



# CounterBalance International

Newsletter of the International Association of Women Judges and the International Women Judges Foundation  
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## The Dublin Conference: *Lessons In Judicial Creativity*

Over 230 judges from 24 nations gathered in Dublin, Ireland from May 22 through 26 at the IAWJ's Sixth Biennial Conference where they explored the diverse paths leading to "Judicial Creativity," considered actions that will reshape the structure of the organization and celebrated a decade of accomplishment and growth.

During opening ceremonies, the IAWJ members were welcomed by the Honorable Mary McAleese, President of the Irish Republic. Following her gracious remarks, she mingled with members of the audience who crowded around her.

A day later, the Honorable Mary Robinson, outgoing High Commissioner on Human Rights for the United Nations, explained the difficulties confronting the Commission in enforcing human rights conventions. She urged the audience to remember that as judges, they are the guardians of humanity's human rights, and as such, should be trail blazers and risk-takers in enforcing them.

"Judicial Creativity" figured in every educational session, beginning with a scholarly address by Dr. Angela Ward, professor of law at the University of Essex, on the way in which international human rights law can be applied in national courts, even where the Conventions have not been domesticated. Thereafter, Hon. Beverley McLachlin and Hon. Ronan Keane, Chief Justices of the Supreme Courts of Canada and Ireland, respectively, responded to Dr. Ward's talk with comments that reflected diverse approaches to the domestic application of human rights. The audience then met in small discussion groups to consider and compare how international human rights are applied in their own nations.

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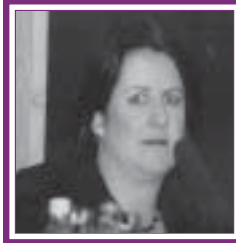
Irish President Mary McAleese greets IAWJ members after opening the Conference.

## JUDICIAL CREATIVITY:

**Enhancing Judges' Role As Enforcers of International Human Rights Law**

**By Dr. Angela M. Ward**

*Dr. Ward, Assistant Professor at the University of Essex, UK, delivered a thought-provoking keynote address at the Dublin Conference. Her paper is excerpted below.*



Dr. Angela Ward

Academic lawyers are always quick to criticise a judicial body when a ruling appears to fall short of human rights protection standards. Yet judicial bodies have made important and, indeed, critical positive contributions. In particular, those bodies in countries with a Bill of Rights in their constitution have been central to maintaining political stability in the post-war era by crafting, applying and upholding rafts of rules that form linchpins of modern democratic governance. Yet, a number of novel ideas are circulating in academic literature on how national judges might play a more active role in enforcing international human rights law. I see

the judiciary playing a key role in securing the effective enforcement of democratic principles and human rights. There is a corpus of principles that even democratically elected officials may not infract, and it is within the legitimate realm of the judicial role to ensure adherence to these rules. This paper canvasses seven ideas that support this view.

1. There is nothing "undemocratic" in the judiciary tying the executive arm of government to promises made to protect and enforce human rights, especially when those promises are made through ratification of an international human rights instrument.

The act of ratifying an international human rights instrument supplies the judiciary with a mandate to enforce it. Tying governments to promises they made to their own people in the context of international human rights treaties is in no way undemocratic. This view is supported by the Australian High Court in the *Teoh* case. Mr. Teoh, a Malaysian citizen married to an Australian citizen, shared responsibility for raising 7 Australian-born children. He was denied a permanent residency permit and ordered deported because he after being convicted for importing heroin. Teoh's counsel argued that since Australia had ratified the Convention on the Rights of the Child (CROC), the government's right to deport non-citizens was limited in that CROC Article 3 provides that the best interests of the child shall be a primary consideration. Although ratified, CROC had not been implemented under Australian law. The High Court refused to order Teoh's deportation, relying on the government's ratification of the CROC in these words:

...ratification by Australia of an international convention is not to be dismissed as...an ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification...is a positive statement by the...government...to the world *and to the Australian people* that the...government...will act in accordance with the Convention. That...statement is an adequate foundation for a legitimate expectation...that administrative decision-makers will...treat the best interests of the child as a primary consideration.

### The Proportionality Principle

Ratification of a human rights instrument also may justify scrutiny of State conduct under the proportionality principle, meaning that human rights instruments can provide a benchmark in determining whether results flowing from a human rights infraction are excessive when compared to a competing state aim.

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# World News Report

→ **Argentina** — Between 1997 and 2001, the AMJA (Argentine Women Judges Association) implemented 16 seminars for women and men judges in various locations throughout the country. The AMJA now is evaluating the impact of this training on domestic jurisprudence and gathering ideas on ways to improve the program in follow-up meetings with seminar participants.

→ **Bahamas** — Dame Joan Sawyer, Supreme Court President, submitted this statement to inform IAWJ members about the status of courts in her country. The Bahamas Commonwealth, a monarchical democracy, attained independence from the United Kingdom in 1973. It consists of 700 islands, 21 of which are inhabited by some 300,000 people. The first woman was called to the Bar in 1953 but women did not win voting rights until 1962. Despite a relatively late start, women have made great strides in the legal profession. Since the appointment of the first magistrate in 1977, the number of women magistrates has increased to 16 out of a total of 72. Of the 6 Registrars, 5 are women. Further, a woman became Vice President of the Industrial Tribunal in 2000. In 1988, the first woman was appointed to the Supreme Court, becoming Chief Justice in 1996. Now, 2 of 12 justices on this Court are women. In 2001, the first woman was appointed President of the Court of Appeal, The Bahamas highest judicial body.

→ **Ecuador** — The Women Judges Association in Ecuador has been engaged in planning and presenting JEP seminars under the auspices of the Inter-American Development Bank. The first two seminars were conducted in late August. A third seminar was held in Port Madryn, Chubut in September and the final one will be conducted in Ushuaia, from November 7 to 9.

→ **India** — Justice Prabha Sridevan, High Court Justice in the State of Madras, submitted a lengthy report detailing the steps being taken in her country to recognize human rights and advance gender sensitivity. Her report is excerpted here. "Although no formal IAWJ association exists in India, judges, lawyers and NGO activists created the 'Asia-Pacific Advisory Forum on Judicial Education and Equality Issues' in 1997." A gender equality education program was developed with oversight by a team of Supreme Court judges from 5 south Asian nations. Indian Supreme Court Justice Ruma Pal served as convener.

The Forum has conducted several gender-sensitivity seminars for junior level judges in various states. The trainings have included visits to women's remand homes and mental asylums. Further, domestic violence survivors have shared their experiences in the justice system and their difficulties in accessing justice

### Human Rights in Action

India's Supreme Court has insisted on effective compliance with Constitutional rights and principles drawn from international conventions. For example, in *Railway Board v. Das*, railway employees gang-raped a foreigner. The Court rejected the argument that fundamental human rights are not available to foreign nationals. In another recent case, *Joy Immaculate v. State* (2002), a college girl who went to a police station to report a missing man complained of indecent behavior and harassment by the officers. The Madras High Court condemned the police action as a 'violation of human dignity' and ordered the police to investigate the case and compensate the petitioner. The government also was ordered to instruct the Madras police that women complainants in domestic violence cases should be allowed to report sex crimes solely to or in the presence of women police.

→ **Israel** — Recognizing the country's duty to comply with the UN Convention on the Rights of the Child (CROC), the Minister of Justice appointed Judge Saviona Rotlevy Chairperson of the Public Committee On Children and the Law. The Committee's goals were to reevaluate existing law bearing on children in light of the Convention's principles; examine the need for merging laws affecting children into a comprehensive act, and decide whether new mechanisms were required to enforce children's rights. The report may be obtained by faxing T. Peled-Amir, 972-2-6466463, or e-mailing committee@hotmail.com

→ **Panama** — On September 9, 2002, the IAWJ launched the first year of the two-year *Jurisprudence of Equality Project* in Central America. Hosted by the Panama Women Judges Association and the Judicial Institute of Panama, women judges from four Central American countries (Costa Rica, El Salvador, Guatemala, and Panama) participated in the first Train-the Trainers Workshop. Training facilitators for the workshop were Cristina Camina and Marcela Rodriguez of Argentina. Judge Angela Russo, President of the Panama Association, and Kathia Ponce, Vice-director of the Judicial Institute, organized the workshop and extended very gracious hospitality. Joan Winship, IAWJ Executive Director, and Anne Goldstein, Human Rights Education Director, attended as observers. In the 6 month period following the workshop, each team of trainers will conduct two seminars for members of the judiciary in their respective countries.

→ **Puerto Rico** — From November 11-13, 2002 women justices from the highest courts in Latin America and the Caribbean attended the Third Encounter of Women Magistrates in San Juan, Puerto Rico. They discussed the role of women justices in the globalization process, as well as strategies on how to incorporate a gender perspective in the daily work of their judicial systems. Then, on November 14, the Supreme Court of Puerto Rico and IAWJ Regional Directors celebrated the first regional meeting of Central and South America and the Caribbean. Supreme Court Justice Miriam Naveira de Rodon, IAWJ Secretary, coordinated both meetings.

→ **Slovak Republic** — Judge Beate Vrotova writes that the Women Judges Association drafted domestic violence legislation, stirring nationwide public debate on this issue. The bill was introduced to Parliament and recently adopted. The Association also was involved in revising the nation's criminal code that made domestic violence a criminal offense, extended protections against the abuser to all family members, permitted the Court to forbid the abuser from entering the home, lengthened the sentence that can be imposed and prohibited the abuser's release until 1/3 of the sentence is served. The most important change allows a trial to proceed without the victim's consent. These changes won massive public support, a reaction confirmed by an opinion poll conducted by the Women Judges Association. □



JEP Travels to Central America: Judicial trainers at dinner during first workshop in Panama.

# The Dublin Conference

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An international tribunal was formed, with its members drawn from the ranks of Supreme Court justices around the globe. Two Irish judges role-played as defense and prosecution counsel, delivering well-prepared arguments in a case involving statutory rape.

## Major Restructuring of the IAWJ

In addition to these and other fascinating educational sessions, IAWJ members also took part in the plenary and regional meetings, reaching a number of decisions that significantly affect the future structure of the IAWJ. The IAWJ, with the assistance of Siobhan Rausch, attorney at the Washington, DC law firm, Hogan and Hartson, has applied for tax-exempt status from the Internal Revenue Service. When the application is approved, the IAWJ will absorb the functions of the International Women Judges Foundation which then will be dissolved. Accompanying this major reorganization, the members, meeting in regional caucuses, elected a new Board of Directors consisting of 2 representatives from each of the IAWJ's 5 regions; that is, Latin America; North America (including the U.S. and Canada); Europe and the Middle East; Africa and Asia/South Pacific. In addition, a new entity, the Board of Managerial Trustees, has been established. Composed of lawyers, consultants, legal academics and judges located primarily in Washington, DC, this body will be responsible for overseeing the IAWJ's office operations and assist with fundraising and program planning. A new Constitution reflecting these major changes will take effect when the IWJF is dissolved.

## A New Executive Director

After serving as President and then Director of the IAWJ-IWJF since the organizations were founded, Arline Pacht announced that she is stepping down from these posts. Her successor, Joan D. Winship, former Vice President of the Stanley Foundation and currently, a consultant to several women's organizations in Washington, DC, then took center stage. She appealed to the members for their help so that the IAWJ would continue as a dynamic and financially stable institution

On the final day of the Conference, Judith Resnik, distinguished Yale Law School professor and member of the Board of Managerial Trustees, who served as Conference rapporteur, gathered together the diverse strands of the meeting in a brilliant summary which outlines the proposals that Conference presenters offered as to the steps judges can take to promote human rights.

The *esprit de corps* that typically characterizes IAWJ conferences was alive and well in Dublin. Lively social events provided informal settings where old friendships were renewed and new friendships forged. In addition to receptions hosted by Ireland's Supreme Court and the Minister of Justice, tours of Dublin and to a nearby historic site were arranged for the participants. A gala banquet on the final evening of the Conference highlighted the social agenda with the human rights award presented to Arline Pacht, IAWJ-IWJF founding President, on the occasion of her retirement.

## Dates To Remember

The Conference ended on a high note when, in a symbolic gesture, Justice Mella Carroll presented the IAWJ's banner to President-elect, Supreme Court Justice Laetitia Kikonyogo and her colleagues, hosts for the Seventh Biennial Conference to be held in Kampala, Uganda from May 9 to 13, 2004. To the accompaniment of enthusiastic ululations, Justice Kikonyogo warmly welcomed all IAWJ members to the next meeting that will focus on ways to guarantee equal access to justice for all people. □

# Gender, Justice, and the ICC

History was made on July 1, 2002, when the Rome Statute creating the International Criminal Court, entered into force. The Court (hereinafter ICC) will be the first permanent institution to investigate and bring to justice individuals who are charged with committing the most serious violations of human rights law; namely, war crimes, crimes against humanity and genocide. Unlike the International Court of Justice, the ICC will have the capacity to try individuals, but only when State-parties are unable or unwilling to try alleged criminals in their own judicial systems.

The ICC is unique in other respects: for the first time, acts of violence against women during conflict are elaborated extensively. The Court will be able to prosecute cases of rape, sexual slavery, sexual violence, forced pregnancy, enforced prostitution and sterilization, in the context of armed conflict or as crimes against humanity.

## A Gender Equality Campaign

In addition, the Convention requires that State-Parties take into account the need for fair representation of female and male judges. Until now, the number of women appointed to international and regional tribunals has ranged from negligible to non-existent. Recent attention to the inclusion of women judges can be attributed largely to the efforts of women associated with tribunals, feminist academics and women's NGOs.

IAWJ-IWJF have joined forces with the Women's Caucus for Gender Justice to help develop a strong and effective Court that includes more than a token number of women judges. To this end, the IWJF and Women's Caucus conducted a 3-day Seminar at the Central European University in Budapest, Hungary from October 10 to 12. The distinguished women judges who attended the Seminar examined the complexities of the Rome Statute and relevant precedents that emerged from the existing *ad hoc* international war crimes tribunals.

The Workshop aims to equip participants with a level of expertise that will make it clear that highly qualified women judges are well prepared to take seats on the Court. The Partners are determined to attain gender parity rather than gender paucity on the ICC as a means of ending centuries of impunity that has allowed war criminals to evade prosecution and escape retribution. □



Participants and facilitators at the ICC Seminar

# Honoring Arline Pacht For A Dozen Years Of Leadership

*Arline Pacht retired on July 1, 2002, after serving as founding President and then Executive Director of the IAWJ-IWJF since 1991. She was presented with the IAWJ's human rights award at the Dublin Conference banquet on May 26, 2002. Following a tribute by President Mella Carroll, Judge Pacht delivered the following remarks:*

For at least a dozen or more years, my principal interest has been to help construct a viable worldwide organization of women judges. Some might even say that the IAWJ is my obsession. But why another judicial organization?

I found one answer after reading an article about Dr. Shirley Tilghman, world-renowned molecular biologist and Princeton University's first woman president. When asked whether she thought there was a difference in the way that male and female scientists approach scientific problems, she said that male scientists typically focus on scientific problems their peers recognize, and to marshal the power needed to break through barriers to find solutions. She then suggested that female scientists often take a different approach, focusing on subjects on the margins of their discipline's map, sometimes making striking discoveries with significant implications

If the distinction Dr. Tilghman makes is accurate, why is it so? The answer could be that when people themselves are on the margin, as women judges traditionally have been — and perhaps still are — problems that others may regard as marginal are seen as they are: central and important.

## A Different Vision

I suspect that some of us in this room know what life looks like at the margin. Because of our own experience, we clearly see the plight of other women in our societies who are at or beyond the edge. As far as I am aware, we are the only organization of judges that is expressly dedicated to ameliorating the conditions that subject women in our communities and nations to second and even third class citizenship. Our profession puts us individually in a position to bring just solutions to the problems that parties bring to our courts. However, when we act in concert, we are able to achieve goals that would otherwise be unattainable. With the leadership of dedicated past presidents — Susan Devine — Carmen Argibay — and now Mella Carroll — we have implemented programs and engaged in activities at national, regional and international levels that we never could have done alone. Take for example, the Jurisprudence of Equality project. Without an IAWJ-IWJF and national associations, could any of us have dreamed of training hundreds of men and women judges about women's human rights? We can be justly proud of what we have accomplished and how far we have come.

## Facing Forward

However, now is hardly the time to rest on our laurels. Rather than looking at where we were, we must look at where we are going. Although I am not clairvoyant, I see an extraordinary future for the IAWJ. We are moving forward into a new millennium with a new Executive Director. I have had the privilege of working with Joan Winship for some 5 years, and can assure you that she is superbly qualified for this position. She has masterful organizational skills and a genius for networking and collaborating with others who share similar goals and interests. While she fully appreciates that we live in a world where national boundaries grow less important, she also recognizes that we must continue to cherish our cultural diversity.

Of course, no one person can manage an organization alone. Joan knows that she has strong support from a new entity in the IAWJ universe. Throughout these past few days, you have heard references to a Board of Advisors. It started out as an informal group of multi-talented persons with wide ranging organizational skills who were near at hand in Washington, DC, and therefore, quickly provided me with sound advice. This group has evolved into a hands-on, actively engaged corps, a majority of whom are not judges, but who, linked by their respect for the IAWJ's mission and accomplishments, want to strengthen the IAWJ organizationally and financially.

The IAWJ now includes more than 4,000 members in 73 nations. Our new Executive Director needs far more support than even our highly competent Board of Trustees can provide. She, the officers and the newly-elected Board of Directors need your support, commitment, ideas and efforts. The collective actions of its members is the IAWJ's strength. As long as we work together the IAWJ will flourish. As the IAWJ grows stronger, so, too, will our efforts to bring relief to the disadvantaged women and girls in our world. As the noted anthropologist Margaret Mead said, "Never doubt that a small group of thoughtful committed citizens can change the world."

I recall that the woman whom we honored in Buenos Aires, Justice Naveathem Pillay, told us that there is no honor like the one that your peers bestow. I know how she felt. I am stepping down, but I will never cease working with you. I have learned much from you — you have changed and enlarged my life. We will continue to share a vision of how life could and should be for all of us on this planet.

I close now with this Irish blessing: *May the road rise up to meet you  
May the wind be always at your back,  
May the sun shine warm upon your face,  
May the rains fall soft upon your fields,  
And, until we meet again,  
May God hold you in the palm of her hand.*



President Mella Carroll honoring Hon. Arline Pacht with 2002 human rights award.

## Bench Marks

by Mella Carroll, President

I am very happy to use this opportunity to send a message of goodwill to all our members worldwide. It was my privilege as your President to meet representatives from many member countries at our Biennial Conference in Dublin in May of this year. It was an enjoyable and informative meeting but with a serious message — the implementation of basic human rights in every country.

These are uncertain times and it is incumbent on us as women judges to do all we can within our powers to encourage, support and implement these rights, without fear or favour within the law. It is by recourse to the courts that disputes are resolved, not by violence which begets more violence.

My sincerest wish for you all, as I approach the end of my presidency, is for courage to persevere, understanding and knowledge to do your jobs, and above all, peace to you, your families and the wider world community.

*The members of the IAWJ  
extend sincere sympathies  
to The Hon. Teresa Nolan  
on the loss of dear husband.*

*Resolution Awarding Honorary Lifetime Membership to The Hon. Justice L'Heureux-Dubé*

**WHEREAS** The Honourable Justice Claire L'Heureux-Dubé, Justice of the Supreme Court of Canada, is retiring from the Court in June 2002;

**WHEREAS** the Honourable Justice L'Heureux-Dubé was instrumental in implementing the Canadian Human Rights Charter;

**WHEREAS** she has authored numerous landmark judgments which have championed the cause of equal justice;

**WHEREAS** she has been a leader in implementing international human rights norms in domestic decisions;

**WHEREAS** she has construed the Canadian Charter of Rights and Freedoms in a way which recognizes the special contextual factors that shape the lives of minorities in order to accord genuine equality;

**WHEREAS** she has devoted endless hours to lecturing, teaching, writing and constant worldwide travel to bring human rights concepts to the attention of jurists around the globe;

**WHEREAS** she was vitally involved in the development of the Canadian Chapter of the IAWJ;

**WHEREAS** she has vigorously participated in the work of the IAWJ and enthusiastically supported its goals;

**WHEREAS** she has been a moving force in developing a global jurisprudence through her membership in and current presidency of the International Commission of Jurists;

**WHEREAS** she has inspired countless women in the law by means of her tireless enthusiasm and commitment to a more humane brand of justice;

The members of the International Association of Women Judges express their profound gratitude to the Honourable Justice L'Heureux-Dubé for her unique contributions to the law and hereby award her lifetime honorary membership.

## On the Record

by Joan D. Winship



I am delighted to be writing my first message to you as the new executive director. We are all indebted to the Arline Pacht for her devoted leadership during the first decade of the organizations' history. Although she felt it was time for her to "retire", she will continue to be active in this organization that she dearly loves. On behalf of all IAWJ members and the many individuals who have found new opportunities toward equal justice because of her work and IAWJ-IWJF programs, we extend to Arline our sincere thanks and our very best wishes in the years ahead. I am excited about becoming the executive director of the IAWJ and was pleased to meet many of you in Dublin. The energy and ideas generated there surely inspired us all to move forward in our work together!

For those who were unable to be in Dublin, I would like to explain the transition that is taking place for the IAWJ-IWJF. Several years ago, as planning began for the Sixth Biennial Conference in Dublin, the Executive Council of the IAWJ-IWJF recognized that the structure of the two organizations had become complex and cumbersome. In 2001 the IWJF received a capacity-building grant from the Ford Foundation to support the work of IAWJ-IWJF headquarters in Washington, DC. As part of that grant, the IWJF received special organizational consultation through the Management Assistance Group in Washington. Included in these consultations were opportunities for strategic planning and needs assessment, and supplementary funding to help implement recommended changes that would strengthen the management of the IAWJ-IWJF.

At the Executive Council meeting in Dublin in September 2001, two members of the IAWJ-IWJF Advisory Board, Agatha Aurbach and I, presented findings to the Executive Council. After much consideration, the Executive Council agreed that it was essential to establish a group of persons who would be able to meet regularly and bring their diverse expertise to bear in overseeing the organization's daily operations, helping with fund-raising, reviewing budgets and recommending actions, programs and/or policies to the Executive Council or Board of Directors. The Council endorsed the organization of a Board of Managerial Trustees.

Much work has been done since a year ago. We now have a board of twelve people, including six judges and six other committed individuals who are working actively now to find us new offices and to help develop our resources so that the IAWJ can truly be a sustainable organization. Additionally, the membership of the IAWJ has approved a reorganization that shortly will have the IWJF dissolved into one more streamlined IAWJ.

The IAWJ is poised to move ahead with new organization and new leadership. I look forward to being a part of our collective work and to meeting many of you in the near future. Please let us hear from you, and particularly let us know if you ever come to Washington or New York. We would like to meet with you and to share your expertise with other friends of the IAWJ to help us raise the visibility of our organization and thus, strengthen our programs and the work we can do for you as members, for other women judges, and for women and girls everywhere.



Hon. Justice Claire L'Heureux-Dubé

# Celebrating the IAWJ's Anniversary



Taiwan was well-represented



Scandinavian Fellowship - Colleagues from Iceland and Norway



IAWJ's newly-elected Board of Directors with Executive Director, Joan D. Winship



Bell'Italia



Latin American Representatives



The Court Chorale

# At the Dublin Conference



Joan D. Winship joins Hon. Mary Robinson and Justice Mella Carroll at lunch



Glorious headdresses abound



A symbolic tradition: IAWJ President Mella Carroll passes banner to President-Elect L.M. Kikonyogo and Ugandan delegates



Indian and Pakistani collegiality



Canadian and USA members are all smiles

## WOMEN, WORK AND POVERTY

At the Buenos Aires Conference in 2000, the membership endorsed "Women Work and Poverty" as the IAWJ's priority issue for the next two years. Thus, it was agreed that national associations and women judges would address this issue within their respective countries. At the Dublin Conference, the membership approved the following resolution that identifies projects consistent with this theme.

**Whereas** 2 billion people are estimated to be living in poverty worldwide, 80 percent of whom are women and children,

**Whereas** World Bank development indicators show that poverty has escalated since 1995,

**Whereas** reliable documentation shows that in many areas of the developing world, children are subject to intolerable commercial and sexual exploitation, and

**Whereas** most nations have ratified Conventions that promote gender equality and protect the labor rights of women and children

The members of the IAWJ, assembled at their Sixth Biennial Conference in Dublin, Ireland, hereby resolve that national associations, chapters, regional councils and/or individual members of the IAWJ will:

1. **Engage** in activities and conduct programs that address women work and poverty as a priority issue in the next two years,
2. **Determine** if their governments have ratified international and regional conventions and/or enacted national laws, standards or codes that promote gender equality in employment, and to encourage such ratification by methods appropriate to judicial officers.
3. **Study** UN and International Labor Organization Conventions, national constitutions and guidelines designed to promote women's equality in the workplace, followed by an assessment of the extent to which the Association's country is in compliance.
4. **Review** conventions, national constitutions and laws governing child labor and/or migrant labor in your countries, followed by an examination of any divergence that may exist between conventions and national law and an evaluation of the extent to which your country is in *de jure* and *de facto* compliance whether the target country has laws, codes or standards governing employment.
5. **Research** the laws of your country addressing discrimination on the basis of gender and/or sexual harassment in the workplace. If such laws exist, attempt to find out if they are being enforced.
6. **Examine** whether your government has ratified ILO Convention No. 100 on equal pay for equal work, No. 175 on part-time work, No. 11 on elimination of discrimination in employment and occupation, No. 177 on home work, as well as the Convention on the Worst Forms of Child Labor. Consider ways to encourage governments to ratify such conventions where they have not done so. Where such conventions have been ratified, determine the extent to which they are being enforced and as appropriate, bring the conventions to the attention of your governments and to women in the workforce.
7. **Investigate** the composition of labor union membership in trades where women are employed in significant numbers, and determine the extent to which women are permitted and/or encouraged to join unions that represent those trades.
8. **Review** your nation's constitution and laws that may govern women's right to credit, property ownership and/or inheritance rights to determine if there are inequities.
9. **Study** your country's standards for maternity protection to determine the extent to which they are available to pregnant workers and consider how these protections, if any, can be improved.
10. **Develop** methods to educate members of the judiciary, government officials, and the public about inequities and/or discrimination that may exist with respect to any of the topics listed above. Collect and distribute to members of your judicial systems, with copies to IAWJ-IWJF headquarters, any judgments that address these issues. □

## Consolidating IAWJ and IWJF

*This resolution was passed at the 6th Biennial IAWJ Conference in Dublin, Ireland.*

**Whereas** the IAWJ and the IWJF are closely related and share many of the same purposes, including:

- 1) engaging in, funding, sponsoring and/or promoting research and study that contributes to the understanding and resolution of legal issues facing women, and encouraging cooperation and collaboration among women judges of all nations;
- 2) assisting, conducting, funding and/or sponsor, regional, national or international educational conferences, judicial exchanges, fora, seminars and training programs, for the benefit of judges and other interested persons, to increase their understanding of the broad range of social, economic, psychological and cultural factors that influence women affected by the court system.
- 3) educating, the public and the judiciary about human rights law and the role of the judiciary in implementing that law to promote and protect the rights of women on an equal basis.
- 4) engaging in, funding, sponsoring or promoting the research, analysis, compilation, publication and/or distribution of educational materials to enable women judges to become more knowledgeable and proficient.
- 5) studying and educating the public about women judges, their number, the processes by which they are selected, and the barriers which interfere with their full participation in the process, in order to expand the number of women at all levels of the judiciary so that the judiciary may accurately reflect the population it serves.
- 6) educating the general public and policy makers on the importance of selecting judges who reflect the ideals of a democratic society.
- 7) studying and educating the public about the role of the legal-judicial systems in promoting and protecting the equal rights and interests of women and their role in society, and
- 8) encouraging and assisting the establishment and operation of women judges associations at all levels so they may serve their communities and nations more effectively.

**Whereas** the IAWJ and IWJF are engaged in an increasing number of programs and activities that impose expanding responsibilities on a very small staff;

**Whereas** the IAWJ-IWJF officers, acting as the Executive Council, recognize the need to conserve the economic and organizational energies of the IAWJ and IWJF to achieve organizational goals more effectively and function more efficiently and economically

**Whereas** the Executive Council has determined that consolidating the IAWJ and IWJF into one incorporated organization will serve to strengthen the IAWJ and improve its productivity

**Whereas** the Executive Council has obtained and relying on the *pro bono* legal services and advice of counsel expert in matters concerning the legal formation and functioning of nonprofit, non-governmental organizations such as the IAWJ and IWJF

**Whereas** the Executive Council has approved the establishment of a Bylaws Committee and a Board of Managerial Trustees to plan and prepare for the incorporation of the IAWJ and its transition to a single organization that can apply for the status of a nonprofit, tax exempt corporation;

**Therefore**, the members of the IAWJ hereby resolve that, in the best interests of the organizations, the IAWJ shall transfer its assets and liabilities to an incorporated IAWJ, thereafter, the unincorporated IAWJ shall be dissolved.

The IAWJ, sole member of the IWJF, further resolves that, in the best interests of the organizations, the IWJF shall transfer its assets and liabilities to the incorporated IAWJ providing it has attained tax exempt status, and thereafter, the IWJF shall be dissolved.

# Summing Up IAWJ's Biennial Conference

Professor Judith Resnik, Reporter

*Professor Judith Resnik, Arthur Liman Fellow at Yale University School of Law, served as Conference Reporter. She presented the following Summary at the final plenary session which was endorsed by the membership.*

At the Sixth Conference, held in Dublin, Ireland from May 22-26, 2002, the IAWJ selected "judicial creativity" as its conference theme. The discussion focused on:

- a) what roles judges can and should play in understanding international human rights, in educating litigants, lawyers, and the public and themselves about transnational human rights conventions and international customary law,
- b) what role those conventions and norms should play in national adjudication;
- c) the task of addressing in more detail its own organization and structure, exploring how to expand its governance mechanisms and reshape its structure to be more inclusive of its global membership, consistent with practical demands of management;
- d) the significant financial challenges of maintaining the organization and its programs in the present and for the future.

From many sessions shared themes emerged, resulting in a focus on the following priorities:

1. The IAWJ recommitted itself to its principal role as an educational organization, dedicated to enabling the sharing of knowledge, techniques, and problems common to judges.

2. To that end, the IAWJ will continue to use a major part of each conference for such education. The IAWJ will endeavor to provide materials in advance, when possible, and to have them available in as many languages as is feasible.

3. The IAWJ also will explore expanding on its current, significant efforts to train judges about gender equality and the role played by international conventions, regional or transnational provisions, and customary international law in developing and deepening the understanding of and commitment to equality of all persons.

4. Further, the IAWJ will consider how to take the many model programs on these issues that have been implemented by national chapters, by special projects or through regional efforts and make them more widely available — both inside specific countries and in regional meetings.

5. The IAWJ will consider how it may modify its electronic clearinghouse for judges to make their rulings on equality and human rights from courts of original as well as appellate jurisdiction more accessible.

6. Moreover, the IAWJ will consider how to develop programs that expand the education of lawyers, litigants and the public on the propriety of exchanging views on human rights and equality law and the special, appropriate role that judges at all levels of the judiciary can play in participating in that effort.

7. Such programs will explore the relationships among local and national law and international norms. The IAWJ will seek to understand how to develop links between and across different sources of law. Further, many nations have committed themselves to the equality of women and men through domestic law and/or by approving regional or international agreements. Therefore, an important question for the IAWJ will be how to help root the practices of equality within nation states so as to deepen the implementation and enforcement of the rule of law.

8. As part of such educational efforts, the IAWJ also will also focus on the office and role of judges as adjudicators. The IAWJ is committed to sustaining judicial identification with equal justice.

9. Just as human rights and equality law have a transnational aspect, so too does the law of judging which demands impartiality and independence. It further requires that judges provide fair hearings guided by the rule of law. The IAWJ will include within its priorities efforts to understand changing demands on judges and efforts to develop structures by which to underscore the many useful functions served by the adjudication process. To this end, the IAWJ may seek to work in coordination with ongoing efforts sponsored by the United Nations and other organizations on judicial independence and impartiality.

10. The IAWJ will address the ways in which contemporary attacks on judges sometimes focus on the institution of the judiciary, on specific judges or on adjudication itself. Such attacks run the risk of harming the adjudication process which is the foundation of judicial legitimacy.

11. The IAWJ will also address the role in transnational and international adjudicatory bodies, and help to encourage the full participation of women judges in such institutions.

12. As to its own structure, the IAWJ is undertaking new organizational formats, welcoming a new executive director, focusing on much needed financial development, and seeking to enable better communication to and from its members as well as exploring how to expand its international governance and its daily management. At the members' suggestion, the IAWJ hopes, in future meetings, to include more time for judges to meet and develop regional programs. The IAWJ also hopes to develop more means by which members can make suggestions and communicate regularly with the organization, and in turn how the management of the organization can facilitate membership accomplishing specific projects. □

## UGANDA CONFERENCE ONLY 18 MONTHS AWAY

Judges, especially women judges, are busy people who must plan their calendars long in advance. With this in mind, the National Association of Women Judges-Uganda (NAWJ-U) send this early notice to colleagues throughout the world:

### IAWJ 7<sup>th</sup> Biennial Conference: ACCESS TO JUSTICE

when: MAY 9-13, 2004

where: Kampala, Uganda

Accommodations at the 4-star Nile Hotel are a bargain at \$100 and \$120 for single and double rooms respectively. An early registration fee is modestly set at \$300. A special program for accompanying guests and a post-Conference safari will be offered. Look for a registration form after January 2003 on the Internet at: [www.iawj-ijw.org](http://www.iawj-ijw.org).

Dear IAWJ members:

All of us know that membership dues are crucial in supporting the IAWJ's work. Please continue to give that support by participating in IAWJ activities and by the timely payment of dues. Payment for national associations and individual members is due annually on March 31. Currently dues for each member of a national association is \$6 (US), and for each individual, \$15 (US).

You may transmit your payment to the IAWJ by wire transfer to:

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4435 Wisconsin Avenue NW, Suite 407

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If you have difficulty paying the dues promptly, please notify the IAWJ Headquarters to explain your situation. On behalf of the IAWJ membership committee, I thank you for your assistance and support.

Hon. Pi-Hu Hsu (Taiwan),  
IAWJ Membership Committee Chairperson

# Judicial Creativity:

## Enhancing Judges' Role As Enforcers of International Human Rights Law

continued from pg. 1

The case came before Australia's Federal Court in 2001, after the Government prohibited a boatload of asylum seekers from landing. A Court majority held that the Government acted within the executive's power to expel aliens under the Australian Constitution. The Court ignored the Refugee Convention, Article 32, that provides that states party "shall not expel a refugee lawfully in their territory save on grounds of national security or public order" and in accordance with "due process of law." The full Federal Court could have curtailed the executive's authority to ignore customary international rules.

2. It may not be undemocratic for the judiciary to enforce internationally recognised human rights norms in the face of conflicting legislation.

I support scholars who argue that judges have a legitimate function in policing the fundamental "rules of the game" in the polity over which they preside. It falls to the judiciary...to check a government's breach of these principles. For example, in *Vishaka v. State of Rajasthan*, India's Supreme Court cited the Convention On the Elimination Of All Forms of Discrimination Against Women in ruling that the proscription on sex discrimination in India's Constitution applies to sexual harassment in the workplace.

The Supreme Court ruling in *Nguyen v. Immigration and Naturalization Service* exemplifies a national court's failure to look to international standards. The applicant, born in Vietnam to an unmarried American father and Vietnamese mother and raised in Texas, sought US citizenship. It was denied because the father failed to take a step required by U.S. law to assert paternity before the applicant turned 18. This would not have been required if the mother was a US citizen. The Court found that the discriminatory means Congress employed to determine citizenship were "substantial" in achieving Congress' objectives. The majority would have seen that discriminatory treatment of children born out of wedlock breaches the European Convention's right to family, out-weighting any legitimate State aim, had they looked to European Court of Human Rights case law.

3. Judicial rulings pertaining to democratic principles and human rights should be viewed as part of a dialectic process, in which an immutable rule emerges only after broad social discourse and input from political actors.

Objections that judges are not democratically elected and, therefore, should defer to the judgment of politicians must be viewed against the backdrop of political realities. Perhaps the most vivid illustration of the judicial impotence when confronted with a government determined to enforce its own interpretation of human rights rules emanates from Zimbabwe where the Supreme Court ruled in the *Commercial Farmers Union case* that under the Constitution, white farmers whose lands were seized were denied equal protection and discriminated against on racial grounds. Despite the Court's ruling, land resettlement continues to be a dominant controversy in Zimbabwe.

4. Legal certainty can be preserved by limiting the sources on which judges draw to international human rights instruments, and legal rules common to modern democracies.

A concern often raised is that judicial enforcement of human rights rules will create legal uncertainty. I contend that once the judge finds sufficient evidence of an alleged right in international instruments and in the legal traditions of modern democracies, the threshold required to protect legal certainty will be satisfied.

I have identified 13 human rights rules common to the ICCPR and the regional human rights instruments of Europe, Africa and the Americas, including freedom of expression, the right to fair trial and due process of law, the right to free movement of people, the prohibition on torture, the right to family life, and the right to participate in fair political processes, to name a few. These, I would argue, represent minimal international standards that domestic judges are mandated to enforce.

5. Cultural relativism can be accommodated by referring to the development of regional rules.

Concerns that western values might be imposed on non-western states by the elaboration of "universal" standards can be resolved by developing regional rules. For instance, the African Charter, Article 29 states that individuals have the duty to "preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents. . .and maintain them in case of need." This suggests that liberalised definitions of family in western states may not necessarily graft into an African cultural context.

6. Rules formed in the days of "horse and carriage" may not be apt under human rights instruments.

Many rules crafted by national courts limiting the legal effects of international treaties arose in the days when states had little recourse to the international arena. This suggests that it is time to rethink some of the legal principles formulated in a bygone era. One such rule is the distinction between self-executing and non-self executing treaties. Even in countries where constitutional law vests treaties with primary status, the idea that treaties can be non-self executing, and, therefore, unenforceable in national courts, has impaired national enforcement of human rights instruments.

7. Judges have a legitimate role in crafting effective legal sanctions to enforce rights recognised in international human rights instruments

I submit that a major impediment to widespread state observance of human rights agreements has been the absence of sufficiently potent sanctions to deter their breach. Yet, national courts may be able to upgrade the sanctions that apply to such breaches by requiring that the full force of domestic sanctions be applied to them.

### Judges As Guardians

I see the judiciary as the guardian of "essential" rules on which rest the foundations of democratic governance and human rights standards. Fundamental human rights form part of these rules and national judges have a mandate, if not a legal duty, to secure their enforcement. On the recent 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights, Mary Robinson, then U.N. Human Rights Commissioner observed:

I do not see this 50<sup>th</sup> anniversary of the Declaration of Human Rights as an occasion for celebration. Count up the results of 50 years of human rights mechanisms, 30 years of multi-billion dollar development programs and endless. . .rhetoric, and the impact is quite under-whelming. . . . There is a failure of implementation on a scale which shames us all.

If national judiciaries were more active in enforcing international human rights rules, the results in terms of prevention could be highly significant. If the judiciary in the former Yugoslavia had preserved freedom of expression, the propaganda machine essential to Slobodan Milosevic's rise may not have functioned. If the right to life and rule of law had been preserved in Rwanda, mass human rights violations there might have been thwarted. In achieving these goals, and meeting the challenges of transnationalism, international human rights law presents an invaluable source of legal doctrine, and one on which national judiciaries can legitimately and confidently draw. □

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**April 1, 2003**



# LANDMARKS



The cases digested below were decided by East African judges who participated in Jurisprudence of Equality workshops and seminars. The digests also may be found at [www.iawj-iwjf.org](http://www.iawj-iwjf.org), human rights link. Complete copies are available by contacting IAWJ-IWJF headquarters.

**Tanzania** — *Ndossi v. Ndossi*, High Court, (February 2, 2001) On the death of Jackson Ndossi, the trial court appointed the decedent's brother administrator of the estate. After decedent's lawful wife successfully challenged this appointment in District Court, appellant appealed. High Court Justice Eusubia Manuo held that the lower court lacked jurisdiction in matters such as this involving title or interest in land. The Court instructed the widow to institute probate and administrative proceedings on the grounds that she was responsible for maintaining herself and the children, whereas the appellant was neither an heir nor a beneficiary. The Justice further ruled that the widow and children were protected by Tanzania's Constitution, and by the Conventions on the Elimination of all Forms of Discrimination Against Women (CEDAW) and The Rights of the Child, both of which were ratified by the Tanzanian government.

— *Mallya v. Republic of Tanzania*, High Court, Moshi; Criminal Appeal 88 (April 29, 2002) Joseph Mallya appealed his rape conviction, alleging that he did not rape but rather, married the victim under customary law. Relying on the Law of Marriage Act, 1971, Sec. 9(1) which provides that a customary marriage must be voluntary between the parties, Justice Manuo found that appellant's act was an abuse of custom and dismissed the appeal. In support of this conclusion, she also cited Article 16 of the Universal Declaration of Human Rights and CEDAW Article 2 that requires state-parties to take appropriate measures to abolish customs and practices that discriminate against women.

— *Maganjila v Mohamed*, High Court, Dodoma; Civil Appeal No. 4. In granting Maganjila a divorce, the Primary Court divided the matrimonial assets and ordered the husband to maintain his children. The District Court reversed, ruling that Respondent should have custody of his children over 7 years of age and awarded him the family home on the grounds that it was built with his funds. The High Court reversed, ruling that the Marriage Act, Sec. 125 (3) does not automatically grant custody to a father of children over age seven. Rather, Sec. 2 and 3 of the Act read together, require that in awarding custody, a court must consider the best interests of such children. The Court then found that no evidence was adduced showing that the children's best interests would be served by awarding the father custody. The Court also rejected appellee's challenge to the division of property, finding that the wife had contributed to the home by bearing and rearing the couple's children and performing other domestic chores.

**Uganda** — *Owagage v Mudhma*, High Court, Kampala. Decedent Owagege willed his property to his wife and their children. Decedent's son challenged the validity of the will, or in the alternative, claimed that the deceased did not own the property, but held it in trust for his clan. Justice Solomy Bossa ruled that as the decedent had acquired the property lawfully and constructed a house on it, the will was valid under Article 50 of the Succession Act. Thus, decedant was entitled to will it freely. The Court rejected the son's claim that the decedent held the property in trust solely for clan members as contrary to the equality provision of the Uganda Constitution, that prohibits a clan from discriminating against a wife.

— *Muwanga v Kintu*, High Court, Kampala, Divorce appeal No. 135 (August 20, 2002). Respondent appealed a divorce decree obtained by Petitioner on grounds of adultery, desertion and cruelty. The issues on appeal were whether the marriage was valid, whether the divorce was allowed under the Divorce Act, and if so, whether the Respondent committed any offense under customary law to justify divorce. Also raised on appeal was whether the Petitioner was entitled to an interest in the matrimonial property and alimony. Justice Bossa concluded that according to Banyoro custom, the parties' marriage was valid, but that such marriages are subject to the equality and equality-in-marriage clauses of Uganda's Constitution, Articles 21 & 31. In addition, the Court observed that customary marriages must comply with Article 33(6) of the Constitution, that prohibits rules that offend the dignity, welfare or interest of women or undermine their status. While the Court noted that a man may enter into more than one customary marriage without committing adultery, a relationship without benefit of customary marriage will be deemed adulterous. Based on evidence that the husband was in an adulterous relationship, the Court ruled that the wife was entitled to matrimonial property and dismissed the appeal. □

*Jamesina King, a law fellow from Sierra Leone with the Women's Law and Public Policy Fellowship program at Georgetown University Law Center, volunteered her time to provide enormous assistance in preparing the above digests.*

## IAWJ Represented at The Hague Special Session

By invitation of the Hague Permanent Bureau, the IWJF was represented at a recent special session on The Parental Abduction Convention, becoming the first judicial organization to be accorded expert observer status. The meeting was chaired by IAWJ member, Hon. Catherine McGuiness, a member of Ireland's Supreme Court.

Parental abduction of children across national boundaries is a worldwide problem for the judiciary in both convention and non-convention countries. Such cases often raise issues of domestic violence, child abuse and trauma.

The IAWJ is well-positioned to take part and provide leadership in such matters. However, in order to participate, members need to network with other judges who are working on these issues. To the end, the Permanent Bureau has offered to e-mail the *Judge's Newsletter*, printed without charge in both English and French, to interested members. Those who wish to receive this publication should send their e-mail addresses to IAWJ headquarters — [office@iawj-iwjf.org](mailto:office@iawj-iwjf.org). Those without e-mail may authorize release of their mailing address to receive a hard copy of the material. □

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