexual assault. The purpose was to highlight the differences on a day to day level of how the fear of sexual violence impacts on women and men.

The use of double standards

For example, using the lower wages of women in certain occupations as the

standard by which worker compensation will be paid to them. In these cases, it is argued, women's lower wages reflect systemic discrimination (shown in the gender pay gap) and women should not be doubly disadvantaged by that discrimination when assessing the amount of any work-related compensation.

The privileging of men over women

For example, the legal rules about consent in rape trials. Dr Martin referred to the defence available to an accused who testifies that while the woman may not have been consenting to sexual connection, he *honestly thought she was*. The result is that his interpretation of events is preferred to what the woman may have experienced. In a move to change this, Canada has recently introduced a "no means no" Bill. If passed, the Bill will require the accused to show that he took reasonable steps to secure consent. This type of privileging may occur in other contexts. For example, in the next issue of the *Feminist Law Bulletin* we will consider the recent comments of a High Court judge that a single touching of a woman on the bottom is not "sexual harassment."

The use of gender bias in language

For example, referring to women as 'girls' which is demeaning and impacts on a woman's credibility. Alternatively, describing an accused person's sexual assault as "advances", thereby hiding the violent nature of force used.

Finally, Dr Martin examined some of the areas where gender bias is found. She considered examples could be found in philosophy, legal methodology, substantive law, the rules of evidence, legal investigation techniques (including fact-finding) and in legal institutions.

CEDAW Optional Protocol

Twenty years after it first adopted an international convention banning all forms of discrimination against women, the United Nations has finally agreed on a way to offer abused women independent redress against violation of their rights.

The new mechanism is the adoption of an optional protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW).

The Convention was adopted in December 1979 and has been ratified by 163 countries so far. The 22 countries which have not ratified CEDAW include the United States of America and Saudi Arabia.

The new protocol was adopted in March and allows a woman suffering any form of discrimination banned by CEDAW to appeal to the CEDAW expert's committee once she has exhausted all forms of redress in her own country.

Appeal may also be made to the committee by women's organisations or other groups acting on behalf of victims. The woman's consent is generally required, although the committee considered some flexibility on this issue was necessary (such as where a woman lacks the education and the money to complain themselves).

The protocol is a reflection of the pressure put on governments by women's organisations and community groups, including those attending the Vienna Conference in 1993 and the 1995 UN Conference in Beijing.

The protocol will be opened for signature at the next UN General Assembly later this year, and only needs ratification by 10 countries to come into force. The pressure will now go on governments to ratify the protocol as quickly as possible. In New Zealand, the Government has not yet publicly announced whether it will ratify the protocol.

Human Rights Commission Report

The Human Rights Commission (HRC) has released the "report that the government did not want". The report on government compliance with the Human Rights Act 1993 was completed on 31 December 1998 and published earlier this year.

It is perhaps surprising that in all of the debate and media coverage about the Consistency 2000 project and the Human Rights Amendment Bill, the final report seems to have been released with comparatively little fuss.

However, the reasons for this become clear in reading the final report since while the report might have promised much, in the end it delivers little. The HRC acknowledges the report is incomplete and indicates strongly that the reasons for this lie at the Government's doorstep. According to the HRC, the Consistency 2000 Project was stopped just at the point where the benefits were beginning to flow.

The HRC indicate the reasons for this included a reluctance to fund the costs of the project and a sense of "alarm" among Ministers contributed to, in part, by the approach of the Department of Social Welfare. In discussing the different phases of the project the HRC noted the differences in approach of Social Welfare and HRC and comments:

"The result appears to have been that ministers were advised prematurely by officials that were not expert in human rights matters, about risks to social welfare programmes that may not have been real, and had options proposed to them that were not well-founded in human rights terms." (page 22)

In the end, the HRC report focuses on a number of themes that emerged in the work that it was able to do and reported on inconsistencies so far as it was able. There are very few inconsistencies related to sex discrimination. However, this may be because none were found in the analysis the HRC was able to do in the time available. Key recommendations include:

- The definition of "family unit" for public policy purposes be reviewed and adapted to reflect the diversity of families in New Zealand
- A comprehensive review of the legal recognition of same sex couples be carried out
- Work currently being done to explore the constitutional role of the Treaty of Waitangi include the implications of affirmative action
- Definitions of "disability" in legislation be reviewed fully to create, wherever feasible, consistency with the Human Rights Act
- The relationship between the 'good employer' provisions in the State Sector Act and the Human Rights Act be clarified

Copies of the report cost $31.50 and are available from the Human Rights Commission, PO Box 5045, Wellington.