

Women as outsiders of the law: A review of *How many more women?*

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By Ramona Vijeyarasa

Introduction

Atkins, Hoggett, Thornton, Morgan, Graycar, Smart, Bartlett and Charlesworth, among many others, were and continue to be pioneers of their times.¹ They offered a robust critique, in English-language scholarship, of domestic and international law's failure to find a place for women, but also the tendency for law and legal systems to marginalise, exclude and discount women's experiences. Decades have passed since some of this early scholarship, but the repetition of Audre Lorde's caution that, '[T]he master's tools will never dismantle the master's house,' at countless gatherings of feminist socio-legal scholars today² is an unnecessary reminder that women remain 'sister outsiders', the title of the 1984 book compiling Lorde's essays and speeches.³ Perhaps more importantly, Lorde was on the cutting-edge of raising our consciousness about the compounded experiences of discrimination women face, within and beyond the law, based on their multiple identities. Today a plethora of researchers—and I count myself in that circle⁴—continue to take up the baton to demonstrate that sadly little has changed when it comes to the institution of the law.

Contributing to and amplifying this agenda, in *How many more women?* international lawyers, Jennifer Robinson and Keina Yoshida seek to depict law's failure to listen to and to believe the stories of women victims of gender-based violence (GBV). In the words of scholar of gender,

¹ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, USA 1990); Reg Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press 2002); Carol Smart, *Feminism and the Power of Law* (Routledge 1989); Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829; Hilary Charlesworth, 'Human Rights Are Men's Rights' in Andrea Wolper and Julie Peters (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (E-Book, Routledge 1995); Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613; Susan Atkins and Brenda Hoggett, *Women and the Law* (University of London Press 2020) <<https://press.uchicago.edu/ucp/books/book/distributed/W/bo56375069.html>> accessed 13 January 2023.

² Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in Cherrie Moraga and Gloria Anzaldúa (eds), *This Bridge Called My Back: Writings by Radical Women of Color* (2nd edition, Kitchen Table/Women of Color Press 1983).

³ Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press 1984).

⁴ Ramona Vijeyarasa, 'In Pursuit of Gender-Responsive Legislation: Transforming Women's Lives through the Law' in Ramona Vijeyarasa (ed), *International Women's Rights Law and Gender Equality: Making the law work for women* (Routledge, Taylor and Francis 2021).

peace and security, Jacqui True that GBV ‘is one of the key struggles and wishes of our age’.⁵ The book’s focus on GBV is therefore an apt lens through which to analyse whether laws today work better for women.

The book centres around three key questions: what happens when women speak out about their alleged experience of GBV? Have we created a legal system that is just, fair and equitable? Has the right balance been struck between protecting a man’s privacy and reputation and allowing women to speak about their experiences?

A key moment in women’s rights history

Perhaps the book’s greatest limitation epitomises one of the biggest challenges of GBV and defamation. US television personality Bill Cosby, Hollywood producer Harvey Weinstein, Oscar-winning actor Geoffrey Rush, Hollywood star Johnny Depp, all discussed throughout the book, will soon become names of the past. The book is therefore a contemporary account of both the famous and everyday men who have (allegedly) abused women. It was published right after the peak of the global MeToo movement—one that was started many years ago but went viral in 2017—and has meant the opening of public discourse to experiences of violence and harassment that women would have otherwise ‘taken to their graves’.⁶

In the words of the authors, ‘[T]he MeToo movement is a response to legal systems that do not serve women and girls, either because the laws are inadequate or because the response of the legal system to victims and survivors is flawed’.⁷ It was a global movement, a coming together, although in different forms in each nation, that generally meant that ‘women were speaking’, women ‘were being heard’, with a ‘new form of justice’ taking shape.⁸ At the same time, Robinson and Yoshida remind us how MeToo’s spike in women speaking out created a ‘perverse twist’—in the words of the UN Special Rapporteur for Freedom of Opinion—whereby defamation, contract, privacy and breach of confidence have all been wielded to suppress and silence.⁹

⁵ Jacqui True, *The Political Economy of Violence Against Women* (OUP USA 2012) 3.

⁶ Rahul Sambaraju Dr., ‘“I Would Have Taken This to My Grave, Like Most Women”: Reporting Sexual Harassment during the #MeToo Movement in India’ (2020) 76 *Journal of Social Issues* 603.

⁷ Jennifer Robinson and Keina Yoshida, *How Many More Women? Exposing How the Law Silences Women* (Allen and Unwin 2022) 2 <<https://www.readings.com.au/product/9781761066702/how-many-more-women--jennifer-robinson-keina-yoshida--2022--9781761066702>> accessed 12 January 2023.

⁸ *ibid* 100.

⁹ *ibid* 4.

It is these legal tools, and particularly defamation, that form the other pivotal part of the story. The law silences women. However, at times, other institutions, including the media, ‘out’ women, forcing them to tell their stories when sloppy and hurried reporting reveals the wrongs done to them without their consent. At times, it becomes the job of the victim to correct an incorrect narrative that an alleged perpetrator has told. When these women are forced to speak, too often the result has been a threat of an action in defamation.¹⁰

How Many More Women? is not the first or only account of this centuries’ old challenge of powerful and wealthy men using their resources to discourage women from coming forward. Yet it tells these stories with the first-hand experiences of the authors—as activists, as barristers, and importantly as listeners and representatives of many of the women who have bravely spoken out and the media outlets that wanted to publish their stories. While we can hope that the authors’ beliefs that ‘legal change is possible’ to achieve a legal system that will adequately weigh all rights¹¹ will ring true, my bigger worry is that these men, and importantly the victims, will simply be replaced by a new set of names in the future.

The books foundational framework

The book offers an excellent foundational framework to explore these issues. Patriarchy, it is explained, is a system. Learning from bell hooks, we know that patriarchy has no gender. Women can support the system of patriarchy just as men can fight for gender equality. Robinson and Yoshida offer stories of ‘himpathy’—sympathy towards powerful men in a way that sustains the patriarchy and the status quo and encourages a profound lack of empathy for the women who make claims against them. They also write of gender bias among judges, re-traumatisation by police and during cross-examination, and experiences of victim-blaming in the court room which are as common in the UK,¹² as in Australia.¹³ Yet they rightly broaden the landscape, acknowledging that the problem starts as early as the miseducation of children

¹⁰ *ibid* 102–103.

¹¹ *ibid* 385, 387.

¹² *ibid* 2.

¹³ Vesna Emma Clark, ‘Victim-Blaming Discourse Underpinning Police Responses to Domestic Violence: A Critical Social Work Perspective.’ (2021) 4 *Social Work & Policy Studies: Social Justice, Practice and Theory* <<https://openjournals.library.sydney.edu.au/SWPS/article/view/14959>> accessed 13 January 2023; Asher Flynn and others, ‘Victim-Blaming and Image-Based Sexual Abuse’ [2022] *Journal of Criminology* 26338076221135330; Rachael Burgin and Asher Flynn, ‘Women’s Behavior as Implied Consent: Male “Reasonableness” in Australian Rape Law’ (2021) 21 *Criminology & Criminal Justice* 334, 366.

when it comes to issues of consent and the pervasive nature in which misogynistic values have seeped into our cultures.¹⁴

The authors also offer readers the human rights framework that governs these issues—of particular interest to me. International law prohibits GBV and obliges governments to protect women and sexual minorities against such violence.¹⁵ However, we begin to see that perhaps the foundational framework was too weak. Robinson and Yoshida note the unsuccessful attempts by Australian pioneer and activist Jessie Street to argue for inclusion of the right of women to freedom from violence in the Universal Declaration of Human Rights.¹⁶ Just over thirty years later, the Convention on the Elimination of Discrimination against Women (CEDAW) did not explicitly refer to GBV either, even if GBV has been discussed in detail in three ulterior recommendations of the Committee on the Elimination of Discrimination against Women.¹⁷ Nonetheless, international law is slowly advancing. For instance, one of the co-authors—Yoshida—co-represented a Sri Lankan applicant, Roser Flamer-Caldera, before the CEDAW Committee in its recent decision that criminalisation of consensual same-sex relations violates numerous principles of international law, not least those that fall within the right to marriage and family relations.¹⁸

Can women speak and what happens when they do?

The weaknesses in the foundations offer some explanation for why law continues to fail to accommodate women's experiences globally. Law reform is slow: slow to criminalise marital rape and slow to guarantee all people the right to refuse consent, including women not deemed 'respectable' such as sex workers. Judges still look for evidence of force to find a perpetrator guilty of rape while juries remain influenced by rape myths.¹⁹ The practice of law itself is often a difficult and uncomfortable place for women to be, even for privileged women lawyers.²⁰ The authors also draw attention to vulnerable groups: sexual and gender minorities fearful of stigma and the criminalisation of same-sex relations that exists in over 78 countries.²¹

¹⁴ Robinson and Yoshida (n 7) 2.

¹⁵ *ibid* 4.

¹⁶ *ibid* 15.

¹⁷ Ramona Vijayarasa, 'CEDAW's General Recommendation No. 35: A Quarter of a Century of Evolutionary Approaches to Violence against Women' [2019] *Journal of Human Rights* 153.

¹⁸ Ramona Vijayarasa, 'Flamer-Caldera v Sri Lanka: Asia-Wide Implications of an Essential Evolution in CEDAW's Jurisprudence' [2022] *Asian Journal of International Law* 1, 1.

¹⁹ Robinson and Yoshida (n 7) 17–37.

²⁰ *ibid* 48–50.

²¹ *ibid* 78.

The authors, however, leave some space for hope. Even if not framed as ‘wins’—because women do not win when it comes to GBV—throughout the book there are notable examples of progress, some incredibly significant:

- A UK Supreme Court decision that acknowledged that language expressed by an alleged victim on social media should not be giving a technical meaning so as to leave the victim at risk of a defamation suit (*Stocker v Stocker* [2019] UKSC 17).²²
- Better protections for victims to speak and report the truth after Australia’s Grace Tame, victim/survivor and journalist Nina Funnell’s #LetHerSpeak campaign resulted in a change to sexual assault victim gag laws, which have also started to change the national narrative.²³
- The introduction by the federal and state governments in Australia to provide sexual consent education for school children from age five.²⁴

A Global North account of a world-wide phenomenon

One of the authors’ strengths is their ability to demonstrate to readers the global nature in which law has failed to account for, believe and respond to the stories of victims. We read of the experiences of human rights defenders in Colombia and the stereotyping and exclusion of Japanese women from public life. The legal tactics used in India—getting a court order to require Google and Instagram to remove URLs of posts relating to allegations of sexual harassment ahead of trial—would surprise many readers.²⁵ The book also reminds us of those countries that have long-been a concern when it comes to human rights abuses. The response to China’s Peng Shuai, tennis star, accusing a former vice premier of coercing her to have sex, reminds us that the consequences for some women speaking out are particularly grave.²⁶

It is, however, inevitable that not every story can be told and it is the stories from the global North that are most visible in this book. We are offered numerous examples from Australia—allegations against former Australian politician Christian Porter and a finding of sexual harassment perpetrated by Australia’s former High Court justice, Dyson Heydon AC QC. We read of the use of Non-Disclosure Agreements—whereby women are ‘contracted to

²² *ibid* xvi.

²³ *ibid* 71–72.

²⁴ *ibid* 131.

²⁵ *ibid* 264.

²⁶ *ibid* 59–60.

silence'²⁷—and are left asking why so many years of abuse passed before cases against Jeffrey Epstein; US musician and producer R Kelly; and US personality Bill Cosby were brought forward. This global North focus may be a shortcoming when some ground-breaking moves to address these problems are happening in the global South. For instance, in *Vertido v The Philippines*, the CEDAW Committee determined that a Filipino judge, while conducting a rape trial, had been influenced and motivated by gender-based myths and misconceptions about rape and rape victims.²⁸

Moving forward

In many respects, the book—while highly informative, very well researched, timely and an important work to read for those who are part of the movement for change—leaves us with a sense of exhaustion. When writing this review, I deleted and then added, then deleted the term ‘alleged’ (as in ‘alleged victim’) constantly. Despite the gravity of a woman’s claims and the commitments made by governments to protect women from gender-based violence and guarantee the right of women to speak, a woman is not a victim until the law says she is. There are redacted passages throughout the book, a reflection of the legal risks that women face when they speak out which are also a challenge for the authors who help tell their stories. These redactions are also a visually effective tool to demonstrate how much power law still holds—too much power.

At the same time, *How Many More Women* prompts action and I am left returning to my usual reflections on how we can use the Master’s tools to make law more responsive to women’s lived experiences. The book is a recommended read for anyone trying to better understand one of the many challenges women face in accessing justice and adds more fuel for those up for the challenge of determining how the law and legal systems can better serve all women by adequately giving meaning to their lived experiences.

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²⁷ *ibid* 185.

²⁸ *Vertido v The Philippines* [2010] UN Committee on the Elimination of Discrimination against Women Communication No. 18/2008; Cees Flinterman, ‘Eight Years in CEDAW’ (2011) 29 *Netherlands Quarterly of Human Rights* 8, 10–11.

