Chapter 2

**LAW REFORM AND REALITY?**

Before undertaking the journey through history in Part Two below, another question remains to be addressed: do changes in international law have merely symbolic significance, or do they lead to meaningful operative changes at the level of both national norms and the reality on the battlefield? International law has traditionally been characterized by the absence of a central authority holding exclusive power to create law, implement it and oversee it. Accordingly, one may ask: what is its significance? Why is it important to fill in its gaps and address its weaknesses?

Christine Chinkin and Hilary Charlesworth address this question. They claim that international law’s importance lies not only in its immediate enforceability, but also in its ability to provide a theoretical and conceptual foundation for the distribution of power and the allocation of resources in the international community—a community whose influence (on domestic matters as well as international) has greatly increased as a result of globalization. They exist alongside the processes discussed below in Part Two that have led to the establishment of international courts and tribunals with authority to criminally prosecute individuals.

The academic, political, and legal discourse is another component in the struggle to change the governing systems. This discourse, which Nancy Fraser calls “the ‘experts’ discourse”, links the unorganized social discourse to the state. This professional discourse coins new terms and adds them to the lexicon.

The radical feminist discourse focuses on the patterns and modes that will lead to a fundamental change in society by abolishing the situation of inequality between women and men. The change sought by radical feminism is not just in how the law is implemented, but also a substantive and fundamental change in the content of the law. This goal arises from a belief in the power of law as a tool of social formation:

The project of constructing feminist jurisprudence is thus an ambitious as well as radical one: it seeks not only to challenge values and the goals of the

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72 See Hilary Charlesworth, Christine Chinkin & Shelley Wright, supra note 24, pp. 619–622; Gilad Noam, supra note 21, pp. 190–191.

existing legal order, but also (like the Marxist theory) to undermine its epistemological foundations, by exposing the ways in which law constitutes “reality” – objective, true and gender neutral.74

Radical feminism is based on the assumption that law is a primary tool for legitimizing the existing social order. Moreover, because the liberal perspective views law as a tool for shaping social life (and not as a product that reflects the power relations in society), then from the moment the masculine view becomes embedded in the law, it attains an objective status. As a result, in order to change women’s status in society and in law, the change in consciousness must be integrated with a fresh analysis of the institutions, conventions, norms and existing legal criteria.75

As discussed above in chapter one, the metaphor of the “voice” has attained a central place in current feminist literature. Listening to the victims enables them to bring their stories to the world. Giving a voice in law, in general, and in the judicial process, in particular, is a political act which is part of the struggle to change society’s hierarchical power structures by means of the courts.76

In effect, the court is one of the focal points in which the human voice still enjoys an advantage in western culture. By changing the law, the historical silence will disappear and new colors will paint the crimes that in the past were transparent.

Consequently, the existence of this discourse in the international arena has an impact and defines new terms. These changes have stimulated discussion and given a voice to the silent. Simultaneously, this international discourse has had an impact on what is taking place in the private realm of domestic law. Halley calls this the “politics of recognition”.77

Now the question arises: are the rationales for conducting this discourse indeed relevant to situations of armed conflict? In other words, is the aspiration to establish normative arrangements for the behavior of fighting forces at the height of battle realistic?


Feminism has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the eroticization of dominance and submission…. This is the social meaning of sex and the distinctively feminist account of gender inequality.

76 See Leora Bilsky, supra note 37; Katharine Bartlett, supra note 39.
77 Janet Halley, Rape at Rome, supra note 3, p. 51.