

THE CHALLENGES OF INDIGENOUS WOMEN IN LIBERAL DEMOCRACIES

by Megan Davis

SPECIAL FOCUS: INDIGENOUS WOMEN

There are many cogent concerns about the contemporary western democratic system. The most salient concern congruous with the challenges of Indigenous women in Australian democracy is the caution expressed by feminist theorists of the crystallising human right to democratic governance in international law as the 'the globalisation of patriarchal and liberal forms of democracy'.¹ While Indigenous feminism differs to white feminisms, this critique of liberal democracy is useful in conceptualising Indigenous women's challenges in Australian democracy today. Indigenous women's experiences in Australia provide an important case study of the blind spot in democratic governance. For Indigenous women, the state's blindness is dual – not only is the democratic form patriarchal; it also discriminatory. It is important that Indigenous women's perspectives are recorded of the problems inherent in the current form of democracy that underpins any right to democratic governance internationally.² It is equally important to conceive of ways in which liberal democracies can ameliorate the impact of the deficiencies highlighted in this paper. This paper presents only a cursory exploration of two specific challenges that face Indigenous women in democracy's current form: the limitations of the ballot box and the marginalisation of women in the legal system.

MINIMAL CITIZEN PARTICIPATION: THE BALLOT BOX

As an Aboriginal woman and an international lawyer working on indigenous peoples' human rights issues, it is apparent that indigenous women around the world suffer dual oppressions within state borders. These challenges encompass those characterised as mainstream challenges of women such as maternity leave, childcare and employment but they also include additional challenges related to race. It is often the case that indigenous women are marginalised within their own indigenous communities and equally so by the broader community. This has been apparent in Australia, where Indigenous women's issues have often been at the periphery of mainstream Commonwealth and state policies and this was certainly the case, as attested to by many Indigenous women, with the Aboriginal and Torres Strait Islander Commission ('ATSIC').³

Women in general are acknowledged to be poorly represented in the democratic framework of both state and federal governments, though their representation is slowly increasing.⁴ In assessing how well Indigenous women in Australia are served by the ballot box it is important to consider political representation as well as leadership positions that are held across the public service and in roles of decision making and policy making.⁵

In terms of extra parliamentary representation, there is contemporaneous discussion about the establishment of a new representative body for Aboriginal and Torres Strait Islander peoples. For this reason it is important to consider how Indigenous women fared under ATSIC. ATSIC was the peak national Indigenous representative organisation. Its major role was policymaking and advocacy for Indigenous people.⁶ It was an independent statutory authority established by the Commonwealth Government in 1990. The general trend in ATSIC elections during its period of existence was a reduction in the participation of Indigenous women in Indigenous politics, particularly at the national level where women's participation dramatically reduced after the Minister ceased appointing board members.⁷ A report issued in 2000 noted the discrepancy in gender participation and representation in ATSIC elections stating that, 'women do not seem to be successful in being elected ... nor in attaining higher elected ATSIC office'.⁸ However it also stated that while 'women's representation within ATSIC elected office leaves something to be desired, it is probably at least as good as the recent record of women's representation in Australian parliaments'.⁹

Indigenous women have a strong and important leadership role in Indigenous communities and community organisations. It is interesting to note that the diminution in participation and power that eventuated with the imposition of minimalist representative structure like ATSIC mirrors the loss of power and participation of women in Eastern European countries after the fall of Communism.¹⁰ With the implementation of liberal democratic structures predicated upon a market economy, the minimalist participatory structures for citizens resulted in a loss of the power and influence they had previously

wielded in the community, leading to a phenomenon known as the 'feminisation of poverty'. This is why, as Jackie Huggins identified in the ATSI Review report, Indigenous women's input is so crucial to any future national representative structure.¹¹

Women's participation in mainstream politics and in any future Indigenous representative structure is crucial because a lack of input and participation correlates to a lack of policy on Indigenous women's issues. This was a concern of the ATSI Section 13 Women's Advisory Committee, *Kungkala Wakai - Our Women's Voice*, in their submission to the ATSI Review that 'one possible result of this under-representation is that less attention has been given to issues related to families and women, including the needs of youth, the homeless ... and family violence'.¹² Importantly the Committee recommended that

a key objective of any new arrangements should be equal representation of women in terms of membership of regional councils, the proportion of regional council chairs, and in the proportion of commissioners on the ATSI board. That is, 50 per cent of these officials should be women. Putting in place a mechanism to achieve this may or may not have broad community acceptance, but it is nevertheless one way of addressing the marginalisation of women in Indigenous affairs.¹³

MARGINALISATION IN THE LAW

Indigenous women, like feminist theorists have always been critical of the notion of law as being neutral and objective.¹⁴ The growing inequality and marginalisation of Indigenous women from the legal system works against that proposition. There are many facets of this marginalisation. A succinct summary would include concerns Indigenous women have raised about the limited opportunities of access to justice. The Australian Law Reform Commission ('ALRC') has identified the 'lack of access to culturally accessible legal aid for Indigenous women' and found that 'Indigenous women are the most legally disadvantaged group in Australia'.¹⁵ The challenges of Indigenous women's access to justice have been elicited through evidence submitted to both the ALRC and Senate inquiries and falls across Indigenous and non-Indigenous specific service providers. In 1994, the Australian Law Reform Commission Report entitled *Equality before the Law: Justice for Women* found that:

Aboriginal and Torres Strait Islander Legal Services do not currently benefit women and men equally. First most services implement a policy of not acting for either party in a matter between two indigenous clients. Second, most legal services give priority to defending criminal cases over other matters. On

the face these practices appear gender neutral but their effect is to indirectly discriminate against indigenous women.¹⁶

These concerns were later supported by Indigenous women who gave evidence at the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice.¹⁷ In family law, Ruska and Turner have identified this disadvantage as fourfold: barriers in accessing legal aid; lack of appropriate support mechanisms for Indigenous women in key agencies; lack of cultural sensitivity and awareness of professionals working in family law; and the outcomes for Indigenous women in the Family Court.¹⁸

Another way in which Australian legal institutions contribute to the dual oppression of Indigenous women is evident in the way in which Aboriginal law is treated by the judiciary. This has been well established by many Indigenous and non-Indigenous women including Hannah McGlade and Audrey Bolger.¹⁹ It illustrates how the 'populist vision of the neutrality and fairness of the legal system', ignore 'the gendered and racialised biases that exist on the bench'.²⁰ Aboriginal women have suffered because of what Sharon Payne described as the use of 'bullshit law' or distorted Aboriginal customary law to mitigate criminal acts against Aboriginal women.²¹ Inevitably the adversarial nature of the Australian legal system and precedent encourages lawyers to advocate the use of Aboriginal law in mitigation.

CONCLUSION

It is important for Indigenous people to interrogate the impact of western liberal democratic structures upon our communities. In other liberal democracies with indigenous populations there have been measures taken to address and ameliorate the marginalising effect of both representative democracy and the legal system upon indigenous peoples. These have included treaties, parliaments, designated parliamentary seats and a Bill of Rights entrenching fundamental human rights. These ideas are already supported by Indigenous Australians. However it is a difficult task to advocate for these measures as initiatives that will enhance our democracy rather than divide our democracy, and such a task can only be achieved with political leadership and political will. Whatever the outcome of contemporaneous discussions about extra parliamentary representation or unfinished business, it is important for decision makers to take into account that any institution will have a differing impact upon indigenous men and indigenous women. As Deborah Bird Rose succinctly argued in this publication a decade ago, '[c]olonising practices embedded within decolonising

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institutions must not be understood simply as negligible side effects of essentially benign endeavours but rather the embeddedness may conceal, naturalise or marginalise continuing colonising practices'.²² It is hoped that after a decade this idea is better understood for the benefit and the advancement of Indigenous women in Australian democracy.

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The Heart of Culture
Lee-Anne Hunter

Acrylic on canvas, 610mm x 510mm



- 1 Dianne Otto, 'Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women' (1993) 4 *Transnational Law and Contemporary Problems* 371, 412.
- 2 Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Gregory H Fox, 'The Right to Political Participation in International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 48-90; Henry Steiner, 'Political Participation as a Human Right' 1 *Harvard Human Rights Year Book* (1988) 77.
- 3 Aboriginal and Torres Strait Islander Commission - Office of Evaluation and Audit, *Evaluation of the Effectiveness of ATSIC Programs in Meeting the Needs of Aboriginal Women and Torres Strait Islander Women: Final Report* (1995).
- 4 Sarah Maddison and Emma Partridge, 'How Well Does Australian Democracy Serve Australian Women?' in *The Democratic Audit of Australia* (2007) 55.
- 5 *Ibid* 56.
- 6 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s 3.
- 7 W Sanders, J Taylor and K Ross, 'Participation and Representation in ATSIC Elections: A Ten-Year Perspective' (Centre for Aboriginal Economic Policy Research Discussion Paper No 198/2000) (2000).
- 8 *Ibid*, 16-17.
- 9 *Ibid*.
- 10 *Ibid*.
- 11 The Hon John Hannaford, Jackie Huggins AM and the Hon Bob Collins, *In the Hands of the Regions – A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission* (2003).
- 12 Submission to the ATSIC Committee on Women's Issues (Kungala Wakai) cited in Hannaford, Huggins and Collins, above n 11.
- 13 *Ibid*.
- 14 See generally, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 56-84.
- 15 Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69) (1994), see Chapter 5 and recommendation 5.2 .
- 16 Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69) (1994).
- 17 Senate Legal and Constitutional Committee, Federal Parliament, *Inquiry into Legal Aid and Access to Justice* (2004) Chapter 5, 96-100.
- 18 Keryn Ruska, 'Justice in Family Law through the Eyes of Aboriginal and Torres Strait Islander Women' (Paper presented at the National Association of Community Legal Centres Annual Conference, Fremantle, September 2001).
- 19 Audrey Bolger, *Aboriginal Women and Violence* (1991); Larissa Behrendt, 'Law Stories and Life Stories: Aboriginal Women, the Law and Australian Story' (2005) 20(47) *Australian Feminist Studies* 245-254; Megan Davis and Hannah McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' (Background Paper for the Law Reform Commission of Western Australia) (2005).
- 20 Wendy Shaw, 'Post-Colonial Encounters: Gendered Racialisations in Australian Courtrooms' (2003) 10 *Gender Place and Culture* 325, 329.
- 21 Sharon Payne, 'Aboriginal Women and the Law' in PW Eastale and S McKillop (eds), *Women and the Law* (1993); Sharon Payne, 'Aboriginal Women and the Law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice*