

ECONOMIC RIGHTS AND SOCIAL JUSTICE :

A FEMINIST ANALYSIS OF SOME INTERNATIONAL

HUMAN RIGHTS CONVENTIONS

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Introduction

A major difficulty in talking about human rights in international law is to define such rights as if they really applied to all human beings. It will be assumed for the moment that "rights" as a legal category both nationally and internationally has at least rhetorical value, and probably substantive value as well, despite difficulties with definition and enforcement. This analysis of what is meant by "human" rights will necessarily be speculative and introductory and possibly also somewhat confused. The confusion stems in part from enormous confusions within human rights talk itself. This confusion would seem to consist in two basic problems.

1. Up until very recently, the only people who have done much talking about human rights have been white European middle-class men. Non-white men have begun to contribute, and be listened to, in the mainstream discourse of human rights only within the last thirty years. Human rights as a topic of international law is itself very recent, although derived from debates and legal regimes within nation states dating back to at least the late eighteenth century. Women have also attempted to join in this discourse and again, within the last twenty years, some, mainly white European women, have played some role in putting women's interests and needs onto the international agenda. However, the vast majority of the world's women, non-white non-European women, are still silenced. It is not possible to adequately address the problems in language and communication that this creates. One problem is that, despite the inadequacy of the existing discourse to define or describe many women's needs, it is extremely difficult to talk about these needs in any other language. The discourse of human rights can become a trap out of which communication becomes extremely difficult.

The problems of language and discourse lead to a fundamental problem in talking about human rights and that is that the "human" rights that have been talked about up until now have been white European male rights. The term

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"human rights" is a modern euphemism for the "rights of man" which has meant, for most of their history, "men's rights" in the literal, gender-specific, masculinist sense of the word. The problem of "men's rights" masquerading as human rights is not merely one of language, but is historically and culturally specific to the development of these rights in modern Western Europe. The substance of the rights, and the political/economic foundation on which they rest, are also "male" and not "human".

2. The second problem leading to confusion in the discussion of human rights is basically political. This is the necessity to choose the particular discourse which can most effectively be used to achieve the aims, that I have called "economic rights and social justice", for all human beings, not just some men. The discourse of human rights, as flawed as it is, may contribute to the long term achievement of these aims. But it is also necessary to choose a way of working within this discourse in order to help bring about the long term goal of creating a broader conception of human rights that is more than just "men's rights" in disguise.

Up until now, when talking about "women's rights" or human rights which specifically and expressly include women, the particular aspect of human rights which has been chosen has been the discourse of equality. The Convention for the Elimination of All Forms of Discrimination Against Women of 1979 ("Women's Convention") is based on the necessity to achieve women's equality with men.¹ Women's rights generally, wherever they are mentioned in human rights instruments (which is rare) are put in terms of "sexual discrimination" or the need for equality. One of the central debates in modern feminist theory has revolved around the meaning of equality, the "sameness/difference" debate.² It is suggested that the discourse of human rights must be substantially altered so as to incorporate, not the equality of women and men, but a redistribution of power and responsibility such that all women and men are free to choose among a reasonably wide range of productive, positive options to enhance their own existence and the existence of others. "Equality" of some sort would necessarily be part of this process, and one of the aims to be achieved. The power and freedom to make such choices are political questions, therefore the kinds of rights necessary for both women and men are political rights. But these rights must also be economic rights, in the sense that the distribution of power necessarily involves, and cannot be achieved, without a redistribution of resources. The relations of production and reproduction must be altered, not only through and towards equality, but also through and towards freedom and community.

¹ UNGA Res 34/180 (XXXIV) December 18 1979, entered into force, September 3 1981. See the Preamble which talks almost exclusively about equality and non-discrimination for women and men.

² See for example MacKinnon C, *Feminism Unmodified* (1987) and Towards a *Feminist Theory of the State* (1989); Gilligan C, *In a Different Voice: Psychological Theory and Women's Development* (1982); Smart C, *Feminism and the Power of Law* (1989).

The aim of this paper is therefore to put modern international "human rights" into an historical context and to discuss some existing human rights provisions and the problems they pose for women. It is suggested in this paper that a central issue that must be resolved if "human" rights are to be truly human, is the issue of reproductive control and the transmission of traditional and other cultural values through the family. It is also suggested that a redefinition of what is meant by human rights must force us to redefine what we mean by "economic rights", as well as political rights, in order to achieve something that can be called "social justice" for all.

Historical Development Of Human Rights

It has been said that "The emphasis on individual liberty and freedom has been a distinctive feature of western political and legal philosophy since the seventeenth century, associated particularly with the doctrine of natural rights."³ Natural rights, or natural law as it is sometimes called, is an ancient doctrine, owing its roots to Greek and Roman thought. The great medieval thinkers, such as Thomas Aquinas, built theories of divine and natural law in an elegant hierarchy of descending order from God to man, and then on down through the lower creatures (including women and children), which created for European society a fragile sense of divinely inspired order in which all creatures had their due and proper place. The notion of natural rights, however, went through a profound change during and after the Renaissance, leading to the development of new political and legal ideologies stressing the importance of individual man and removing the justification for human conduct and human rights from divine and priestly ordinance. The result of this was the development of ideas about authority, sovereignty and rights which revolved around "Man" rather than around "God". Even a male patriarchal God might be tempered to some extent by the intervention of gentler spirits, or at least by the realisation that the divine hierarchy subordinated men, even kings, as well as women, to the divine order. Once God disappeared, as He (in his dominant Judeo-Christian aspect) effectively appeared to do in any political sense in Europe sometime around the end of the seventeenth century, the hierarchy no longer recognised the subservience of "Man" to God, but rather placed "Man" at the pinnacle. Unfortunately, the rest of the human race failed to achieve any similar promotion and remained subjugated. For women, children and many men of the poorer or non-white classes, it is at least arguable that "Man" (in his ascendant white European mode) has been a harsher master than even the most bloodthirsty of patriarchal Gods.

The first major promulgation of human rights in the modern sense was contained in the Virginia Declaration of Rights which predated the American Declaration of Independence of 1776 by just three weeks. Both documents are based on a Lockean version of "natural rights" phrased in the beautifully ringing

³ Lloyd of Hampstead, *Introduction to Jurisprudence*, 4th edition (1979), p 99.

language of one of the world's great political drafters and legislators, Thomas Jefferson. The Declaration of Independence begins:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;...⁴

The American Bill of Rights was added to the Constitution in 1791. The French Declaration of the Rights of Man and the Citizen was passed by the newly constituted National Assembly of Revolutionary France in one of its first actions of 1789. Both these basic statements of human rights, modelled on Lockean natural rights theory, and, in the case of the French Declaration, on the inalienable rights of the "people" to express their will through legislative means, have remained intact and legally binding in the United States and France to this day, although the effect and interpretation of the two documents are widely different. The emphasis on individual rights, and duties imposed on the State to protect those rights; the nature of the rights relating directly to civil and political freedoms which have formed, since the late eighteenth century, the core of traditional human rights; and the phrasing of the rights as rights of men based on the assumption of inherent theoretical equality, have shaped, for better or for worse, the adoption and interpretation of "human rights" to this day.

After the Second World War, human rights generally went through a second great revival after a long period of desuetude when the emphasis had been on legislative supremacy and positive law, at least throughout most of Europe. The rights that were recognised, in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, and in subsequent documents, were based on these initial civil and political liberties derived from natural rights theory in the eighteenth century. The impetus for the inclusion of human rights on the international agenda was in response to the horrific human costs of two world wars, particularly after the discovery of evidence of the Holocaust and the Nazi death camps. European and international policies consciously adopted human rights as a response to the failure of positive law to prevent such bloodshed. In addition there was the hope, particularly in Europe, that recognising human rights and allowing an effective mechanism for their implementation might act as an alarm system to prevent the uncontrolled development of racism, fascism or oppressive political regimes before they got out of hand. The adoption of human rights on the international plane was felt to be one way of avoiding war. Finally, the massive explosion of nation building that characterised the post-War years as the old colonial empires broke up also involved an equally massive explosion of constitution writing in which human rights or fundamental liberties based on the French, American and United Nations models were incorporated.

⁴ The Declaration of Independence, July 4, 1776 as quoted in Hampton C, *A Radical Reader: The Struggle for Change in England, 1381-1914* (1984), p 326.

But the historical foundation of human rights in natural law theories of the eighteenth century gives rise to a number of difficulties for their modern formulation. These might be summarised as first, the emphasis on the individual, and, second, the emphasis on the rights of "Man".

I. The Emphasis on the Individual

Because the historical foundation of human rights lies within theoretical constructs which developed over two hundred years ago, and which have been effected by the overwhelming authority of positive law and notions of sovereignty since then, a number of difficulties exist, which can be attributed, at least indirectly, to the political and historical formulation of human rights. The first of these social constructions which we will have to deal with is the emphasis on the "individual" as the focus, or subject, of rights. To allow individuals to be the "subjects" of international law directly opposed to their own States, can be seen as a revolutionary alteration to the long established acceptance that only States may be subjects of international law. This change has come into existence only since the Second World War and is particularly evident in both the European Convention on Human Rights ("European Convention"), the first major effective human rights multi-lateral treaty in international law,⁵ and in the later International Covenant on Civil and Political Rights (ICCPR).⁶ Both of these conventions, through Article 25 of the European Convention and through the First Optional Protocol to the ICCPR, allow, where their States have acceded to these provisions, individuals to bring petitions directly against their States before an international tribunal. In the case of the European Convention, there is also a power of review in the Committee of Ministers of the Council of Europe or the European Court of Human Rights.⁷ States are bound by decisions of the Committee or the Court, whereas under the ICCPR the Committee of Human Rights can only "forward its views to the State Party concerned and the individual."⁸

The rights contained in these two conventions are based on civil and political rights formulated in the American and French Bills of Rights. The Universal Declaration of Human Rights (1948), partly based on these older documents, was used as the basis for the drafting of these modern international instruments. This document, although it is only a resolution of the General Assembly,⁹ is often described as having binding effect on members of the United Nations, or indeed the world community as a whole, as the expression in detail of the United Nations' commitment to human rights contained in the Charter itself.¹⁰

⁵ Signed in Rome, November 4 1950, entered into force September 3 1953.

⁶ 999 UNTS 171 (1966), entered into force March 23 1976.

⁷ Articles 31, 48.

⁸ ICCPR Optional Protocol, Article 5.

⁹ GA Res. 217A (III) (1948).

¹⁰ See the United Nations Charter, Preamble, Articles 1, 2, 55, 56, et al.

But the Universal Declaration does not limit itself to enumerating traditional political and civil rights, but also includes a list of economic, social and cultural rights.¹¹ These rights have been incorporated in the International Covenant on Economic, Social and Cultural Rights,¹² a European Social Charter¹³ and various national constitutional documents, in particular India, the Soviet Union and the People's Republic of China. These rights reflect a major trend in human rights, beginning during the middle of the nineteenth century and the development of socialist doctrine, which emphasises the individual in society and places obligations on the State to ensure basic standards of health, welfare, education, workers' rights, medical care and the like. These rights are usually not reflected in instruments or political documents which allow an individual right of petition, but rather impose a general obligation on States to work towards the achievement of these "social" or "economic" rights.

It has often been suggested that this second kind of right is antithetical to civil and political rights; that without the fulfilment of basic social and economic needs civil and political rights are useless or may even interfere with the fulfilment of social justice. The basis of this conflict again goes back to Lockean principles where civil and political rights and freedoms are seen as part of "man's" inherent right of property both in himself and in his "estate". Civil and political rights are part of a general philosophical tradition guaranteeing individual rights to ownership and unfettered enjoyment of property. They were part of a general move away from feudal obligations based on status and community towards individual economic freedoms separating ownership of property from social obligations and allowing the accumulation of capital. The synthesis of individual rights, freedom, civil society and the minimal role of the State is perfectly summed up in another well-known eighteenth century author, Adam Smith, who states:

... all systems of preference or of restraint [on the part of the State] ... being thus taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest in his own way and to bring both his industry and capital into competition with those of any other man or order of men. . . [but] . . . It is only under the shelter of the civil magistrate that the owner of that valuable property which is acquired by the labour of many years or perhaps of many successive generations, can sleep a single night in security. . . [and] . . . Commerce and manufacture gradually introduced order and good government, and with them, the liberty and security of individuals . . .

11 See Universal Declaration of Human Rights, Preamble, Articles 22 et seq.

12 993 UNTS 3 (1966), entered into force January 3 1976.

13 Drafted under the auspices of the Council of Europe and agreed upon October 1961; entered into force, February 1965.

This though it has been the least observed is by far the most important of all their effects.¹⁴

Adam Smith rejects the social contract theories of both Locke and Rousseau, adopting the approach of David Hume that these theories are contrary to empirical evidence. Nevertheless the enjoyment of individual rights and freedoms are described as directly attributable to and inseparable from, the gradual development of individual initiative and self-interest unfettered by governmental interference. It is in this sense that individual rights are connected to economic rights; but in a way which is directly antithetical to later socialist theories developed in response to the failure of Adam Smith's "natural liberty" and economic freedom to achieve justice or equity, or to alleviate massive poverty. Thus classic civil and political rights are seen as directly contrary to obligations placed on the State to regulate the economy and interfere with the free enjoyment of property for the purpose of wealth redistribution and the creation of real, rather than purely theoretical, equality.

The third major strand of human rights which has developed since the Second World War directly out of the end of the colonial period are group rights or "people's rights", such as self-determination.¹⁵ Perhaps the most interesting and significant list of such rights is contained in the African Charter on Human and Peoples' Rights (Banjul Charter) in Articles 20 to 24.¹⁶ It may again be argued that such rights are antithetical to civil and political rights, particularly since the focus is on the community or group, rather than the individual, although the Banjul Charter itself contains a mixture of civil, political, economic, social and peoples' rights in a single document.

But the conflicts between these different kinds of rights are more apparent than real. First, individual and political rights and freedoms such as are contained in the ICCPR or the European Convention presuppose the existence of more or less equality of position between people, or between people and institutions. Social and economic rights presuppose the possibility for the creation of such equality through legal, economic and social reform. This synthesis of political and economic rights is the basis for the Women's Convention. The "conflict" becomes one of emphasis and priorities and ignores the historical linkages between libertarian and socialist thought in the nineteenth century from which these groups of rights are derived.

Secondly, the existing definitions of human rights within a political or civil context also presuppose that individuals live in isolation from one another, that the individual is an autonomous unit who may acquire freedom and justice *vis a vis* the State while ignoring the individual's relationship with others and her or

14 Smith A, *The Wealth of Nations*, as quoted and discussed in Fine B, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (1980), pp 37-50.

15 GA Resolution 1514 (XV), December, 1960. GAOR 15th Session, Supp 16, p.66, Declaration on the Granting of Independence to Colonial Territories and Peoples.

16 21 ILM 58 (1982); adopted by the Organisation of African Unity, June 27 1981; entered into force, October 21 1986.

his community, family, ethnic group, religion, language, etc. Even in the enumeration of social, economic and cultural rights contained in major international documents, such as the Universal Declaration, the emphasis is on the individual's relationship to the group, rather than the rights or needs of the group as a whole. Only the most recent category of rights, peoples' rights, begins to depart from this dependence on the individual as the subject of rights.

A third major problem is that these rights presuppose that the existence of all effective power lies in the State as a recognisable entity which must either be constrained from interfering in individual lives (under political and civil rights), or must fulfil obligations to achieve equity and justice for individuals through economic or social manipulation and regulation.

The first assumption, the existence or simple achievement of equality, is obviously and verifiably false. Individuals and institutions, even States themselves, are not equal and anti-discrimination laws on either a national or international level have failed to achieve such equality. The difficulty may have much to do with what is meant by "equality". From a feminist, or a non-European perspective, "equality" with white, male, Euro-centric ideals of individualism, exploitation and the competitive pursuit of wealth would exacerbate, not resolve, the problem of social justice in the world as a whole. The problem is not just "equality", but the standard by which it is measured and the separation of political and economic rights into separate fields in which equality provides an uneasy and very fragile bridge.

The second assumption, the autonomy of individuals, is also false. Individuals are not autonomous in any real sense, but are the products of their community, culture and society. Individual abuses of rights are inseparable from social structures which perpetuate or create social injustice. "Liberty" or "equality" may be laudable goals, but they cannot be achieved by ignoring the individual's relationship with and responsibility to others. In particular women, unlike men, cannot easily be separated into autonomous individual units in view of their traditional and still primary role as mothers, wives and caregivers. Women cannot be "individuals" as men can be since they are usually, and according to common perceptions of what is "natural", should always be, irrevocably tied to other human beings in either a caring or a subservient role, or both, and individual rights must often be extremely difficult in application to women because of this.

Civil and political rights are not the antithesis of economic or social rights, but the individual manifestation of problems within cultures and societies. Neither are economic and social rights especially relevant to individuals in society in a way fundamentally different from political rights. They too are a reflection of the need to protect individuals within social contexts. Both kinds of rights are predicated on the notion of accessibility of these rights to individuals through States or international agencies, either to protect specific political freedoms, or to enhance economic or social position. Both tend to ignore the problem women have in relating to such rights that make no allowance for the

primary role women are expected to play in most political and social structures, is to give up their own "individuality" in the care and service of others. Care and service of others makes most civil and political rights simply inapplicable, as if they were accorded to a different species, and most economic and social rights practically unattainable.

This brings us to the third assumption and that is that power is readily identifiable as part of the State's apparatus. This ignores the reality of economic power in the hands of non-State entities, such as multi-national corporations, banks and economic cartels which control national laws, or can supersede them at will simply by crossing boundaries. It also ignores the exercise of power through entities that exercise technocratic or "expert" control over peoples lives only indirectly connected to the State. It also ignores the location of power in the most intimate and private areas of human life where neither the State, nor human rights traditionally described, can have much effect. For most women, most of the time, indirect subjection to the State will always be mediated through direct subjection to individual men, or groups of men, whether these men be defined as fathers, husbands, sons, priests, psychiatrists, social workers, judges, etc. It is also true that most women also spend at least part of their lives in subjection to other women – including their mothers, mothers-in-law (particularly important in Islamic and other non-European patriarchal societies), social workers, teachers, etc. These dominant women however are always themselves subject to male domination either through individual men or institutions controlled by men or the State itself. Women are not necessarily lacking in human rights or equality because of State action, or the failure of State action, but because of the existing construction of women's "natural" position within existing power structures and the recreation and reproduction of this position over and over again in every aspect of life.

II. The Rights of "Man"

This leads to the second, and perhaps more important, difficulty in relation to the modern formulation of human rights both nationally and internationally. All these rights, even in the most recent international documents, talk about the rights of "Man" or "Mankind". In the earliest documents, such as emanated from revolutionary France or America, "Man" is not used as a gender-neutral term, and, although it is argued that the word refers to humanity as a whole in later instruments, this ignores the historical derivation of such rights. When Thomas Jefferson, or his contemporaries, talk of protecting the rights of "Man" they are referring to individual white men. It is possible that with some writers, such as Locke or Smith, it is middle-class property owning men that are being referred to, rather than the working class or the poor. Black men, or men of indigenous groups, may have disturbed the consciences of some revolutionaries (Jefferson himself was a slave-owner), but women were definitely not included. In the long drawn out battle for the right to vote, it was only against much prolonged resistance throughout the nineteenth century that "universal suffrage" was seen as

including women as well as men. This was so despite the arguments of such early feminists as Mary Wollstonecraft that individual rights and freedoms must include women. For a brief period during the French Revolution women did take a very active role in the political process, but they were quickly silenced and many were guillotined as the male bourgeois nature of the Revolution began to gain in ascendancy. Mary Wollstonecraft had gone to France in the first flush of intense excitement over the changes occurring in Europe's greatest power, but left as the Revolution turned towards Terror and eventually to middle-class male supremacy. As has been argued:

The shift from the iconic imagery of the Old Regime [of pre-Revolutionary France] to the symbolic structure of bourgeois representation was constitutive of modern politics as a relation of gender. Women's absence from the bourgeois political sphere has not been a chance occurrence, nor merely a symptom of the regrettable persistence of archaic patriarchies. From the standpoint of women and their interests, enlightenment looks suspiciously like counterenlightenment, and revolution like counterrevolution. . . . Women [such as Mary Wollstonecraft] who attempted to fashion new public languages or personae in the post-revolutionary age violated the symbolic code of bourgeois representation, which dictated a more "natural", transparent mode of female gender behaviour. Those who aimed to represent women's interests violated norms of universal reason . . .¹⁷

The basic foundation of liberal democracy, and classic civil and political rights, is the division between public and private. Usually this is characterised as the separation of the State from interference in the "private" sphere of commerce and individual initiative. The effect was to protect property from State regulation. It is also the basis on which the State is obliged to refrain from interfering in certain "natural" human rights, such as expression, religion, assembly, association or privacy itself. The modern liberal emphasis on the freedom of the individual in matters relating to sexuality, morality and family life are a continuation of this theme. The State is obliged to refrain from interfering in "private" matters. The "private" sphere also includes the home, or the domestic sphere, the domain of women and children. Work, or commercial activity, in this sense, although still "private" is nevertheless part of the outside world. In classic liberal theory both types of privacy should remain unregulated or protected from interference, while socialist theory would allow some interference in the economic and cultural aspects of the "private" sphere in order to produce over-all social justice. But the innermost "private" arena of home and family remains essentially inviolate under both libertarian and socialist theory.

It can be argued that the very creation of liberal democratic bourgeois society, in which individual civil and political rights are protected, presupposes, and

¹⁷ Landes JB, *Women and the Public Sphere : In the Age of the French Revolution* (1988), pp 204-205.

indeed relies upon, the subjection of women to this untouchable "private" sphere. Thus women are by definition incapable of enjoying the rights and freedoms "naturally" attributed to men. The rights of "Man" mean exactly what they say, not only as an effect of gender-specific, i.e. masculinist, language, but also as essential to the very substance of the rights protected.

. . . Women are held to be born to subjection. Locke takes it for granted that a woman will, through the marriage contract, always agree to place herself in subordination to her husband. He agrees with the patriarchalists that wifely subjection has 'a Foundation in Nature' and argues that in the family the husband's will, as that of the 'abler and the stronger', must always prevail over 'that of his wife in all things of their common Concernment'. The contradiction between the premise of individual freedom and equality, with its corollary of the conventional basis of authority, and the assumption that women (wives) are naturally subject has since gone unnoticed. Similarly, there has been no acknowledgement of the problem that if women are naturally subordinate, or born into subjection, then talk of their consent or agreement to this status is redundant. Yet this contradiction and paradox lie at the heart of democratic theory and practice. The continuing silence about the status of wives is testament to the strength of the union of a transformed patriarchalism with liberalism...¹⁸

This inherent contradiction did not disappear as the Industrial Revolution followed on the heels of the political revolutions of America and France. The response of socialist theory to the failures of classic liberalism failed to adequately address the most fundamental paradox of all, the subordination of women within the family unit, despite the increased necessity for women to work outside the home to support their children. The material division of capital and labour failed to recognise the even more fundamental division between production and reproduction, reflected in the division of labour between the sexes and enshrined in both liberal and socialist theory as "natural".

The conviction that a married woman's proper place is in the conjugal home as a servant to her husband and mother to her children [sic – children were "his" and "his" only until well into the nineteenth century – unless of course they were illegitimate in which case they were manifestly "hers" and denied rights accordingly] is now so widespread and well established that this arrangement appears as a natural feature of human existence rather than historically and culturally specific. The history of the development of the capitalist organisation of production is also the history of the development of a particular form of the sexual division of labour (although this is not the history to be found in most books). At the time when the social contract theorists attacked the patriarchal thesis of a natural hierarchy of inequality and subordination, wives were not their husbands' equals, but nor were they their economic dependants. Wives,

¹⁸ Pateman C, *The Disorder of Women* (1989), p 213.

as associates and partners in economic production, had an independent status. As production moved out of the household, women were forced out of the trades they controlled and wives became dependent on their husbands for subsistence or competed for individual wages in certain areas of production. Many working-class wives and mothers have had to continue to try to find paid employment to ensure the survival of their families, but by the mid-nineteenth century the ideal, the natural and respectable, mode of life had come to be seen as that of the middle-class, breadwinning paterfamilias and his totally dependent wife. By then the subjection of wives was complete; with no independent legal or civil standing they had been reduced to the status of property, as the nineteenth-century feminists emphasized in their comparisons of wives to the slaves of the West Indies and the American South. Today, women have won an independent civil status and the vote and they are, apparently, 'individuals' as well as citizens – and thus require no special attention in discussions of democracy [or human rights]. However, one of the most important consequences of the institutionalisation of liberal individualism and the establishment of universal suffrage has been to highlight the practical contradiction between the formal political equality of liberal democracy and the social subordination of women, including their subjection as wives within the patriarchal structure of the institution of marriage.¹⁹

The ideological construction of the family itself went through a profound transformation between the sixteenth and the end of the eighteenth century in European society.²⁰ The familial model became the closed nuclear bourgeois family, the site of "virtue", affection, comfort and graciousness. Women and children were confined to the home to a much greater extent than in previous centuries, and their economic role or value outside the home diminished. In some ways this may be characterised as an advance for women. Women and children had always been to some extent subordinate. During the political, religious and economic upheavals of seventeenth century Europe their position became ruthlessly subject to an ideology of extreme patriarchy.²¹ By the end of the eighteenth century, the more brutal aspects of this patriarchal rule were disappearing, at least as a model, and women's role in the home was seen by many as an improvement. But the reverse of this was that women were not seen as participants in the public social world of "rights" and political or economic achievement. What few privileges they had previously had in relation to property or public participation disappeared. The subordination of women to patriarchal structures did not end with the development of liberal, or even later socialist, theories, but was entrenched in the new political order and conceived of as "natural". So Adam Smith could again write in his *Wealth of Nations*:

¹⁹ Ibid pp 213–214.

²⁰ See especially Stone L, *Family, Sex and Marriage in England, 1500–1800* (1979).

²¹ Id.

There are no public institutions for the education of women, and there is accordingly nothing useless, absurd or fantastical in the common course of their education. They are taught what their parents or guardians judge it necessary or useful for them to learn; and they are taught nothing less. Every part of their education tends evidently to some useful purpose; either to improve the natural attractions of their person, or to form their mind to reserve, to modesty, to chastity and to economy; to render them both likely to become the mistress of a family, and to behave properly when they have become such . . .²²

Although the establishment of traditional civil and political rights, including the spread of democracy and formal suffrage, eventually gave women the appearance of equality with men, the granting of these "rights" has ignored their historical derivation as "men's" rights at a time when "women's" rights were being actively and effectively suppressed. The attempt to improve economic and social conditions of the poor and working classes failed to adequately deal with the ideology of the family and women's primary reproductive role that had become entrenched in existing democratic and libertarian institutions. The problem of the ideology of reproductive and familial roles, although differing between cultures, is not confined to European bourgeois political and economic structures. Reproductive roles of women in traditional patriarchal societies remain as a problem which existing human rights instruments, ostensibly based on freedom and equality, cannot deal with as they are presently constructed because the human rights instruments themselves mask continuing, although transformed, patriarchal structures developed in Europe during the eighteenth and nineteenth centuries. Without this understanding of history, which is not (as Carole Pateman says) the history taught in the usual texts, the failure of existing human rights to be fully "human" cannot be identified or corrected.

Production And Reproduction

The earliest human rights "campaigns" in the modern sense of the word, were first against the institution of slavery and the slave trade and then, once both the trade and slavery itself had (at least apparently) been abolished, against the "slavery" of women. Slavery as an institution, and the practice of trade in human beings, was the first area which was prohibited as a matter of international human rights law in the modern sense. From the mid-nineteenth century onwards, trafficking in human beings has been seen as contrary to general principles of international law.²³ The Slavery Convention of 1926 was the first true international human rights instrument.²⁴ The prohibition against slavery

²² Smith A, *The Wealth of Nations*, Vol.II, V.i.f.47 as quoted in Rendall J, 'Virtue and Commerce: Women in the Making of Adam Smith's Political Economy' in Kennedy, Ellen & Mendus, *Women in Western Political Philosophy* (1987), p 69.

²³ The General Act of the Berlin Conference on Central Africa as quoted in Sieghart P, *The International Law of Human Rights* (1983), p 229.

²⁴ As amended by the Protocol of 1953, substituting references to the League of Nations with the United Nations. See also the Supplementary Convention on the

may arguably be a principle of 'jus cogens' or a peremptory norm of international law. Many women, particularly in England and the United States, were extremely active in the anti-slavery campaign, from the late eighteenth century to the American Civil War of the 1860's, including Hannah More of England and Harriet Beecher Stowe of the United States whose novel *Uncle Tom's Cabin* galvanised the anti-slavery movement world wide and was described by Lincoln himself as a major influence on the abolition of slavery. Women were not slow to see the parallels to their own positions and many of the same women, and men, were involved in the overlapping campaign for women's rights and the end of women's subservience and "slavery".

It is arguable that this battle against slavery is anything but over, that women are still largely "enslaved". Some women are relatively free, or what might be called "emancipated", granted "manumission" (within the confines of the construction of gender and its continued maintenance through all existing social institutions, including international law), but most women are not free. The prevailing construction of gender in most parts of the world is one which confines women to the tasks of biological reproduction, nurturing and service of others, mainly men and children. The key word is "reproduction". As Marilyn Waring has said:

Biological reproduction is the most obvious [facet of reproduction within an economic context]. Its characteristics are pregnancy, giving birth, lactation, and motherhood. Within economics, its only visibility is as welfare. This form of reproduction is conceptually different from the reproduction of the labour force. Reproduction of the labour force focuses, on the political and economic stage, on "fertility". Powerful patriarchs of legislative, religious and cultural bodies deny women the right to control their own fertility, and thus to control the reproduction of the labour force.

Now if we are to remain with the interdisciplinary jargon of this exercise of conceptualising reproduction, we next encounter the reproduction of the relations of production. In the traditional labour force theory interpretation, this concept leads to the exploitation of women's productive work (lower pay, lower status, few benefits, less job security). In the household, this is the reproduction of enslavement.

Enslavement also includes female infanticide, preference for sons, maternal mortality, the custom of women eating last or least, female sexual slavery and marriage. These aforementioned are characteristics of the reproduction of the relations of reproduction.

You will begin to notice that "exchange" is current in all these facets of reproduction, but this seldom occurs in the market. It is no less true of the reproduction of the social relations between women and men, which

Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956) and other international instruments of both the UN and the ILO in this area. *Ibid* 233-235.

includes the religious, legal, and cultural beliefs and practices that define women as the property of men. This is enslavement. And it is most definitely about economics.²⁵

It is also about politics, and human rights. Waring adds a sixth facet:

. . . the categorisation, and subsequent institutionalisation, of who does (and doesn't) and/or should (or shouldn't) reproduce. It is distinguished and characterised in the oppressions of ageism [reproduction and sexual relations are confined to young women and young or middle-aged men], classism [the lower classes procreate too much, have too many children, fertility rates in the "developed" world are falling thus leading to the possibility of a diminution of "developed" middle-class populations], racism [similar to classism only more virulent], 'development' ["development" is constructed on the invisibility of women in the 'public' economic sphere and is predicated on their continuing role as reproducers and child care workers], colonisation [the colonial period saw the Third World as a dumping ground for surplus First World populations, whether they be aristocratic younger sons, the deserving poor as pioneers or gulags for the depository for undesirables as in Australia – the Third World's surplus population could also be used as a source of cheap labour, whether through open slavery or through less obvious means of migration or exploitation], neo-colonialism [explicit colonialism or slavery has (more or less) ended – it has now moved to a less visible economic sphere], religious fundamentalism, and homophobia [or enforced heterosexuality].²⁶

These six facets of reproduction underlie the depiction of human rights that we see in international instruments, including the Women's Convention. Because reproductive rights are not seen as "rights" within the accepted canon, (or if they are they are "men's rights" not "women's rights") the continuing slavery of women (and children) is not recognised as such.

I. "Traditional Values" and the Control of Reproduction

The creation of the most recent discourse of peoples' rights within the international arena by non-European, Third World men provides both hope and some feeling of hopelessness in relation to the development of human rights generally. It is a hopeful sign in that it shows the possibility for escaping from a narrowly white male European discourse of rights and creating a new venue for discussion which attempts to escape from the exploitative and destructive underside of traditional human rights talk. By limiting rights to the terms set by eighteenth and nineteenth century theorists whose major concern was control of property – either through the accumulated property of capitalism or the

²⁵ Waring M, *Counting for Nothing : What Men Value and what Women are Worth* (1988), pp 153–154.

²⁶ Id. The comments in square brackets are my own elaborations.

egalitarian redistribution or elimination of property proposed by socialism – we remain trapped in the discourse of those who define all human relations through the language of ownership and control, or lack of control, over property. Some things may be appropriate subjects of a property-based construction, but other matters fit with great difficulty. Property as the basis for human rights tends to limit the effective application of these rights to men who either control or want to control the world around them as property. Individuals who are not seen as capable of owning property (either in the present or in the future) are either left out of this discourse altogether or become property themselves. Women and children, and many poor or non-white men, therefore are either described in metaphysical terms completely apart from economic or political realities ("the angel of the house", "the children's hour", "the noble savage") and are thus effectively disenfranchised, or they are seen as property. Not only individuals, but also other aspects of life included in such discourse suffer. "Nature" becomes a thing to be tamed rather than an environment to be lived in; human relations are seen in terms of exchange based on contract and consent, or lack of consent, rather than as the expression of human caring and attachment. Animals are brought into the market system and used or destroyed, their own separate existence ignored unless humanised into caricature. But the creation of communal or "peoples' rights" also causes difficulties for a feminist theory of rights in that it too tends to be devised and talked about by men. It ignores the often severe limitation on the rights of women within specific communities or "peoples".

The Banjul Charter is possibly the best expression of such rights to date. The Preamble includes within it a specific reference to the elimination of "all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion." Article 2 further enshrines the enjoyment of all rights contained in the Charter without discrimination of any kind, including discrimination based on sex. But the Charter thereafter talks exclusively of "his" rights, the "rights of man". Articles 3 to 17 set out basic political, civil, economic and social rights similar to those contained in other instruments, in particular the International Covenants, the Universal Declaration (which is particularly cited in the Preamble) and European instruments. Article 14 specifically protects a right of property subject only to "the public need" or the "general interest of the community" governed by appropriate national law. Article 15 stresses that the right to work includes the right to "receive equal pay for equal work". This right might be useful for women seeking equality of treatment where they are employed in jobs that men also do. The difficulty is of course that most African women (similar to their sisters elsewhere) do not perform jobs that men also do, or where they do it is in terms specifically not equal, as in piece work or part-time work, or in subsistence agriculture or housework in which the invisibility of the work as "work" prevents any discussion of equality of treatment.

The peoples' rights contained in Articles 19 to 24 include the rights to development, self-determination, peace and a healthy environment. However in

Articles 17 and 18 and in the list of Duties contained in Articles 27 to 29, difficulties that women may have even in relation to rights specifically contained in a Charter designed to be a clear departure from the narrower definition of rights contained in other international or European instruments can be seen. In Article 17(3) it is stated that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." Article 18 places the custody of such morals and values in the family which is described as "the natural unit and basis of society". Discrimination against women is set out as something which is to be eliminated, but the conjunction of the notion of equality within the context of the family and "traditional values" may pose serious problems for women in Africa.

Zimbabwe is a member of the Banjul Charter. The confusion created in State policy towards women in this and other southern African states has been noted.

. . . [there are] common strands between the Zimbabwean, Angolan and Mozambiquan ruling parties' conceptions of the subordination of women and the ways in which this should be tackled in a newly 'socialist' society. Like the revolutionary movements in Mozambique and Angola, which faced similar difficulties and resources, ZANU (PF) and (PF) ZAPU in Zimbabwe adopted policy positions on women broadly similar to those of states in Eastern Europe and the USSR. Official Soviet policy is based on Engels' and Lenin's belief that the key to female emancipation lay in incorporation into productive work outside the home. However, little attention was (or is) paid to women's subordinate role within the home and the family.

Penelope Roberts quotes President Machel of Mozambique to exemplify this position: 'Women's liberation is to be achieved by the abolition of private property and women's entry into social production, both of which are inseparable from socialist strategy itself and therefore requiring no separate struggle.' She comments that Machel has defined the limits of 'permissible feminism' indicating that feminism is a secondary issue which confuses women, especially as it suggests that men might be in part responsible for the maintenance of gender divisions.

The official political rhetoric relating to women in these southern African societies may be rooted in a model derived from Engels, via the Soviet Union, but the actual situation they face today bears little resemblance to that of the USSR. In Zimbabwe particularly, policy-makers are caught between several ideological and material contradictions, which are especially pertinent to women-oriented policies. The dominant ideology has been shaped by two belief-systems, opposed in their conceptions of women. Marxism vies with a model deriving from pre-colonial society, in which women's capacity to reproduce the lineage, socially, economically and biologically, was crucial and in which lineage males controlled women's labour-power. Arising from this, there have developed conflicts between the political rhetoric which pledges ZANU to the total emancipation of women, on the one hand, and the enactment of

State policies which entrench women's dependence on men, on the other. Thus statements about the need to bring women into 'social production' co-exist with the State's reinforcement of men's control over women.²⁷

This contradiction, between the emancipation of women and the adherence to traditional values, is at the heart of difficulties in talking about human rights in relation to women. The rhetoric of human rights, both on a national and an international level, talks of women as equal citizens, as "individuals" subject to the same level of treatment and the same protection as men. But "traditional values" whether they be openly referred to as in the Banjul Charter and in the observance of the Charter in African states such as Zimbabwe, or whether they are silently ignored or considered of little importance, as in Western human rights documents, is exactly that discourse in which the inability of women to enjoy any rights, of whatever description, lies.

The focus of "traditional values" or "natural law" as it relates to women, is in the control of reproduction. The venue within which this focus is normally centered is the family. Therefore women's position in family life, described in most human rights instruments (as in the Banjul Charter) as the main centre for the continuation of social life and social stability, is crucial. The Women's Convention is virtually unique in attempting to define and guarantee women's rights within the family, particularly through Article 16.²⁸ This article, and associated provisions within the Convention, have either led to the refusal of some countries to ratify the Convention, or countries have entered reservations to these provisions undermining their commitment to the protection of women's rights where there is a perceived conflict with the family and "traditional values". The countries which have most consistently refused to ratify the Women's Convention, or who have made significant reservations to their adherence to this Convention, are Islamic countries like Egypt who base their reservations on potential conflicts with Islamic law.²⁹

There has been much discussion of the position of women in Islamic law, particularly the position of married women. Both women and men are expected to marry. Indeed marriage is considered so essential to the maintenance of public morality that this has been argued as the justification for polygamy under

27 Jacobs SM and Howard T, "Women in Zimbabwe: Stated Policy and State Action" in Afshar, H *Women, State & Ideology: Studies from Africa and Asia* (1987), pp 29-30.

28 For a fuller discussion of the Women's Convention and reservations to it see Cook RJ, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" 30 *Virginia J of Int L* 643 (1990) and Wright S, "Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women", paper presented at the Conference on Human Rights in the Twenty-first Century: A Global Challenge, Banff, Canada, November 19-12, 1990, proceedings to be published.

29 *Ibid.*

Islam.³⁰ Haleh Afshar writes graphically of the position of women in Iran both under the Shah, where they had made considerable gains towards sexual equality on the Western model, and after the Revolution when these gains were removed and the full impact of the Sharia, as mediated through the male priestly class who have authority in the Shiia sect, was imposed:

Within months of his takeover in March 1979, Khomeini issued a decree dismissing all women judges and barring female students from attending law schools. Subsequently he closed the Law Association, . . . and replaced secular courts with religious ones, often presided over by theological students with one or two years' religious training. The laws now implemented do not admit women's evidence unless it is corroborated by men, . . . Women, who nevertheless, insist on giving evidence without male corroboration are assumed to be lying and liable to punishment for slander. . . . This refusal to accept women's evidence is a contradictory interpretation of the clear Qoranic statement which accepts women's evidence, but equates that of two women with the words of one man The 'natural' and 'biological' inferiority of women is described as a fundamental law governing all social and political activities. Ayatollah Hashemi Rafsanjani [when he was 'Majlis' or Speaker of Parliament] . . . denounced the West for 'overreacting' to feminist demands and creating total anomie as a result. In his view Western women have been 'forced to abandon their natural talents, as created by God and endorsed by men'. They have been pushed out of their 'natural and humane domestic environment' and 'propelled from school to offices and subjected to harsh demands of factories and work places' and 'obliged to adopt shameless and dishonourable roles which go against their gentle and sensitive nature'. The unnatural 'displacement' of women has, according to Ayatollah Hashemi Rafsanjani, imposed the double burden of domestic and wage labour on the women, against their own interest. The result has been the failure of many to fulfil their holy duty of motherhood or, in some cases, even to deny this very instinct: this has resulted in the birth of an unloved and uncared-for generation which lacks the fundamental basis of mother love and tenderness, and which has become an alienated and disrupted society."³¹

The antipathy towards feminists, and the enunciation of the "traditional" view of women as "natural" caregivers and servants, forms a fundamental part of all cultures, not just that of fundamentalist Shiite Iran. The Egyptian feminist, Nawal El Sadaawi has argued:

³⁰ Afshar H, "Women, Marriage and the State in Iran" in Afshar, above n.27, 75. See also Nigosian S, *Islam : The Way of Submission*, (1987), pp 174-178; Smith JI, "Islam" in Sharma A, *Women in World Religions* (1987), pp 235-250; Ahmed L, "Feminism and Cross-Cultural Inquiry: The Terms of the Discourse in Islam" in Weed E, *Coming to Terms : Feminism, Theory, Politics* (1989), 143-151; and El Saadawi N, *The Hidden Face of Eve : Women in the Arab World* (1980).

³¹ Afshar, *ibid* pp 71-72.

Many people think that Islamic precepts and legislation are the main obstacle to change insofar as the common law is concerned. Yet the same Islamic precepts and the very same legislation have not prevented other Islamic countries from making the necessary modifications, or even promulgating entirely new laws. Furthermore, Islam has not prevented the profound legislative and judicial changes in other spheres that were made in Egypt after 1952. Examples of such laws are those related to a ceiling on land holdings, or the new clauses introduced into the penal code in relation to adultery and theft. In these last two areas, the new rulings are definitely not in line with Islam in which the punishment for theft is cutting off the culprit's hands, and that for adultery stoning both the woman and the man to death.³²

A similar traditional view of women also exists within Christian cultures. For example, under the Constitution of the Republic of Ireland, it is stated:

The State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.³³

It has been noted:

'Woman' in the first sentence and 'mother' in the second are clearly meant to be interchangeable terms. From this formulation, it would be hard to make sense of a woman who is not a mother, for that is how her position is defined within the Irish Constitution. This interpretation is bolstered by the fact that divorce is still prohibited under the Irish Constitution and a 1930's statute banned the sale, advertising and importation of contraceptives until a Supreme Court decision in 1973 held the import restrictions to be a violation of the marital right of privacy. Even after that decision, a new statute regulating contraception went into effect in 1979, allowing contraceptives to be supplied only on prescription and only to married couples for medical reasons or 'bona fide family planning purposes'. Together with a ban on abortion, these laws mean that Irish women once married cannot get out of their marriages, cannot get access to contraception without great difficulty and cannot get abortions if they are pregnant. No wonder the Irish Constitution equates womanhood with motherhood.³⁴

32 El Sadaawi, above n 30, 197-8.

33 Constitution of the Republic of Ireland, Article 14 as quoted in Scheppel KL, "The Law of the Mother: Abortion and Legal Culture in Comparative Perspective", paper presented at the Feminism and Legal Theory Conference : Motherhood, University of Wisconsin, June 18-22, 1990, 15.

34 Id.

Most religious or traditional values, whether they are expressed in a religious context or not, are virtually synonymous with women's subordination within the domestic or "private" sphere. And these "traditional values" are equally important, and every bit as intransigent, when looking at those expressions of Western European, liberal, democratic instruments such as the Economic and Social Covenant, the ICCPR or the European Convention.

II. The "Natural" Reproductive Role of Women in Modern Human Rights

The Universal Declaration states in Article 12 that "No one shall be subjected to arbitrary interference with his [sic] privacy, family, home or correspondence . . ." and in Article 16(1) "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." and in Article 16(3) "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The ICCPR repeats the expression of these rights in Articles 17 and 23. The European Convention provides for a similar protection of "privacy" in Article 8 but avoids explicitly describing the family as the "natural" or "fundamental group unit in society".³⁵ The equal rights and responsibilities of women and men in relation to each other and their children during or after marriage is also the subject of Article 5 of the Seventh Protocol of the European Convention. All provisions require the "consent" of both parties to entering into marriage or "founding a family".

The Economic and Social Covenant also talks about the primacy of the family, particularly in Article 10 which says:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the attending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Within the Universal Declaration, and the abovementioned Covenants, sexual discrimination and the equality of women and men are stated as of fundamental importance. But the family, the "natural and fundamental group unit of society" is exactly that unit where women's inequality and sexual discrimination generally are reproduced. It is the unit in which women are expected to have their role, whether it be through the application of "natural law" in the Lockean sense, or

³⁵ European Convention, Article 12.

through older patriarchal structures such as exist within certain religious cultures and "traditional values". The rights enumerated in the rest of these Conventions ignore the economic and social reality, the construction of gender through "traditional values" and the family, within which all women, at least to some extent, must live.

Where women are least subservient, least structured into private domesticity, reproduction, nurturance and servitude, is where they, like many privileged Western women including most feminists, are most like men. Women such as this can rely on "men's rights" because they have achieved to a fairly high extent that equality with men's values expressed in these rights – i.e. they are not primarily concerned with childcare or nurturance, they are not fully employed with biological and social reproduction. Privileged women of the West may now be employed in "men's jobs" to which at least some lip service to equality and anti-discrimination must be paid. On a deeper level, such women have become to some extent "ungendered" – they talk the male gendered language of law, politics and economics; they wear the accepted female equivalent of the male uniform ("power-dressing"); they have structured their daily lives into timetables which are not primarily governed by the needs of others.

The rights set out in Articles 12 and 16 of the Universal Declaration in relation to privacy and the family are those most crucial to "women's rights", but they are consistently put, as they are in the Declaration, without any regard to the central question of reproductive control which is cited as being specifically within the family or the "private" realm. Protection of privacy as it is presently constructed cannot be a useful right for women. This is despite the usual characterisation of a woman's right to choose an abortion as a privacy issue in conflict with the right to life. Reproductive rights are not private rights for women, and their characterisation as such merely serves to perpetuate the ideological distinction between public and private which is the primary source of women's subjection within all major cultural constructions that we know of, including Western liberal democracy. It is difficult to argue with MacKinnon's thesis here:

In private, consent tends to be presumed. Showing coercion is supposed to avoid this presumption. But the problem is getting anything private to be perceived as coercive. This is an epistemic problem of major dimensions and explains why privacy doctrine is most at home at home, the place women experience the most force, in the family, and why it centers on sex. . . . The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. . . . The doctrinal choice of privacy in the abortion context thus reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private distinction. The political and ideological meaning of privacy as a legal doctrine is

continuous with the concrete consequences of the public/private split for the lives of women...³⁶

Why are marriage and the family privileged in the way that is stated in Article 16 of the Universal Declaration and in other provisions mentioned above? Why is the "family" the "natural and fundamental group unit of society"? Why cannot reproductive rights (which is what these rights are) be put in terms of sexual freedom, the right to choose when and how often to have children (as in the Women's Convention, Article 16(1)(e) which still places this right within the political unit called "marriage") or the right to control reproduction regardless of marital status? Why does the "family" require protection, whereas the treatment of individuals within the family, women and children, evades protection which is described as "arbitrary interference" with ". . . privacy, family, home or correspondence"? In other words "protection" of women and children in the domestic sphere is presumed to be unnecessary and will always be subject to the charge that it is "interference" or possibly "arbitrary interference". Despite the guarantees of equality and consent provided in these provisions, the ideological basis, whether it be some form of patriarchy of a religious or traditional nature, or whether it be the mitigated patriarchy of the Western social contract, entrenches inequality and does not allow the exercise by women of real consent. The existence of such injustice and coercion – the denial of both economic and political rights – would appear to be necessary for the maintenance of the existing social structures reflected and defined as "human rights" in "liberal democracies".³⁷

The family, described in Article 18 of the Banjul Charter as "the custodian of morals and traditional values", is the site of reproduction as legitimated in international human rights law. Biological reproduction may occur elsewhere, but it will not be protected or condoned with "rights" attached. Sexuality, central to the control of biological and social or cultural reproduction (what Waring calls the reproduction of the labour force), is framed in terms of compulsory heterosexuality legitimated through marriage. No other reproductive rights are recognised in international law. Sexuality which exists independently of controlled reproduction, i.e. independently of legitimated fertility policies, is harshly condemned in nearly all cultures, including the Western liberal democratic tradition. There are no rights recognising the freedom to choose one's own sexual preference, nor are there any guarantees within international law requiring the State to protect individuals from sexual exploitation or assault, other than within the fairly narrow confines of recognised sources of exploitation such as child trafficking or prostitution. Such rights or privileges or legal protections that exist tend to be put in terms of "privacy" at least theoretically immune from "interference".

If human rights were really "women's rights" as well as "men's rights" then a primary and express right must surely be the right to exercise reproductive

³⁶ MacKinnon C, *Towards a Feminist Theory of the State*, above n 2, 190–191.

³⁷ Pateman C, above n 18; see especially "Women and Consent", 71 et seq.

control at all levels. The difficulty is that if this again were phrased as a "human" right, rather than a source specifically for women's protection, it would very quickly again become a "men's right" – which is of course what it is now in the private spheres of marriage and the family.

Conclusion

This article has mainly concerned itself with existing human rights, either of a political or an economic nature. It is the opinion of the author that the division between civil and political, or economic and social rights, is a false division. Both categories of rights privilege individuals, who are constructed as male. The new category of peoples rights rarely concerns itself with the probably different impact of such rights on women. Human rights are historically a development of men's rights and are still intensely insensitive to the usual real condition of women.

The core issue in human rights for women is the control of reproduction; biological, social, sexual, economic and political. This essay is titled "Economic Rights and Social Justice". Reproduction, in all its existing social constructions, is a relationship of exchange, according to the dominant male discourse which we are forced to use. This exchange is carried out through marriage and is itself reproduced through the family. This seems to be true of most cultures whether of the developed or the developing world; East or West. Economic rights, from a feminist perspective, would be the control by women of reproduction in all its facets which may in turn lead to social justice as the hoped for creation of a true realisation of human rights for all.