

LIBERAL LAW'S FEAR OF 'CULTURE'

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On 15 April 2010 The Honourable J J Spigelman AC, Chief Justice of New South Wales, presented the Inaugural Address to the *Law, Governance and Social Justice Forum* convened by the Faculty of Law at the University of New South Wales.¹ His Honour's lecture was entitled 'Violence Against Women: The Dimension of Fear' and sought to develop a particular theme on which he had lectured the previous year — namely, the underappreciated importance of what his Honour then termed the 'forgotten freedom', being freedom from fear, to contemporary human rights discourse.² As his Honour's title on this most recent occasion indicates, his concern was with violence against women (and contemporary legislative and policy efforts, both Australian and international, to ameliorate or eradicate the problem). As the title of the present piece also hopefully indicates, my concern in responding critically here to his Honour's intervention into debates surrounding violence against women is to examine certain (of his) assumptions about culture and tradition.

I argue that Spigelman CJ's racialised assumptions about culture and its effect on women prevent a more nuanced acknowledgment of, and hence constructive engagement with, the dynamics of gendered violence. I want to start in the first half of this article by giving a brief summary of his Honour's remarks before, in the second half, making some critiques of, and raising some questions about, Spigelman CJ's own very particular cultural approach to the question of gendered violence. Simply put, my critique is that his Honour deploys a number of misleading and essentialist understandings of 'culture' (pertaining both to what he labels as 'majority' and 'minority' cultures) and that these misconceptions of culture not only falsely describe a more complex reality but that they serve to (re)constitute that reality in ways profoundly unhelpful to Spigelman CJ's avowed intention — the comprehension and prevention of violence against women under contemporary conditions of cultural, religious and ethnic diversity. That is, his Honour's understanding of (certain) 'cultures' as monolithic and enduring actually marginalises resistant voices both outside and within those cultures who are struggling to rearticulate and contest patriarchal norms.

His Honour's remarks

Spigelman CJ's lecture ranged over a number of different and inter-related topics, but the general

argument drawing together his diverse reflections was that the prevention of violence against women had, over the course of the last four decades, increasingly become an accepted (Western) cultural norm and that this cultural norm increasingly found its juridical expression in (Western) law. According to his Honour, despite the fact that many important advances had been made in recent decades, nevertheless 'much remains to be done.' (p 372) If this were all the Chief Justice's speech articulated then it would be difficult to disagree with, and nor would I seek to do so here. However, as newspaper advertising billboards the day after his Honour's speech shrilly attested ('Top Judge Warns of Sexist Migrants', for example),³ this narrative of Western self-realisation, self-critique and constant improvement is predictably (and necessarily) set against a different narrative introduced more explicitly towards the end of the lecture — namely, the spectre of various *other* traditions which remain rooted in an atavistic sexism and which, consequently, pose problems of accommodation for the progressive, enlightened, Western liberal legal system. In what follows, I want to give a brief summary of his Honour's lecture before — in the next section — offering some critiques of his position.

Spigelman CJ begins his remarks by observing that '[t]he cultural and social bases for violence against women have been a focus of public attention for at least four decades.' (p 372) This opening sentence is on its own quite revealing — here the sources of violence, being 'cultural and social', will primarily be thought apart from law (foreclosing a fuller and more searching account both of law's constitutive links to these domains but also of law's own role in producing and sanctioning violence).⁴ Moreover, as will become clear, the cultural and the social as productive of violence will themselves be given a certain colouring: some cultures will be more given to violence, more generative of violence against women in particular that is, than others.

But, at any rate, this opening statement about public concern over the bases of gendered violence prefaces an initial survey of legislative and policy developments, both in Australia and internationally, which are directed towards solving the problem of violence against women. Spigelman CJ discusses a number of select examples amongst an admittedly wide field, such as the criminalisation of stalking in a range of different (Western) jurisdictions (p 373) and the New South Wales Domestic Violence Intervention Court Model

REFERENCES

1. Hon J J Spigelman AC, Chief Justice of New South Wales, 'Violence Against Women: The Dimensions of Fear and Culture' (Inaugural Address to the *Law, Governance and Social Justice Forum*, Sydney, 15 April 2010), available at: <lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman150410.pdf/\$file/spigelman150410.pdf> at 8 November 2010. The speech has been subsequently published as: The Hon J J Spigelman AC, 'Violence Against Women: The Dimensions of Fear and Culture' (2010) 84 *Australian Law Journal* 372 (references hereinafter in parentheses).
2. See Hon J J Spigelman AC, Chief Justice of New South Wales, 'The Forgotten Freedom: Freedom from Fear' (Address to the Australian Academy of Law, Sydney Law School, Sydney, 17 November 2009.) This has now been published as: James Spigelman AC, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 543.
3. This was the advertising billboard for the *Sydney Morning Herald* on 16 April 2010.
4. To the extent that Spigelman CJ describes a relation between law and culture it is, in the context of what he calls 'the dominant European culture in this nation' (p 373) at any rate, a somewhat simplistic one in which 'law increasingly reflects' cultural beliefs (p 374).

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(p 373). The point of this initial discussion is to establish that, as his Honour puts it:

The dominant European culture in this nation has developed, admittedly only over recent decades, a broadly based set of policies directed to ensuring substantive equality between men and women, including in personal and family relations. The legal system increasingly reflects these values in terms of substantive law and procedures. Nevertheless, there are communities within Australia who have a cultural background that is quite inconsistent with many aspects of the majority position. (pp 373–4)

This theme of 'inconsistency' is then picked up in the following section of his Honour's remarks (entitled 'Human Rights Discourse') which moves from the domestic to the international arena in order to deal with the drafting of international human rights instruments on the topic of violence against women — specifically, the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'). Spigelman CJ rehearses a number of critiques of CEDAW in this context (namely, of its enforcement and reporting mechanisms, of the extensiveness of reservations to the instrument, and so forth), all of which are ultimately referable to 'the necessity [in the drafting process] to obtain agreement from a wide range of nations whose cultures permit conduct towards women which we would regard as discriminatory.' (p 374) These nations, particularly those 'in Africa and the Islamic world,' continues his Honour, subscribe to 'customary and social practices which [are] problematic in terms of gender bias' and which affected the drafting of what turned out to be an 'acceptable, but flawed, international model.' (p 374)

The middle sections of his Honour's address concern, respectively, 'Security of the Person' and 'Freedom from Fear'. In these sections, Spigelman CJ argues that (as pertains the *particular* right to security) 'there is a distinct reluctance amongst human rights scholars to recognise the right to personal security as any kind of individual right' (p 376) and that, on a more *general* level, 'the [overarching] concept of "freedom from fear" has virtually disappeared from contemporary human rights discourse.' (p 377) The diminution of rights to security of the person and the related attenuation of the freedom from fear within contemporary human rights discourse have, according to Spigelman CJ, a 'particular significance' for women (p 377). And it is in the context of this particular significance — the link between women and fear of violence, and the consequent role of the state to guarantee rights to security of the person — that the troubled question of culture finally emerges. His Honour

thus begins the concluding, and most problematic, section of his address in the following terms:

Sexism in the European cultural tradition has been attacked on a broad front, including with respect to violence against women. However, there are important racial, ethnic and religious minorities in Australia who come from nations with sexist traditions which, in some respects are even more pervasive than those of the West. (p 380)

At this point, his Honour discusses a range of seemingly related concerns, though without ever quite explaining precisely what links are sought to be drawn between the varied experiences of Australian Indigenous and migrant communities, and the structuring effects of colonialism and racism on both. At this point in the lecture, fraught examples of cultural accommodation are adduced — from 'revelations of physical abuse of women and children' within Indigenous communities in the Northern Territory necessitating intervention (p 380) to the spectre of 'honour crimes and forced marriages', the European experience of which '[w]e are unlikely to avoid' (p 380) — in order to substantiate his Honour's conclusion that:

There is [a] tension between gender bias considerations and cultural respect considerations in determining what the overriding value of equality before the law requires in a particular case. It is a very real challenge to balance the objective of cultural equality and diversity against the protection of women from gender based violence. (p 382)

Judiciously, his Honour refuses to resolve the tension between respect for women and tolerance of culture — indeed, it is in the nature of the tension as constructed by the Chief Justice precisely for it to be *irresolvable* and that, as I want to explore in the next section, elides a whole range of different political responses and questions. Rather, he concludes by observing that:

There can be no compromise with acts of violence. However, the enforcement of laws designed to minimise violence does give rise to a complex range of issues about which debate will continue. (p 383)

His Honour's lecture is a curious mix of the assertive and the allusive, of statements and silence, of questions asked and questions raised (indeed, more frequently, begged). But what is most problematic about his Honour's intervention into questions of gendered violence under contemporary conditions of cultural pluralism are not the answers he provides but rather the very way in which his questions are framed. As we have seen, his Honour refuses to specify the way in which 'we' are to resolve these questions, does not

call for the eradication of illiberal cultural practices, but simply raises their troubling nature as something with which 'we' have to grapple. I want now to accept his Honour's invitation to debate, and offer several inter-related critiques of his position. These critiques seek themselves to raise questions of the Chief Justice's racialised presuppositions about the relations between culture and gender.

Critique: Static culture and the temporality of tradition

The first thing one can observe about Spigelman CJ's invocation of 'culture' is that it is conceived in hermetically sealed terms. Cultures are singular in the Chief Justice's imagination, and when the singular norms of one culture come into conflict with the singular norms of another culture (say, for instance, when one culture's habitual denigration of women meets another culture's emergent respect for women), then irresolvable problems of accommodation inevitably arise for the liberal legal system in which the conflict plays out. 'Clearly,' writes Spigelman CJ, 'with respect to the criminalisation of physical violence the majority culture is not able to compromise, although sometimes difficult questions arise with respect to enforcement and sentencing.' (p 380) He continues thus:

It is, however, difficult to know where to draw the line in terms of legislation and enforcement of laws based on the approach of the majority culture, where the policies underlying these laws conflict with other policies involving the recognition of the respect that should be given to minority cultures. (p 380)

If there is a difficulty involved in 'drawing the line' when technical questions of law-making and law enforcement are concerned, it seems this difficulty does not attach to conceptual questions about the limits (and internal dynamics) of cultures themselves. Repeatedly, the Chief Justice refers to entities such as 'the majority culture' and 'the minority culture' (my emphasis) as if these entities did not exist in relation to each other and were not themselves internally conflicted, dynamic and evolving. This is not a linguistic quibble but a wider and more important political question about who gets to define what is and what is not cultural. This adjudicative position is comfortably occupied by the Chief Justice, who implausibly manages to separate majority and minority cultures and even — writing of an appeal he once sat on to the NSW Court of Criminal Appeal — culture and religion itself: 'The accused and his family were Jordanian. They were orthodox Christians, a point which is worth emphasizing. The issues that arise in this context are cultural rather than religious.' (p 380) A series of questions emerge immediately — How can one purport to separate the cultural from the religious? Do not the two domains, to the extent they can be separated, necessarily overlap and inform each other? Indeed, what sense (if any) can be made of a religion abstracted from its cultural context, observance or practice?

But more pertinent here is the way Spigelman CJ purports to define cultures by consolidation and separation, a symptom of which is Spigelman CJ's easy

assumption of the first person plural (for example, '... a wide range of nations whose cultures permit conduct towards women which we would regard as discriminatory' (p 374, my emphasis); '[w]e are unlikely to avoid' the problems Europe has faced (p 380, my emphasis)). The seductive plausibility of Spigelman CJ's 'we' gathers together a range of very different and conflicting interests under the unitary signs of the West or of Europe — and opposes this to the proverbial 'rest'. This uncritical resort to 'we', along with the other binary distinctions of 'majority' and 'minority' culture, is adduced by the Chief Justice in order to bolster the West's claim to universality, tolerance and respect for women. This gesture obviously belies a long history (and present) of Western violence against women (and in so doing erases a whole range of more interesting and productive critical questions which could well be asked of contemporary gendered violence). Of course this self-assertion can only be sustained at the cost of creating the non-Western *other* in barbaric and uncivilised terms.⁵ The 'negative exemplar'⁶ of the African, the Middle-Eastern, the Arab and the now 'privileged' figure of the Islamic are fundamental to securing the identity of the West and its tolerant law.⁷

As I have argued, defining culture in this way prevents or makes more unlikely certain necessary critiques of 'the West' itself and its presuppositions. However, it also crucially misrepresents those *other* cultures Spigelman CJ denigrates. In one fell swoop, Spigelman CJ both accepts and thus helps to constitute as 'cultural' those practices demeaning of women without inquiring into the way these practices come historically to be formed and are themselves internally contested, resisted and remade. Such a stereotypical thinking of culture which equates one 'official' patriarchal version of culture with its immutable essence, as Homi K Bhabha has argued elsewhere,

obscures indigenous traditions of reform and resistance, ignores 'local' leavenings of liberty, flies in the face of feminist campaigns within nationalist and anticolonial struggles, [and] leaves out well-established debates by minority intellectuals and activists concerned with the difficult 'translation' of gender and sexual politics in the world of migration and resettlement.⁸

'Whose culture?', then, is a question the Chief Justice might more profitably have asked himself in this context — indeed, this is a question which has informed more critical scholarship on what appear to be *irresolvable* conflicts between self-proclaimed *universalists* and *cultural relativists* in the international arena⁹ and indeed on the domestic level in terms of the 'cultural defence' in the context of the criminal trial.¹⁰ Ironically, in his attempt to counter essentialist deployments of culture as a 'defence' to gendered violence, Spigelman CJ's laudable insistence that such violence is inexcusable simply entrenches false understandings of culture and silences Indigenous feminist voices.

Of course, Spigelman CJ is careful not to assert that the West has eradicated the problem of violence against women. Rather, the West — or its various textual synonyms here, such as 'the European tradition',

5. For discussion see Edward Said, *Orientalism* (1979).

6. Peter Fitzpatrick, *The Mythology of Modern Law* (1992), 132.

7. For a contemporary discussion of this dynamic in Australia, see Scott Poynting et al, *Bin Laden in the Suburbs: Criminalising the Arab Other* (2004).

8. Homi K Bhabha, 'Liberalism's Sacred Cow' in Joshua Cohen, Matthew Howard and Martha C Nussbaum (eds), *Is Multiculturalism Bad for Women?* (1999) 83.

9. For just one example amongst many, see the work of Dianne Otto which interrogates 'East Asian' challenges to the supposed universalism of human rights. See her 'Rethinking the "Universality" of Human Rights Law' (1997–1998) 29 *Columbia Human Rights Law Review* 1.

10. For an 'intersectional' engagement with the question, see Leti Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defense"' (1994) 17 *Harvard Women's Law Journal* 57. See also Santo de Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110.

A series of questions emerge immediately — how can one purport to separate the cultural from the religious? Do not the two domains, to the extent they can be separated, necessarily overlap and inform each other?

'the majority culture', and so forth — is defined by its capacity for progressive self-correction. Hence for example his Honour writes that: 'The dominant European culture in this nation has developed, admittedly only over recent decades, a broadly based set of policies directed to ensuring substantive equality between men and women' (p 373). Here and throughout, the West emerges as constantly self-reflective and adaptive in correcting its historic sexism. An example Spigelman CJ draws on here — *both* as an example of an area of law in which pro-feminist developments have been made in the West *and* in which the claims of other, regressive sexist cultures are proving to be problematic — is the example of provocation law. Spigelman CJ writes of this area of law thus:

Historically it has operated as an excuse for men who kill women, an excuse which juries used often to accept on the basis that men were expected to react with aggression to slights to their sexual prowess. This 'boys will be boys' approach is no longer acceptable. (p 373)

The historic bases of sexism in the Western legal tradition are well documented and provocation is indeed a good case in point. We can thus identify shifts in the gendered paradigm of provocation from the doctrine's roots in 'a world of Restoration gallantry' (wherein violent masculine retaliation was normatively approved of) to 'a society of Victorian middle-class propriety' (which conceded a short-lived loss of reason in provoking circumstances).¹¹ Contemporary legal reforms to the doctrine of provocation (around the limits of the 'subjective test', for example) have been brought about through feminist activism and strategic litigation.¹² According to Spigelman CJ's temporal narrative (in which overt sexism 'is no longer acceptable'), the Western legal tradition has thus largely corrected itself.

Leaving aside the fact that for many observers of the modern law of provocation the gendered dynamics of the defence are in fact much more embedded than such a story allows (and indeed remain linked to persistent and contemporary forms of sexism and homophobia),¹³ the Chief Justice's narrative functions to place the West's developmentalism alongside the regressive tendencies of those *other* cultures. There is an in-built temporality to the idea of 'tradition' in the Chief Justice's reckoning — *tradition* is oriented towards the past, *tradition* is what one has to overcome, 'traditional forms of patriarchal domination ... [remain to be] extirpated.' (p 378) Whereas the West is defined

by its dynamism and its overcoming of tradition, the African, the Middle-Eastern and the Islamic are themselves equated with and resigned to traditional forms of life (there are, it seems, simply 'nations with sexist traditions' (p 380) that are constitutively attached to them in a way we are not). Here Spigelman CJ's repeated, and untheorised, invocation of Indigeneity (as somehow commensurate with 'ethnic' challenges to the liberal Australian legal system) itself raises a pointed analogue — namely, the rendering of 'tradition' by the High Court in the context of native title law. For example, in the case of *Yorta Yorta* a majority of the High Court interpreted the 'tradition' requirement in s 223(1)(a) of the *Native Title Act* to mean that only pre-[British] sovereignty laws and customs (or those deriving from them) could be traditional for the purposes of recognising native title and, furthermore, that these laws and customs must be observed by a society that 'has had a continuous existence and vitality since sovereignty' if the requisite connection is to be established.¹⁴ Tradition here becomes a timeless, backward-looking destiny that particular social groups must obey and, in their continuous existence, can never transgress without losing the essence of who they are.

In sum, Spigelman CJ's curiously *quantitative* approach to questions of gender oppression — according to which patriarchy exists in greater or lesser measure as an observable cultural or geographic fact (some cultures being *more* or *less* sexist than others, *more* or *less* pervasive in effect) as opposed to being *differently* constituted — obscures much more than it reveals and consequently blinds him to several useful insights. Such stereotypical and reductive characterisations of culture 'disavow the complex, often contradictory contexts and codes — social or discursive — within which the signs and symbols of a culture develop their meanings as part of an ongoing, transformative process'.¹⁵ Culture is thus represented as static, and patriarchy as destiny. Not only does this stance help to place the presuppositions of the Western liberal legal system conveniently outside the frame of critical analysis (with an unjustified faith in its inherent perfectibility). 'Historically and still today,' Adrian Howe reminds us, 'killing a wayward wife has been seen as culturally excusable — "she asked for it", so the dominant cultural script goes, since *Othello* and beyond. That is "our" customary law'.¹⁶ But more importantly it renders as abject those within the demeaned culture who are working to displace or reorient its norms — that is, it denies their political and transformative agency.

11. *R v Smith (Morgan)* [2001] 1 AC, 159–60 (per Lord Hoffmann).

12. In the UK, see for example the case of *Ahluwalia* (1993) 96 CR App R 133. In Australian jurisdictions, see *Hill* (1981) 3 A Crim R 397; *R* (1981) 28 SASR 321.

13. See de Pasquale, above n 10; Adrian Howe, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses — Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19 *Sydney Law Review* 336.

14. *Yorta Yorta (HC)* (2002) 214 CLR 422, 444 (per Gleeson CJ, Gummow and Hayne JJ).

15. Bhabha, above n 8, 81.

16. Adrian Howe, 'R v *Wunungmurra*: "Culture" as Usual in the Courts' (2009) 30 *Australian Feminist Law Journal* 163, 168.

17. See de Pasquale, above n 10.

The critique I am proposing here of the Chief Justice does not function as an 'excuse' for culture but rather as an injunction to critique it, and not to accept it for how it is represented in a range of (very different, very contested) patriarchal discourses. A whole range of urgent questions are foreclosed or rendered less possible by the sort of political intervention mounted by Spigelman CJ. What is the liberal legal order's relationship to (its own) culture?¹⁷ How does it *both* encode and solicit *and* yet disavow and forbid culture? How is the legal relationship to culture organised and how can it be contested, and in whose interests? How does the liberal legal order represent and construct the cultures of *others* and how do political interventions (such as that mounted by the Chief Justice) work to entrench these representations, eliding other transformative possibilities that are being sought and

fought for? What relations of complicity are sustained between white elites, with their pronouncements on 'culture', and Indigenous or 'minority' structures of patriarchy? These are the questions, it seems to me, that are much more vital and urgent than the ones proposed by Spigelman CJ and to which the debate proposed by the Chief Justice might with more profit address itself.

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MENTIONS

Law conferences 2011

23–24 February

Law & Justice within Indigenous communities

Location: Holiday Inn Esplanade, Darwin, NT

Law & Justice within Indigenous communities addresses a strategy to increase equitable processes and outcomes for Indigenous people when encountering the criminal justice system, with a view to reducing incarceration rates.

Website: indigenoulawjustice.com/

23–25 March

National Information Law Conference 2011

Location: National Museum of Australia

Freedom of information reforms, privacy issues, greater government transparency and increasing access to government information. This is the inaugural AGS National Information Law Conference.

Website: ags.gov.au/whatweoffer/training/outlines/2011/National_Information_Law_Conference_March2011.pdf

18–19 May

Meeting the needs of victims of crime

Location: Sydney

Hosts: Australian Institute of Criminology and NSW Department of Justice and Attorney General

Email: mandy_young@agd.nsw.gov.au

Website: aic.gov.au/en/events/aic%20upcoming%20events/2011/victim.aspx

3 June

Justice Connections Symposium

Location: Canberra, Australian Capital Territory, Australia

Contact: Patricia Eastale or Josie Hampton

Organisers: University of Canberra (UC) Faculty of Law, and ANZSOG Justice (Access and Administration).

Website: canberra.edu.au/faculties/law/anzsog-justice-symposium

23–25 June

The Promise and Limits of International Law

Location: University House, The Australian National University, Canberra,

Website: http://law.anu.edu.au/anzsil/conferences/2011/call_for_papers.pdf

22 July

Human Rights 2011, The Annual Castan Centre for Human Rights Law Conference

Location: Melbourne

10–12 August

Sisters Inside 6th International Conference
Is Prison Obsolete?

Location: Citigate Central Hotel, 169–179 Thomas St, Sydney
Focussing on service provision, advocacy and alternatives to prisons.

Website: sistersinside.com.au/conference2011.htm

16–18 September

Earth Jurisprudence: Building Theory and Practice

Australia's 3rd Wild Law Conference

Location: Griffith University, Brisbane

Contact: Michelle Maloney, Griffith University,
m.maloney@griffith.edu.au

26–28 September

Crime, Justice and Social Democracy: An International Conference

Location: QUT Gardens Point (City campus), Brisbane

Website: crimejusticeconference.com/index.html