Human rights and women's rights

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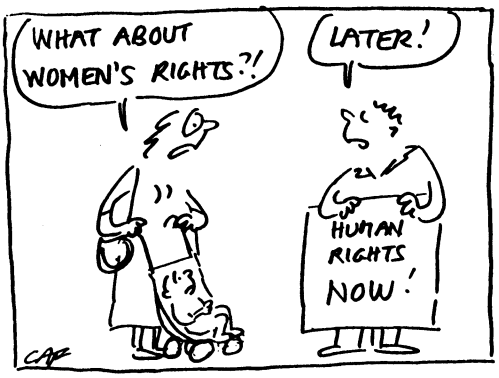
Until mainstream international human rights documents address the specific needs of women, 'human' rights will not be fully human.



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The United Nations Convention on the Elimination of all Forms of Discrimination Against Women (the 'Women's Convention') was adopted on 18 December 1979 by a nearly unanimous resolution of the General Assembly.[1] As of 1992 the Convention has been adopted by over 100 nations, representing the majority of peoples from all cultural, religious and linguistic backgrounds throughout the world, including Australia. Significant exceptions are the United States of America which signed the Convention in 1980 but has failed to ratify it, and India. Some nations' adoption of the Convention has been made with reservations to certain provisions that arguably undermine the object and purpose of the Convention, thus reducing, if not nullifying, commitment to the protection of women's rights as described in that document. It should be noted that under Article 28(2), reservations 'incompatible with the object and purpose of the present Convention shall not be permitted'. The effect and significance of reservations appear to be a purely technical issue of international legal doctrine but, in fact, represent a much deeper problem.

The United Nations has been committed to sex equality, at least as a matter of rhetoric, since the drafting of the United Nations Charter in 1945. The Preamble affirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. Article 1(4) states that the promotion and encouragement of respect for human rights 'without distinction as to race, sex, language, or religion' is a basic purpose of the United Nations.

The United Nations Commission on the Status of Women was set up under the auspices of the Economic and Social Council of the United Nations in 1946 to investigate the position of women. In 1972 the UN General Assembly proclaimed 1975 to be International Women's Year. In June and July of that year the United Nations sponsored a Conference in Mexico City to discuss women's issues. Documents adopted by this Conference included, 'The Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace' and a 'World Plan of Action'. The General Assembly approved the action plans proposed by the Conference, including two regional plans focusing on Asia and Africa, and declared 1975 to 1985 to be the UN 'Decade for Women'. From 1972 to 1979 the Commission on the Status of Women through a Working Group drafted the present Women's Convention which was adopted by the General Assembly in December 1979. In 1980 and 1985 two further Conferences were held in Copenhagen and Nairobi to evaluate the progress of action to improve the status of women and to set out further strategies up to the year 2000.

Definition of women's rights

There appear to be a number of major historical and theoretical barriers to the accurate definition of women's rights as part of 'human' rights, and to their effective enforcement. These might be summarised as follows:

The historical construction of modern human rights from norms and institutions designed by men to serve men's interests.

- The cultural construction of women's reproductive role and the continuance of this role within the family.

The division of rights into discrete categories and definitions such as 'civil', 'political', 'economic', 'social', 'cultural' or 'peoples" rights which do not reflect the reality of women's lives.

Human rights as men's rights

With the exception of international documents and instruments directed specifically towards women, such as the Women's Convention, the language of human rights is resolutely and utterly male. The rights which are guaranteed are the 'Rights of Man' or 'Mankind'.

The exploration of the problem of masculinist language in the law has been made on a number of different levels by both Anglo-American and continental European, particularly French, feminists. There has been very little discussion about language within international law, probably because the problems of language diversification and translation are already so great. The effect of masculinist language exacerbates a serious problem in characterising human rights as inclusive of women. Women are, linguistically, and on consequent deeper levels of thought and action, consistently marginalised in the 'mainstream' international instruments. Only where women are dealt with in their 'own' conventions, committees and other international forums are issues relevant to them discussed. The other major human rights instruments, although paying lip-service to the ideas of equality and non-discrimination including sex equality, are consistently expressed, described and interpreted as they relate to men's experiences.[2]

The problem is also historically and politically important in relation to human rights, in that, at the time 'Les droits de l'homme et du citoyen' and the Bill of Rights were being drafted and incorporated into the revolutionary constitutions of France and the United States, women were specifically excluded from most market-oriented economic and all political institutions. It has been argued that this exclusion was extended and exacerbated to the point of virtual 'slavery' for most women within European and, to a lesser extent, North American and Australasian societies after the success of the bourgeois political and economic revolutions of the 1780s and 1790s.[3] When masculinist language is used within human rights law, it is based on a history of the exclusion of women. The words 'les droits de l'homme' or 'the Rights of Man' meant and still largely mean 'men's' rights, 'les droits des hommes', not 'women's' rights. The claimed gender neutrality of modern international law instruments disguises this history and distracts attention away from the marginalisation and exclusion of women through the period when modern political and economic rights were being defined and limited.[4] Nor does the problem appear to have been identified or resolved in instruments which attempt to redefine human rights outside their Euro-centric origins, such as in the African Charter on Human and Peoples' Rights ('Banjul Charter').[5]

The United Nations Convention on the elimination of all forms of discrimination against women

The Women's Convention is the major international instrument dealing specifically with women.[6] The very existence of this and other 'women's' conventions indicates the failure of human rights law generally to adequately deal with women's issues.[7] 'Women's' rights as opposed to 'human' rights are relegated to their 'own' convention, which nevertheless reproduces many of the assumptions found in 'human' rights generally. Other mainstream instruments or institutions, such as the Human Rights Committee under the International Covenant for Civil and Political Rights, the UN Commission on Human Rights and other organs set up under the Economic and Social Council consistently fail to deal with human rights violations against women.

The basis of the Women's Convention is equality, or the principle of non-discrimination on the basis of sex. The Preamble, the first four articles, and nearly all the substantive rights contained in Parts II, III and IV of the Convention are explicitly designed to eliminate 'discrimination against women' and ensure the 'equality of men and women'. Article 1 defines 'discrimination against women' as:

> . . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Articles 2 and 3 outline in more detail the requirement to take steps to eliminate discrimination against women 'in all its forms' and to advance women's 'full development'. Article 4 allows the adoption by States Parties of 'special measures' creating temporary inequality in favour of women 'aimed at accelerating *de facto* equality between men and women' and protecting maternity. Such 'special measures' are deemed not to be discriminatory, but (with the exception of protecting maternity) 'shall in no way entail . . . the maintenance of unequal or separate standards' and 'shall be discontinued when the objectives of equality of opportunity and treatment have been achieved'. Parts II, III and IV set out substantive political, civil, economic and social rights to be applied without discrimination to women as well as men. These rights reiterate, for the most part, the substantive rights contained in other mainstream 'human' rights instruments.

Equality as the basis of women's rights

The problem of equality as the basis for theorising about 'women's' rights contains some major difficulties. Equality, particularly where, as in the Women's Convention the ideal appears to be 'sameness' with men, accepts the validity of a male standard as 'human' and indirectly silences or subverts the value of specifically female experiences, such as maternity, which men do not directly share. Thus the concrete reality of the lives of half the human race is marginalised and denigrated and a major part of most women's experience, maternity and child care, is treated as requiring 'special measures'.

Where equality attempts to validate the 'difference' of women, the effect can also be marginalisation and trivialisation of women's realities.[8] As Catharine MacKinnon points out, 'difference' tends to ignore the underlying power imbalance out of which women's experiences are constructed. Women are arguably 'different' in the existing sense because of sexual oppression. There is no adequate means of knowing what is 'female' because the 'feminine' is presently defined by men to serve men's interests.[9]

Difference as a basis for equality tends to be reductive and hence unrealistic in adequately reflecting or dealing with women's or men's experiences. It is as if we can either be men (or 'the same as men') or mothers ('different from men'). Somehow what might be fully human for many women and men is silenced or portrayed as suspect or abnormal; for example, the experiences of lesbians and gay men who defy

simple gender dichotomies, or the complicated intersection of race, class and cultural contexts in relation to the rights of women and men. This is particularly acute in an international law context where cultural differences and the existence of a diversity of traditional and other practices fragments the search for simple equality.

A third way in which 'equality' can be discussed is in terms of dominance and submission, or power imbalance.[10] Within this perspective, sex inequality is seen as entrenched within existing social structures, and the social construction of sex, sexuality, reproduction and gender are responsible for the continuing oppression of women. MacKinnon identifies sexual harassment, rape, incest, pornography and abortion as key areas for identifying the sources of women's inequality. It is arguable that this is still too narrow in that it focuses on the extreme end of sexual coercion. A more subtle approach would look at the whole range of cultural constructions of sexuality and reproduction, of 'femininity' as revolving around various forms of reproductive control, both coercive and apparently non-coercive.

The Women's Convention, alone among international instruments dealing with 'human' rights, attempts to address some of these problems. Article 14 highlights the role of rural women and their important contribution to the economic survival of their families, allowing an interpretation of rural women's work which steps outside the existing boundaries of 'femininity'. Article 16 attempts to redress problems of inequality for married women in ways which highlight the usual standard of subservience and submission which most married women suffer. Article 5 states:

> States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
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> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

The difficulty with these provisions is that the standard for comparison is still male against which 'inferiority' or (rarely for women) 'superiority' can be evaluated. The subtle nature of the construction of ourselves as male or female is portrayed in simple terms as 'prejudices' which the State can remedy by passing 'appropriate measures'. Common responsibility for child rearing is described as a matter for 'education' rather than for radical social or economic restructuring. The primordial nature of concern for children over all other considerations subtly reproduces the sanctity of 'maternal instincts' and the primacy of child care no matter what the consequences for women in a world where, as a matter of practical reality, women remain the primary care-givers.

Construction and protection of women's reproductive role

Marilyn Waring, in her seminal work *Counting For Nothing: What Men Value And What Women Are Worth*[11] outlines six basic facets of reproduction which she claims are crucial to the continuing inequality of women within modern economic and political spheres. These include biological reproduction; reproduction of the labour force; reproduction of the relations of production; reproduction of the relations of reproduction; reproduction of social relations between women and men; and the categorisation and institutionalisation of those who may or may not reproduce.

An examination of the centrality of reproductive control and the protection of traditional values through the description of the 'family' as the 'natural and fundamental group unit of society' in most human rights instruments effectively reproduces female subservience within the private sphere and makes the list of 'human' rights useless to most women.[12]

Reservations to the Women's Convention

Article 16 of the Women's Convention provides:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
   a. The same right to enter into marriage;
   b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
   c. The same rights and responsibilities during marriage and at its dissolution;
   d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of children shall be paramount;
   e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
   f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
   g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
   h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

This provision, as well as others, has given rise to a considerable number of reservations and objections to reservations. The reservations to Article 16 and associated provisions are, arguably, at the heart of difficulties with the rights enumerated in this Convention. Egypt, in its reservation to Article 16, perhaps sets out most clearly a major stumbling block in balancing traditional values and the emancipation of women:

> Article 16
>
> Reservation to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution. This must be without prejudice to the Islamic Sharia provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sanctity deriving from firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between spouses and not a quasi-equality that renders the marriage a burden on the wife. This is because the provisions of the Islamic Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully out of his own funds and shall also make a payment to her upon divorce, whereas the wife retains full

rights over her property and is not obliged to spend anything for her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.[13]

Other states which have made reservations for apparently similar reasons include Bangladesh, Iraq, Jordan, Mauritius, Tunisia and Turkey. In addition, Brazil, South Korea and Thailand felt themselves unable to accede to Article 16, although they are not influenced by principles of Islamic law. Malawi, also not primarily an Islamic country, made a general reservation to the whole of the Convention: 'Owing to the deep-rooted nature of some traditional customs and practices of Malawians' although this reservation has recently been withdrawn.

A few countries, including Mexico, Sweden and the (then) Federal Republic of Germany, entered objections to these reservations, specifically citing them as going to the 'object and purpose of the Convention'. It is interesting that a major concern of these countries appears to be the possibility that the basic nature of international law will be undermined by states who enter into contractual obligations, in the form of multilateral conventions, and then reserve their right not to implement certain provisions of those conventions where, arguably, they go to the heart and focus of the obligation as a whole. What is not stated in the objections by Mexico or Sweden is why reservations in relation to the rights of married women are so crucial to the rights of women generally.

Article 16(1)(e) is one of only three provisions which explicitly recognises women's right to control their own fertility, at least after marriage, in any major human rights instrument. The other references to a right of women to control their own fertility is access to 'information and advice on family planning' as provided for in Articles 10 and 14 of the Women's Convention. Instead of sanctifying the family as the fundamental group unit of society, the Women's Convention took the important step of outlining rights for women that enhances their control over reproduction of the labour force through control of their own fertility, at least within marriage. This is, not surprisingly, seen as unacceptable to many states.

The fragmentation of rights

The third major theoretical difficulty in describing 'human' rights as including 'women's' rights is the division of rights into discrete categories which may or may not adequately reflect *men's* realities, but which rarely have much meaning in relation to *women's* lives. Most women, because of their lack of access to public spheres of power, will be relatively poorly served by traditional civil and political rights. This is exacerbated by the usual characterisation of these rights as individual rights. Women, in their usual role as care-givers, are not individuals in the same sense as men perhaps can be. Individuality denotes autonomy, something which women are rarely seen as possessing or able to possess. Yet the newer category of 'peoples' rights', which departs from the notion of individual rights, rarely addresses itself to the specific needs of women who comprise at least 50% of most population groups, if not 'peoples' in and of themselves.

Perhaps the category of rights which might be of greatest applicability to women are economic, social and cultural rights. Within 'mainstream' human rights instruments there is greater attention paid in this type of right to the needs of women than in the more traditional delineation of civil and political rights. The International Covenant on Economic, Social and Cultural Rights does at least mention some women's needs.[14] But economic and social rights are rarely contained in instruments with effective enforcement mechanisms. Rather they are seen as aims to be achieved through progressive development and not as existing rights giving rise to claims and obligations.

The Women's Convention itself is characterised in this way with no enforcement mechanism and a relatively weak implementation process of reporting by states parties and the making of suggestions to the Economic and Social Council. The effectiveness of this Convention could be improved by a greater allocation of resources to the work of the Women's Committee set up under the Convention, by the extension of time within which the Committee may meet (currently two weeks a year), and possibly by the addition of a Protocol allowing the Committee to hear petitions by individuals, groups and non-government organisations as exists under other human rights conventions.

Conclusion

Although the Women's Convention does have the effect of marginalising women's rights and confining them to the ghetto of a specialised treaty, these rights are unlikely to become more central in human rights in the absence of a women's 'own' instrument. Conventions and other sources of international law specifically addressed to women go some way to fill in a large gap left by traditional 'human' rights law. This alone provides adequate reason to continue to work within the Women's Convention.

It remains, however, something of an absurdity that one half of the human race, and such rights that they may have, both of a political and an economic or social nature, should be dealt with by one Convention while other human rights instruments fail to adequately address women's issues. There is an urgent need to put economic, social and cultural rights as they effect women, children and men at the top of the international agenda instead of close to the bottom. Until major problems of poverty and underdevelopment of women, social ostracism and political powerlessness, and the maintenance of women's primary role as reproducers and caregivers are dealt with, 'human' rights cannot be fully 'human'.

References

1. 130 votes in favour, none against, ten abstentions as cited in Brownlie, Ian, *Basic Documents On Human Rights*, Clarendon Press, Oxford, 2nd edn, 1981, p.94.
2. The one convention not specifically geared towards women which to some extent avoids the use of masculinist language is the most recent Convention on the Rights of the Child.
3. See Hobsbawm, E.J., *The Age Of Revolution: 1789-1848*, Weidenfeld and Nicolson, London, 1962 for a largely masculinist history of this period; Anderson and Zinsser, *A History Of Their Own: Women In Europe From Prehistory To The Present*, Vol.II 1988 which provides a welcome wealth of information on women's history in Europe from the 15th to the 20th centuries.
4. See Clark, Lorenne, 'Women and the State: Critical Theory – Oasis or Desert Island?' 5 (1992) *Canadian Journal of Women and the Law* 166.
5. Adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986, 21 ILM 58 1982.

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get on average only 25%-30% of farming property settlements on divorce. However, surprisingly there has been no debate over this rule which in a situation where men usually inherit farms has led to the reproduction of male patriarchy on farms.

However, the JSC recommendation even further attempts to restrict women obtaining a fair share of the farm following divorce as the recommendation attempts to turn the clock back to the pre-*Lee Steere* stage where farming properties were put into a category different from other matrimonial property and thus preserved as a productive unit for male farmers. Following this approach, the wife's claim from the pool of assets would be restricted to her respective share of the domestic assets.

This recommendation must, by most views, be seen as a retrograde step. It makes a difference between urban and rural women. It would perpetuate the existing pattern of reproduction of farms based on male patriarchal notions. This leaves women's labour devalued and renders their contributions invisible.

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2. Bell, J. and Pandey, U., 'The Persistence of Family Labour Farm Ownership in an Advanced Capitalist Economy' in T. Lees (ed.) *The Family Farm in Australia,* University of New England, Armidale, 1993, forthcoming.

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6. West, R., 'Feminism, Critical Social Theory and Law', Chicago, (1989) *Legal Forum* 59; Clarke, M., 'Women and Locke: Who Owns the Apples in the Garden of Eden' in *Sexism of Social and Political Theory,* M. Clarke and L. Lange (eds), University of Toronto Press, Toronto, 1979.

7. See Gibson, Baxter and Kingston, above, 1990 above. This survey involved 98 farm women in the Darling Downs and New England areas in 1987-88. For overseas studies on rural women see Haney, W.G. and Knowles, J., *Women and Farming, Changing Roles, Changing Structures,* Westview, Colorado, 1988; Sachs, C. *Invisible Farmers: Women's Work in Agricultural Production,* Rhinehart, New Jersey, 1986; Whatmore, S., *Farming Women: Gender, Work and Family Enterprise,* MacMillan, London, 1990.

8. Aiken, D., 'Country-Mindedness' in S.L. Goldberg and F.B. Smith (eds) *Australian Cultural History,* Cambridge University Press, Cambridge, 1988, p.56.

9. Nalson, J.S. and Craig R.A., 'Rural Australia' in *Selected Readings* S. Encel (ed.), Longman, Melbourne, 1987, p.318.

10. Woog, R.A., Kelleher, F.M. and Andrews, *Issues in Extension and Advisory Services to the North Coast Dairy Industry,* University of Western Sydney, Hawkesbury Agricultural College, Richmond, 1990. They suggest fewer sons wish to take on dairy farms from their parents.

11. Dickey, A., *Family Law,* Law Book Company, Sydney, 1990, p.586.

12. See *In the Marriage of Shaw* (1989) FLC 91-010 where an improvement of the quality of the house and conservation of the property by a wife was regarded as a contribution.

13. *Mallet v Mallet* (1984) 156 CLR 605 at 623, 636, 646.

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16. This is often referred to as the presumption or preference against a 'crippling order'; Wade, J., above, p.266.

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19. See *Norbis v Norbis* (1986) 161 CLR 513 at 523 and 541 which authorises such an approach.

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6. See also the Inter-American Convention on the Granting of Political Rights to Women, 1948; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; Convention on the Political Rights of Women, 1952; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; Convention on the Nationality of Married Women, 1957; Convention Against Discrimination in Education, 1960; Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1962; the General Assembly Declaration on the Elimination of Discrimination Against Women, 1967; and numerous 'protective' conventions on women from the International Labour Organisation.

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12. Universal Declaration of Human Rights, 1948, GA Resolution 217A(III), UN Doc. A/810, at 71, Article 16(3).

13. See Lillich, *International Rights Instruments: A Compilation of Treaties, Agreements and Declarations of Especial Interest to the United States,* 1989, at 220.13.

14. GA Resolution 2200 (XXI) UN Doc.A/6316, Article 10(2) specifically mentions '[s]pecial protection' for 'mothers during a reasonable period before and after childbirth' including paid maternity leave and 'provision for the reduction of the still-birth rate and of infant mortality' in Article 12(2); see also Article 7 on 'equal pay for equal work'.