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**WOMEN'S HUMAN RIGHTS  
QUESTIONS OF EQUALITY AND DIFFERENCE**

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# WORKING PAPERS

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## CHAPTER ONE

### YES, INDEED, WE WOMEN ARE HUMAN

#### Campaigning for Women's Human Rights

In June 1993, at the United Nations World Conference on Human Rights in Vienna, Austria, a petition signed by over half a million women from 124 countries calling upon the gathering to 'comprehensively address women's human rights at every level of its proceedings' and to 'recognise gender violence...as a violation of human rights requiring immediate action' was handed to the Chairman of the Conference. Almost simultaneously, at the NGO Forum in Vienna, 33 women from 25 countries testified at an all-day 'Global Tribunal on Violations of Women's Human Rights'; it was one of the best-attended events of the entire Forum.

The activities in Vienna represented the coming together of a multitude of women linked to and involved in campaigns against violence against women who had been very visible and vocal in many of the world's regions throughout the 1970s and 1980s. In the process of organising and mobilising against the abuse of women in many different situations - against dowry deaths in northern India, rape in the United States, wife beating in Peru, genital mutilation in Sudan and forced prostitution in Thailand, for example - women from all over the world had contributed their insights and perceptions to a larger and on-going theoretical discussion on the issue of violence as a gendered phenomenon which cut across class, race and other differences.

The recognition that violence against women constituted a very particular and specific phenomenon, organically linked to the subordinate status of women in society, led women activists and feminists to explore and evaluate the different avenues for seeking justice and redress for grievances that were open to women who were victims of violence. In this process, women encountered the law and legal institutions operating at the national, regional and international levels; this experience in turn led women to embark on a critical assessment of the gender biases inherent not only in the practice of law and jurisprudence but also in the very conceptualisation of terms such as 'rights' and 'justice'. It is in this context that the consideration of human rights standards as perhaps being the possible framework within which women could work towards the achievement of justice for women first became a significant focus of the discussion. The campaign against violence against women evolved into a campaign for the recognition of violence against women as a human rights abuse; the coining of the slogan 'Women's rights are human rights' signalled the beginning of a process that has led to some serious questioning of concepts within the existing framework of international human

rights, as well as to a demand for re-thinking the parameters of the framework.

The Global Campaign for Women's Human Rights, which played a critical role in the activities towards and at the Vienna Conference evolved from the broadbased international movement against violence against women. While the Campaign aimed to draw attention worldwide to the question of violence against women and thereby improve the situation for women, one of its practical objectives was to pressure the international human rights community, at both the state and non-governmental level, to re-think the formulation and conceptualisation of 'rights' in the human rights discourse. The goal, in this particular instance, was recognition by the international community, specifically the United Nations, of the lacunae with regard to women's human rights concerns in the international human rights system and of the need to take steps towards the full integration of women's rights issues into international human rights standard-setting procedures in a more thorough way than had been done up to the present moment.

At the same time, the Campaign raised some critical issues for the human rights community in general, as well as for critical legal and social theorists who were engaged in challenging fundamental assumptions about concepts such as 'equality', 'rights' and 'justice' at the theoretical and philosophical level. Questions such as:

- 'Are women's rights contained within the definition of 'human rights' in general?';
- 'Are there certain rights that are specific to women because of their being women?';
- 'Would acknowledging that women have specific rights lead to the trap of essentialist or biologically deterministic thinking?';
- 'Have the rights of women - and of other socially disadvantaged groups - been subsumed under traditional definitions of 'human rights' in a way that institutionalises discriminatory practices?';
- 'What are the gender biases inherent within existing perceptions of rights and justice?'

are among those that have formed the core of an on-going discussion within the human rights and women's movement today, linking scholarship and activism in a challenging way.

This discussion has major implications for women everywhere and at all levels, theoretical and political, epistemological and practical. It also links with similar processes of questioning and challenging being taken up by other disadvantaged social groups such as indigenous peoples and gays and lesbians, and thus becomes a part of a broader movement for radical political and social transformation.

### The call for new definitions, new approaches

The ways in which the discussion on the human rights of women has been framed call into question prevailing definitions of the concepts of equality, rights and justice. The feminist challenge, as articulated by Adriana Cavarero, is that 'the modern concept of equality is...false in its logical foundation and homologising in its concrete effects' (1992, p.45). There is an explicit criticism of the liberal conceptualisation of the individual as a free and rational agent and as a bearer of formal rights. Feminists also question the principles governing the 'social' contract on which much of modern society has been modelled on the basis that it is, rather, as Carole Pateman has pointed out a 'fraternal' contract which excludes women from consideration.

At the same time, there is also a questioning of the dichotomy of state and civil society, in particular of the conceptualisation of 'civil society', on the grounds that it fails to acknowledge the significance of the division of society into public and private spheres and the marginalisation of women that occurs as a consequence. Reviewing social contract theory from Hobbes to Kant, from Locke to Rousseau, Pateman points out that a common trend in their work consists of considering women as representative of 'nature' that need to be controlled and transcended; thus, she says, 'woman's relation to the social world must always be mediated through man's reason...the 'foundation in nature' for masculine right is that women cannot develop the political morality required of participants in civil society' (1988, p.101).

This discussion poses a major challenge to the international human rights system which is based on the liberal assumptions of the equality of all human beings and the universality of the rights ascribed to them, in particular as codified in the Universal Declaration of Human Rights and in other International Covenants and Conventions, including, in the case of women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In particular, the discussion focuses on the way that the division of rights into civil and political on the one hand, and economic, social and cultural on the other hand, with an implicit prioritisation of the former over the latter, has serious implications for women. It also focuses on the ways in which the division of the world into 'public' and 'private' has led to many areas of discrimination against and injustice to women being excluded from consideration in the context of international law which is primarily constructed in terms of the 'public' world, with the state as the main 'actor'. As Mary Dietz has commented, this division reinforces 'the idea that certain rights are inviolable and exist in a private realm where the state cannot legitimately interfere' (1987, p.4); this division thus places women

who are abused and violated in the home outside the protection of international law. At another level, the debate on these issues calls into question the idea that only states can be held accountable for violations and abuses of rights - an issue that becomes ever more critical in the face of the declining powers of the nation state in contemporary society.

The ideas about equality and impartiality that structured the discourse on rights and justice in the post-Enlightenment era and the postmodern discussion of plurality and difference come into play here. Attempting to re-conceptualise terms such as equality, rights and justice in the context of the above discussion leads us to a consideration of the historicity of such concepts and compels us to ask fundamental questions: Can, in fact, such concepts be defined in a way that is universally applicable? Can we define certain non-negotiable rights for all human beings?

The discussion leads feminists deeper into the debate on equality and difference from the perspective of social theory and concrete political practice. The rejection of the universal category of 'women' and the specific feminist contributions to the postmodern discussion on 'difference' provide an interesting analytical perspective on the possibilities for solidarity and collective political action. Ultimately, the issues at stake are those of power and hierarchy, legitimacy and representation, democracy and participation: all issues which occupy centre-stage in contemporary social and political discourse.

The discussion also forges links between feminists and theorists of the critical legal school, since the issue of justice and equality are fundamental as principles of most existing legal structures in the world today. The many struggles waged by women for legal reform have been based on their understanding of the law as a major component of patriarchal control in society and as a mechanism which could be utilised to achieve a certain degree of social justice and equity for disadvantaged groups in society. Feminist legal theoreticians have questioned the construction of gender relations by law and by legal systems within a more general analysis of power relations as reflected in law; as Cavarero has shown, 'Modern law is completely modelled on the male subject and can take in women only by homologising them with the male subject which operates as a basic paradigm' (1992, p.37). The argument thus leads us to investigate the feminist arguments for what Anne Bottomley, Susie Gibson and Belinda Meteyard have called 'a new topography of legal theory' (1987, p.59).

The debates on the positive and negative aspects of using law as an 'instrument' have been many and varied. This paper does not allow me the space or time to enter into this debate. However, the ways in which women and women's organisations throughout the world today are using the law for the



advancement of women are manifold and well documented; some campaign for the reform of laws that are unjust to women; others agitate for gender-sensitivity in the practice of the law; yet others struggle to expand women's access to the law. In the final analysis, however, using the law must be perceived as one strategy among many. As Donna Sullivan points out, 'Law reform to protect the human rights of women must be accompanied by educational measures to foster social change and economic and political initiatives to advance women's status if it is to have a significant impact on women's de facto rights' (1992, p.854).

The case of women's rights is an excellent base from which to probe these questions further, since it has been to a large extent the feminist critique of social theory and the politics of power that has radically challenged many assumptions contained in liberal social and legal theory, for example about the homogeneity of the human person and about the nature of the 'individual' as constructed in modern political and legal systems and thought. Through the discussion set out in this paper, I pursue the trend of thought that a radical re-thinking of key concepts such as equality, rights and justice are critical to the evolution of a new and more democratic political practice that will afford all people their rights, with dignity and respect.

I would also link the broad discussion on concepts to the concrete realities of women's activism across the globe to expand on the implications of such a discussion on organising and mobilising around rights-based issues. The experiences of collective action by women, of which the campaign against violence is but one example, demonstrate that there is some commonality to women's oppression and resistance; this poses a challenge to some of the theorising on 'difference' developed within the post-modernist discourse which at times seems to discount the possibility of such linkages and unity. The challenge confronting feminist activists today, therefore, is that of building on our experiences of theorising and mobilising in order to forge unities and alliances that do not deny our differences.

#### Locating myself within the discussion

As someone who is linked to women's movements in various parts of the world since the 1970s, and who has been, in particular, involved in the campaign against violence against women and in the Global Campaign for Women's Human Rights, while at the same time being a human rights worker in the mainstream human rights world, the dilemmas I set out above are also my own. On the one hand, I have experienced the power and the strength of solidarity between women from a wide range of backgrounds; on the other hand, this same experience, along with feminist critiques of the social sciences, of social and legal theory and of liberal democratic practice, have shown me the

multitude of problems emanating from a simplistic vision of sisterhood and solidarity.

This has been coupled with my experiences of trying to integrate women's issues within the framework of the 'human rights world' and discovering the 'male' individual in almost every single construction of equality, rights and justice in the existing scenario. In particular, my position as a person with no legal training or expertise except that which I have gained through attempting to use the law, particularly international human rights standards, to address questions of injustice to women makes my contribution that of an 'outsider' to the system, with all the advantages and disadvantages that brings to the inquiry. As an 'external' observer, I can challenge those vested interests within these disciplines that obstruct the processes of change; as a woman committed to the advancement of women I have a personal and subjective interest in seeing some concrete and practical results emerge from my work.

In my work as well as in the writing of this paper, I have had to deal with the dilemmas created by my own, shifting identity as Sri Lankan, South Asian, single mother, women's rights activist and human rights worker, as well as by our differences as women within the movement. Thus, the issues I write about arise from my personal experience; I hope that the process of writing itself will be one through which I can not only clarify the various dimensions of the issues for myself but also place on record my specific insights and experiences for the use of others who embark on a similar voyage.

#### The scope of the paper

The experience of the international women's campaign against violence against women, and the evolution of the campaign for women's human rights will serve as the background against which the discussion in this paper is set. The campaign itself was limited in its scope, since it addressed only the issue of violence against women; although violence against individual women and their physical person has been a priority for many women's movements, the campaign attempted to draw in the broader issues of systemic violence against women, in particular in situations of political repression and economic deprivation. However, the focus on violence against women as the lens through which we could view the multitude of forms of discrimination against women in every country and in every society was very significant since it highlighted the insidious nature of biases against women in law and legal discourse.

The paper focuses on the issue of gender bias in certain parts of international human rights law and instruments since this is an area on which the international community has pledged itself to act on the basis of the Vienna Declaration and Programme of Action of 1993 which states that 'the human rights of women and of the girl child are an inalienable, integral and

indivisible part of universal human rights' and that 'the human rights of women should form an integral part of the UN human rights activities'.

This paper will review some of the major points of discussion within feminist and legal theory of issues of 'equality' and 'difference' with a view to achieving some conceptual clarity; this clarity is necessary to inform and shape the struggle for achieving dignity and respect for women. I will link the theoretical discussion with what is actually going on at present within the UN human rights system to implement the integration of 'the equal status of women and the human rights of women into the mainstream of UN systemwide activity'.<sup>1</sup>

#### The limitations of the paper

This paper will not give me the space or opportunity to delve into many aspects of human rights that are relevant to the discussion on women and human rights. I will restrict myself to dealing with the framework of 'human rights' as set out in the instruments and mechanisms of the United Nations system in an attempt to identify some of the main areas of concern for women's rights activists. Because of the very current nature of the subject, as well as because of my imperfect knowledge of the subjects I cover, the only conclusions I may be able to draw will be tentative ones; however, I feel that they will make a contribution to the work-in-progress with regard to placing women's concerns firmly at the centre of the discussion on human rights in contemporary society.

#### The hypothesis

My hypothesis is that given the experiences of women trying to defend their 'rights' and obtain redress for grievances within the existing systems of justice, it has become clear that in a situation where women are subordinated, there is differential access to justice, and therefore differential redress. This calls into question basic concepts in human rights theory and law which assume the equal status of all human beings and the universality of rights.

Once you confront the possibility that the construction of equality within the framework of contemporary legal definition is based on norms and standards derived from androcentric (and ethnocentric) experience, you can begin to question the basis on which modern systems of justice and jurisprudence address issues of discrimination and inequality. Since equality has been a distinct goal and objective of all liberatory and emancipatory social movements in modern history, challenging the conceptualisation of equality

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<sup>1</sup> UN Commission on Human Rights, Resolution 1994/45.

leads to questions which have an impact on theorising as well as on concrete political practice.

In the past, conceptualising women's equal rights in law has meant a constant friction between asserting 'sameness' and affirming 'difference'; our fear of being confined by our biology has led us to 'disembody' ourselves in an attempt to be equal. However, our experiences show us that discrimination against women and subordination of women are rooted in the social construction of what is masculine and feminine; the fact that some of us may be mothers has led to all of us being treated - in law, by the state, by the international community - as if child-bearing and rearing were the fundamental female activities.

The legitimisation of the division of the world into public (male) and private (female) domains in law has led to the construction of legal systems, especially at the international level, that look primarily at the relationships between states or between states and their gender-neutral citizens; the exclusion of non-state actors (individuals and groups) and of the 'private' (domestic) world from this system has led to the marginalisation of women's concerns within the legal arena. Thus, as Bottomley and her colleagues point out, 'we need to understand the dynamics of both personal and public life and the hidden imbalance of power within the family and within the workplace if we are to understand the significance of law' (1987, p.52). The ways in which law reflects and constructs power relations in society is a primary concern; looking at how legal systems throughout the world have relegated the issue of violence against women to various acts of criminality rather than viewing it as a manifestation of discrimination against women is indicative of the problems one confronts in this sphere.

This leads me to conclude that what is required is a radical re-conceptualisation of the substance and content of 'equality', 'rights' and 'justice' in a more inclusive and pluralistic way. It is only within such a reformulation that respect and dignity for every human being could be guaranteed. Such a re-conceptualisation may form part of a radical re-envisioning of the future for both women and men.

### The concepts

In this paper I am working primarily with the concepts of 'equality', 'justice' and 'rights' as gendered formulations and with the concept of 'difference' as a factor to be taken into account in defining and determining 'universal' standards of human behaviour. The discussion will focus on the difficult balance between formulating principles of justice and rights that will respond to the needs and interests of every human person and

acknowledging the realities of the many specificities and differences that divide the human race.

This question is significant in terms of my inquiry because of the ways in which women's movements all over the world have located, and still often do locate, their struggles for social justice in terms of the achievement of equality and on the defense of rights. I locate my inquiry within the framework of what Eva Kittay and Diana Meyers have called 'an on-going feminist critique of women's place within the philosophical and psychological tradition that has made men the measure of human experience but has claimed universality for its positions' (1987, p.8). In searching for indicators of a possible way forward, I ground myself in Hannah Arendt's contention, as quoted by Gisela Bock and Susan James: 'From the beginning, the paradox involved in the declaration of 'inalienable' human rights was that it reckoned with an abstract human being who seemed to exist nowhere' and her affirmation that 'The concept of human being, if conceived in a politically useful way, must necessarily include the plurality of human beings' (1992, p.10).

I will also look at the conceptualisation of international human rights norms and standards and some aspects of international and national jurisprudence with regard to women's rights, to explore the gender biases and lacunae that exist in the dominant formulations and practices of law. I consider some practical examples of attempts to integrate women's rights concerns into the existing human rights norms and standards and explore some aspects of recent feminist scholarship in legal theory in order to discern a positive and constructive way forward towards the achievement of full and equal 'human' status for women on the basis of Katerina Tomasevski's statement that 'What women have learned from history is that their needs and interests - and their rights - are neither automatically recognised nor guaranteed unless they articulate them and fight for them' (1993, p.2).



## CHAPTER TWO

### RIGHTS AND WRONGS

#### The evolution of human rights as a universal concept

The idea that 'individuals' have 'rights' is one that can be traced back in human history to the seventeenth century and to the period of the 'Enlightenment' which saw the emergence of liberal humanism as an ideology and democracy as a political practice; an analysis of the evolution of the concept of rights shows us how it has been transformed over time until in the post World War II era, it was articulated as 'human' rights, in the text of the Charter of the United Nations in 1945, which spoke of the 'dignity and worth of the human person'. The Charter, as Alison Renteln points out, was 'the first international agreement in which the countries of the world made a commitment to promote human rights at the international level' (1990, p.21). In 1948, this commitment was set out in detail in the Universal Declaration of Human Rights which has in modern times become the primary instrument of protection for those whose rights are violated; it has also become a basic component of international customary law.

In the pre-Enlightenment era, rights were thought to be derived either on the basis of 'natural' law or of 'Divine authority' and were to be enjoyed only by a select group of individuals - propertied men of a particular race, for example; those who proposed the primacy of 'natural' rights defined women as dependents, incapable of independent or rational thought; those who spoke of 'God's will' doubted if women had a soul. In essence, both groups saw women as representing 'Nature', needing to be controlled. Aristotelian thought, which greatly influenced both political theory and the formation of political institutions of the time, was founded on the belief that there were natural differences between groups of individuals which were translated into a pyramidal structure of hierarchy and power. Cavarero locates the 'political birth of modernity' in the period which followed, when the natural-law theories of political thinkers such as Hobbes and Locke challenged the political model based on an Aristotelian perception of 'natural difference'.

As Susan Moller Okin points out, the gender bias in this mode of thought was very clear; 'Human Nature', we realize, as described and discovered by philosophers such as Aristotle, Aquinas, Machiavelli, Locke, Rousseau, Hegel and many others, is intended to refer only to male human nature' (1979, p.7); Cavarero comments that 'Once man, the full essence of human being, is held to correspond to the adult free male, other human beings who differ from him will be defined in terms of their various differences, which are regarded as marks of deficiency or inferiority' (1992, p.33).

With the changes in society brought about by the development of liberal humanist ideas and democratic political practice, rights for all human beings were conceptualised in the texts of, for example, the Declaration of Independence of the United States of America (1776) and the Declaration of the Rights of Man of France (1789). Liberty, justice, equality and human dignity became the ideals for all persons to strive for in order to 'become' full human beings. As Jane Flax has pointed out, 'The claim of equality which is so central in modern liberal political thought is grounded in a rejection of 'natural' authority ...and on the assertion of the existence of a fundamental human sameness - for example possession of the same bundle of natural rights or of reason' (1992, p.194).

Although there have been some attempts to criticise the idealisation of 'nature' and the 'natural' implicit in liberal thought, the legal framework for rights in international law in contemporary society has remained located firmly within the parameters of liberal doctrine. However, as Seyla Benhabib and Drucilla Cornell point out, 'the public conception of the self as the equal and abstract bearer of rights from which liberalism proceeds is belied by the inequality, asymmetry and domination permeating the private identity of this self as a gendered subject' (1987, p.10).

The fundamental problem with the conceptualisation of rights on the basis of 'nature' was that women were defined according to their child-bearing and rearing functions and the family was seen as a necessary and fixed institution which was founded on principles of affective caring and sharing. There was no consideration of the family as a social unit based on unequal power relations, and as a possible site of conflict. As Okin comments, the political theorists of this period 'had no trouble reconciling inegalitarian, sometimes admittedly unjust relations founded upon sentiment within the family with a more just, even egalitarian social structure outside the family' (1989, p.19).

Throughout the history of liberal political thought and practice, we see that women recognised their exclusion from the formulation of liberty, equality and justice as it existed, and struggled to put themselves back on the agenda. Mary Wollstonecraft (A Vindication of the Rights of Women: England, 1792) and Olympe de Gouges (The Declaration of the Rights of Woman and Citizen: France, 1791) are but two of the better known examples of women who challenged the assumptions about women as 'natural' appendages of men, having no independent social or political rights. Women had to struggle for the right to own property, to vote, to run for public office, in fact for recognition as equal partners in every aspect of life. The patriarchal nature of liberal political ideology and practice and the existence of systems of social stratification on the basis of economic power, race and sex was very much a 'given' in the discussion.



In later years, the movement for the abolition of slavery which was spearheaded by a commitment to a 'shared humanity' irrespective of race or colour, led to the passage of the first International Convention of 1926, which Paul Sieghart (1983) describes as the first international human rights treaty. In the years following the end of the Second World War, the concern of the international community regarding humanitarian conduct during times of war and conflict led to the emergence of a new branch of international law concerned with the creation of international standards which would regulate the behaviour of states towards their citizens. At the same time, the modern concept of 'human rights', universal and inalienable, emerged from a conjunction of moral, legal and political perspectives, defining these rights as those which must be possessed by all human beings, equally. The capacity of all individuals to assert these rights was also a critical aspect of the conceptualisation.

### The UN system and human rights

Following on the Universal Declaration of Human Rights, in 1966 the United Nations adopted two Covenants, one defining civil and political rights<sup>2</sup> and the other, economic, social and cultural rights<sup>3</sup>. Both Covenants came into force in 1976 and the Human Rights Committee was created under Article 28 of the ICCPR in order to monitor the implementation of this treaty on civil and political rights.

The separation - and de facto prioritisation - of civil and political rights over economic, social and cultural rights by both the international human rights system as well as by human rights organisations has been the source of a great deal of debate and controversy up to the present day. At the World Conference on Human Rights in 1993, the agitation to reaffirm the 'indivisibility' of these two sets of rights occupied a centre-stage position. As Vincent points out, the differentiation lies in one's estimation of the scope of the universality of each set of rights; while 'Civil and political rights are rights held against everyone else, economic and social rights...impose duties on governments' (1986, p.12). Thus, the division of the two sets - or 'generations' - of rights is linked to a political division about the role of the state in society. In recent years, there has also developed a focus on a 'third generation' of rights - collective or group rights, which were not encompassed in the original documents or literature.

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2 The International Covenant on Civil and Political Rights - ICCPR.

3 International Covenant on Economic, Social and Cultural Rights - ICESCR.

In the elaboration of rights set out in the two Covenants, two basic categories of rights were identified: positive rights, which gave an individual the right 'to' something (for example, the right to life) and negative rights which guaranteed her protection 'from' something (the right not to be subjected to torture, for example). Over the years, certain of the rights contained in the Declaration have been set aside as ius cogens, rights that cannot be derogated under any circumstances. R.J. Vincent links the concept of rights with that of duties, and speaks of the 'correlative duties' of human rights: 'Duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived' (1986, p.11).

Among the other mechanisms set up by the UN to monitor human rights globally, the most significant are the Commission on Human Rights<sup>4</sup> and the Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>5</sup> under which a range of Working Groups, Independent Experts and Special Rapporteurs monitor and report on on-going situations of violations and abuse of human rights, and define standards and guidelines for action for the international community as represented within the UN system.

Although the international human rights system has its limitations, and has become the site of many acrimonious debates in the past years, it remains a framework - one of few - within which we may attempt to address issues of injustice and abuse of human rights and fundamental freedoms by governments at the global level. The discussion of human rights also provides a focus for many of the moral and philosophical dilemmas we face in contemporary society, and the process of determining norms and standards which may be applied to all human beings so that they may live with integrity and respect is one which challenges us in the face of the disintegration of many social and political institutions today.

In this context, the work of the UN human rights system in recent years, in preparing documents relating to the rights of indigenous peoples,<sup>6</sup> the rights of migrant workers and their families,<sup>7</sup> the rights of persons belonging to national or ethnic, religious and linguistic minorities and on violence

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4 A functional commission of the UN Economic and Social Council - ECOSOC - established in 1946.

5 Also established in 1946.

6 The Draft Declaration on the Rights of Indigenous Peoples and the Technical Review of the Declaration; UN Doc. E/CN.4/Sub.2/1994/2 of 5 April 1994 and E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994;

7 The International Convention on the Protection of the Rights of Migrant Workers and their Families; adopted in 1990, awaiting ratification.

against women can be seen as an activity which expands the parameters of the human rights framework in a very positive and transformatory way.

At the same time, human rights remains, as Charlotte Bunch has pointed out 'one of the few moral visions ascribed to internationally...and one of the few concepts that speaks to the need for transnational activism and concern about the lives of people globally' (1992, p.14) and therefore becomes an arena for mobilising and organising for change by people everywhere. Justice Bhagwati has commented that 'The language of human rights carries great rhetorical force...At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising' (as quoted by Fortman, 1994, p.5).

The human rights focus is particularly significant for the struggle for women's rights. As Savitri Goonesekera has pointed out, in fact the platform of human rights is perhaps 'the only effective one that can assist women of different communities to move out of the constraints of custom and personal law' (1991, p.7). Feminist lawyers at the International Women's Human Rights Law Clinic (IWHR), in their analysis of the need to integrate women's rights into the human rights framework as a first step in the move to re-define the basic concepts of human rights, have pointed out that 'Human rights provide concepts and strategies, formal and informal, that women can shape in the light of our diverse needs and contexts to challenge abuses, promote positive programmes and, at the most fundamental level, to empower women in our daily lives' (1994, p.1).

#### Equality as non-discrimination: the UN conceptualisation

The principle of non-discrimination is a cornerstone of the Universal Declaration of Human Rights, which states that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. As Natan Lerner observes, 'The rule of non-discrimination is basically the negative re-statement of the principle of equality' (1991, p.25).

In 1949, a UN document set out to identify the Main Causes and Types of Discrimination,<sup>8</sup> according to its definition, discrimination dealt with 'prejudice, dislike, enmity or hatred of one person towards another because the latter belonged to a particular race or ethnic group, has a certain colour of skin, belongs to the male or female sex...etc.'; it invalidated all distinctions made on grounds of 'natural or social categories which have no relation either to individual capacities or merits or to the concrete behaviour of the individual person'.

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<sup>8</sup> UN Doc. E/CN.4/Sub.2/40/Rev.1 of 1949.

The fact that the issue of discrimination continued to preoccupy the international community despite all the stated commitments to its eradication is shown in the numerous formulations against discrimination contained in UN human rights documents since 1946. In 1965, the UN adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which came into force in 1969; in its preamble, it stated that discrimination is 'scientifically false, morally condemnable, socially unjust and dangerous'. Both the ICCPR and the ICESCR stress the principle of non-discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

'Positive discrimination' is a method by which the law has attempted to deal with the issue of discrimination. An often quoted judgement by Judge Tanaka in the South-West Africa case in 1966 reflects the thinking on this issue within international law. Speaking of the principle of equality, Judge Tanaka recognised the concept of 'relative equality, namely different treatment proportionate to concrete individual circumstances'; he went on to state that 'Different treatment must not be given arbitrarily, it requires reasonableness, or must be in conformity with justice'.<sup>9</sup>

The principle of 'relative' equality is one which has supported strategies of 'reverse discrimination' or 'affirmative action' for women, racial minorities and other disadvantaged social groups. This principle was affirmed by the UN Human Rights Committee in 1989, when it justified differential treatment on the basis that 'action needed to correct discrimination in fact is a case of legitimate differentiation'.<sup>10</sup>

Despite decades of experience of the failures of 'eradicating discrimination' using existing mechanisms and legal processes, the international community continues to look at questions of human rights within the framework of anti-discrimination laws and legal instruments. In 1994, a Working Paper presented by Asbjorn Eide to the UN Sub-Commission<sup>11</sup> continued in the attempt to refine the definition of discrimination: the current version reads 'any action which denies to individuals or groups of people equality of treatment which they may wish'.

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<sup>9</sup> See Report for 1966 of the International Court of Justice.

<sup>10</sup> Human Rights Committee; General Comment 4; UN Doc. CCPR/C/21/Rev.1 of 19 May 1989.

<sup>11</sup> UN Doc. E/CN.4/Sub.2/1994/36, July 6, 1994; Working Paper 'Suggestions for a comprehensive programme for the prevention of discrimination and protection of minorities;

## The UN and discrimination against women

The UN, since its inception, has clearly stated its commitment to the achievement of equality for women. The UN Charter spoke of 'the equal rights of men and women'; so did the Universal Declaration. It must go on record here, however, that the first draft of the Declaration had Article 1 referring to 'all men'; it was left to the Commission on the Status of Women to propose changing this phrase to 'all human beings'! As Tomasevski has said, 'Gender discrimination is so firmly embedded in the history of humanity that it is often not perceived as discrimination. Because women have always been burdened with unpaid household work and absent from public life this is deemed to be a natural state of affairs' (1993, p.44). In this, she re-echoes an observation by a Committee of Experts to the International Labour Conference of 1971 : 'Experience shows...that many of the distinctions between the sexes which had become customary to accept as 'normal' were really discriminatory' (quoted by McKean; 1983, p.187).

In 1946, the UN established a Sub-Commission on the Status of Women under the Commission of Human Rights; this was later elevated to the status of a full Commission (CSW) because of, as a report from the CSW in 1994 describes, 'fears that women's rights would be lost in a turbulent mainstream'.<sup>12</sup> At the present moment, the CSW has evolved into a body that focuses on developing recommendations on policies and programmes that could address discrimination against women which it then submits to the Economic and Social Council of the UN for further action and implementation. However, the low priority given to resource allocations to the CSW and its physical and systemic separation from the other UN human rights bodies have led it to become one of the most marginalised and poorly supported of all UN bodies.

Throughout the 1950s, the UN and related agencies such as the International Labour Organisation adopted a number of Resolutions, Declarations and Conventions relating to the rights of women, for example on Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO:1951), on the Political Rights of Women (UN:1952) and on the Nationality of Married Women (UN:1957). In 1963, the CSW presented a Draft Declaration on the Elimination of Discrimination against Women which said that 'discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity'.

The issue of 'positive' discrimination and the need for protection of women in certain specific circumstances was one of the major areas of discussion around this Declaration. Warwick McKean comments that 'Since it was felt that

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<sup>12</sup> See UN Doc. E/CN.6/1994/11 of March 3, 1994; the Commission on the Status of Women.

discrimination against women should not be confused with legitimate distinctions based on physiological differences between men and women, a further clause was adopted to make clear that measures taken to protect women in certain types of work for reasons inherent in their physical nature shall not be regarded as discriminatory' (1983, p.185).

While issues of equal pay for equal work and 'protective' legislation dominated the discussion on women's role and position in the productive sphere and outside the home, problems relating to women's sexuality, her reproductive roles and functions and her position within the family and the home were easily relegated to an area protected by the principles of 'respect for privacy' and 'non-interference by the state'. This meant that issues such as female genital mutilation, the perpetuation of traditional, religious or customary laws that discriminate against women in matters of marriage, divorce, custody of children and inheritance and violence against women including rape, trafficking and forced prostitution were treated by the UN human rights system in an ambiguous and noncommittal manner. To this day, the international community remains reluctant to take a stand on violations of women's dignity and right to physical and mental integrity when they take place within the family or community, while the perpetrators have sought recourse in religion, tradition and the principle of national sovereignty in order to justify their actions.

The declaring of 1975 as the International Year of the Woman and the subsequent declaration of the decade from 1975 to 1985 as the Decade of Women resulted in some public attention to the question of women's subordination at the international level. The Forward Looking Strategies that were formulated at the End of the Decade of Women Conference in Nairobi in 1985 identified equality, development and peace as the three main goals for women in the forthcoming years. As Hilikka Pietla and Jeanne Vickers see it, 1985 represented 'a turning point in the history of women's issues in the UN system' (1990, p.viii). Paragraph 11 of the Nairobi document reads 'equality is both a goal and a means whereby individuals are accorded equal treatment under the law and equal opportunities to enjoy their rights to develop their potential talents and skills...For women in particular equality means the realisation of rights that have been denied as a result of cultural, institutional, behavioral and attitudinal discrimination'<sup>13</sup>. Thus, equality for women has become the single issue around which the many different arms of the UN working in the area of women and rights are able to coordinate their actions. At the same time, governments, non-governmental organisations and development agencies are also guided in their activities by this same identification of priorities for working for the advancement of women.

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Nairobi Forward Looking Strategies for the Advancement of Women; UN Doc. A/CONF.116/28 of 15 September, 1985.

## The Women's Convention

In 1979, the UN adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW - the Women's Convention). In its preamble, it acknowledged that 'extensive discrimination against women continues to exist' despite years of struggle. This Convention, which came into force in 1981, defines discrimination as follows: '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' and says that such discrimination 'violates the principle of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity'.

The Women's Convention is, by virtue of ratification, one of the most popular of all international agreements; by June 1993, 121 nations had signed the Convention. However, the discussion that took place around the Convention at the time of its adoption made it clear that most nations viewed women as the repositories of tradition, culture, honour and 'family values'. Commenting on the debates of the time, Theodore Meron says that 'In no other area is the disparity between the formal or 'proclaimed' equality and the reality of discrimination at home, in society and in the workplace so great' (1986, p.55).

This discriminatory bias is borne out by the fact that the Women's Convention also has the dubious distinction of being the Convention against which the most number of states have entered the most number of 'reservations'; of particular concern is the fact that some of these reservations preserve the powers of states to continue with discriminatory practices against women on the basis of culture, tradition or religious belief. Moroccan feminist and scholar, Fatima Mernissi, reflecting on the nature of most reservations to CEDAW entered by Arab States has pointed out that the reservations reflect 'their visceral rejection of the principle of equality' (1993, p.67). In her study of the reservations to the Women's Convention, Tomasevski has highlighted the fact that 'most reservations have been entered with respect to non-discrimination in family law and citizenship, and to women's legal capacity' (1993, p.117).

The issue of the validity of reservations to the Women's Convention has been a continuing areas of concern for the UN Sub-Commission; in a document issued

in 1991, it noted 'that certain reservations to the Convention, in particular those in relation to the adoption of policies and institutional measures to implement the terms of the Convention (Article 2), political and public life (Article 7), discrimination in the field of employment (Article 11), equality of men and women before the law (Article 15) and marriage and family relations (Article 16) might diminish the international legal norm and legitimize its violation'.<sup>14</sup>

However, the structure of the Women's Convention is itself extremely constraining. In the first instance, there is no provision for the rejection of reservations, even when they are considered incompatible with the purposes of the Convention itself; the Committee that monitors the implementation of CEDAW has no mandate to sanction states which are in breach of provisions of the treaty, and no investigatory or enforcement powers. There is also no official process whereby the Committee can receive individual complaints, which effectively hampers their capacity to intervene in situations where violations of the provisions of the Convention take place. The need for an Optional Protocol to CEDAW, which would enable women to address individual complaints to the Committee, is one which has been highlighted by activists in the field.

One of the main constraints identified by scholars who study the Convention, is that the text itself is programme-related; as Susanna Chiarotti (1993) points out, governments are only obliged to 'take measures, dictate laws' etc. and as long as these laws are not dictated, the judiciary is not bound by the treaty. The text of the Convention is also constructed 'within' the framework of rights that could be enjoyed by both men and women. Seeing equality as the main goal to be achieved, there is no consideration of the specific or special problems faced by women by virtue of their being women, no definition of women's rights. A UNIFEM document prepared for the World Conference on Human Rights states, 'the Women's Convention...draws little distinction between the human condition of women and men, ignores the fact that women and men often operate in different worlds and that the world of women and their role in it are undervalued'. Sri Lankan lawyer Radhika Coomaraswamy describes the Women's Convention as a document which is 'in fact the culmination of the Enlightenment project, the rights of man now being enjoyed by women' (1993, p.13).

#### Making 'the home' a part of 'the world'

Discussing the issue of women's rights within the existing human rights frameworks, Marianne Haslegrave (1988) identifies two critical areas of importance for women that she says have been excluded from consideration in

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UN Doc. E/CN.4/Sub.2/1991/65 of 24 October 1991.



the drafting of the Convention. The effects of traditional family law on the status of women and violence and physical abuse. In the current debates, both are acknowledged as areas in which the greatest violations of women's human rights take place; the fact that both occupy space in the 'private' sphere of life is no coincidence.

The campaign for women's human rights challenges the existing assumptions about violence against women in a variety of ways, in particular focusing on the way violence within the home and the community is not a 'private' matter but rather one which concerns the community and society as a whole; it also demands the attention of the international community to the all-pervasive and systemic nature of discrimination against women, in particular within the institution of the family, that denies them the dignity and respect guaranteed in all human rights Declarations and Treaties.

Pietla and Vickers identify the document emanating from the World Conference of Women in Nairobi in 1985 as the 'first unanimously adopted inter-governmental document in which the concept of violence is defined in a comprehensive way and where the links between use of violence at a personal and international level are recognised' (1990, p.63). Subsequently, there have been many studies and reports on the issue of violence against women from all over the world which have affirmed these linkages.

Two further significant events with regard to the issue of violence against women being recognised as a violation of their human rights took place within the UN system of human rights in 1993. First, following on the inclusion of women's human rights concerns in a substantive manner in the text of the Vienna Declaration and Programme of Action at the World Conference on Human Rights, in the fall session of the UN General Assembly that year, the world body adopted a Declaration on Violence against Women; this is a document which could have deep and fundamental implications for human rights standard-setting in the future, since it addresses the commission of 'any act of gender-based violence...whether occurring in public or private life' and thereby brings the private world as the locus of a large proportion of women's oppression and abuse into focus in the international human rights arena. Second, the UN agreed to establish the post of a Special Rapporteur on Violence Against Women and Its Causes within the UN Commission on Human Rights; the appointment of Sri Lankan lawyer Radhika Coomaraswamy as the Special Rapporteur was confirmed in early 1994.

Thus, within the ambit of international human rights law and the UN system of human rights, recognition has been accorded to the need to pay special attention to violations of the human rights of women and to the need to expand the conceptualising of 'human rights' to include violations that take place outside the public sphere and in arenas hitherto considered to lie 'outside'

international jurisdiction. In a document prepared by the Commission on the Status of Women in 1994 <sup>15</sup>, the shift in focus is described in paragraph 9 as 'The main changes in emphasis have been in terms of an evolution in concern away from the existence of rights de jure to their exercise de facto...the constant and increasing concern of the Commission has been with the enjoyment by women of their human rights'.

However, the UN remains yet another patriarchal institution, and those who work within the system are as much influenced by the structures of male domination as in any other. Unfortunately, the same could be said for most non-governmental human rights organisations as well. International organisations such as Amnesty International and Human Rights Watch, which play a key role in transmitting information regarding human rights abuses to the UN human rights system and in campaigning for justice from the system, have also been primarily focused on civil and political rights of individuals. It is only in the recent past that the consideration of the specific needs and concerns of women within the human rights framework has been taken up by these 'mainstream' human rights organisations. The struggle, therefore, for women's human rights activists has moved on from one phase to another: From fighting for the recognition that women's rights are abused and violated in very specific ways and demand specific attention, we must move on to challenging the structures and infrastructures that deny the legitimacy of women's human rights concerns and relegate women to subordinated positions within legal and juridical processes at national, regional and international levels.

The shifts in perception among women themselves is articulated by Charlotte Bunch in this way: 'When we first began to conceptualise our rights, we called our struggle 'women's rights' or 'feminism'. We did not think in terms of 'human rights' because we were trying to understand what was distinct in women's experience. Having conceptualised 'women's rights' we now know what is missing in the mainstream definition of human rights. Our demand that women's rights are human rights is a return to the mainstream, not to fit ourselves in on the old terms but to transform the very definition of human rights'. (1992, p.14)

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see footnote 11.

## CHAPTER THREE

### BEING EQUAL BUT DIFFERENT

#### Juxtaposing feminist theory and human rights concepts

The gender-blindness of legal and moral theorising on issues of justice, rights and equality as well as the blatantly patriarchal prejudices contained within the conceptualisation of such issues have drawn the attention of many scholars and activists in the past years. In particular, feminist scholarship has focused attention on the prevailing imbalance of power between men and women in modern society as being central to the discussion. Catherine MacKinnon has spoken of the ways in which the state, through law, 'institutionalises male power over women through institutionalising the male point of view in law' (1989, p.169). Feminist scholars have been in the forefront of challenging the assumptions of equality and universality expressed in the body and text of law. Discrimination, which is what justice seeks to eliminate, and equality, which is what justice strives to help us achieve, are two other factors around which feminists have structured their arguments about justice.

While it will be extremely difficult to maintain absolutely clear divisions between the concepts that I am dealing with here, since the concepts of equality, difference, justice and rights are intimately connected and interlinked both in theory and in practice, I will try to set out the main arguments within the feminist and legal frameworks as a means of identifying certain key areas of interest in terms of my analysis of the international human rights system.<sup>16</sup> The struggles for re-definition, or expansion, of human rights concepts which we have seen taking place in the international arena in the past years are those that challenge these assumptions.

A main theme that runs through the debate is a critique of the presentation of a 'white male' norm as the standard for equality and universality. As Benhabib has pointed out, 'universalism...is defined surreptitiously by identifying the experiences of a specific group of subjects as the paradigmatic case of the human as such. These subjects are invariably white, male adults...' (1987, p.81); Cornell, in her writing on the subject has stated that 'what is called human is only too often in patriarchal culture the genre of the male' (1992a, p.281).

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Much of the discussion on equality and difference is also relevant to questions of theorising rights and justice issues for other disadvantaged groups such as minorities, indigenous people, gays and lesbians and the disabled.

At the same time, feminists have embarked on a critique of the concept of discrimination in current legal usage, highlighting the problems faced by women when trying to use the concept to obtain justice. According to MacKinnon, discrimination against women is set within the sameness/difference paradigm. She comments, 'Socially, one tells a woman from a man by their difference from each other but a woman is legally recognised to be discriminated against on the basis of sex only when she can first be said to be the same as a man' (1989, p.216). Cornell defines discrimination as 'an imposed law of gender identity on lived possibility' and says it 'results from a comparison between the genders under previously established norms' and is 'based on an inherently comparative (emph. mine) evaluation between men and women which implicitly assumes the validity of the standards of an already established world' (1992a, p.283). Her argument closely parallels that of Iris M. Young who argues that discrimination, by focusing attention on the perpetrator and/or the action/policy, tends to present injustices as the exception and not the rule and thereby misses the 'mundane and systematic character of oppression' (1990, p.196).

If 'Justice' is blind, then we are all equal

As a concept, justice forms the basis of most formulations of international and national law; the achievement of 'justice' is the ultimate goal. At the same time, as Young points out, 'Appeals to justice still have the power to awaken a moral imagination and motivate people to look at their society critically and ask how it can be made more liberating and enabling' (1990, p.35). In recent theorising on the subject, one encounters several diverse and sometimes conflicting perspectives on justice. The fundamental problem continues to be one that has occupied philosophers and moral theorists for centuries: that of evolving a system of resolving conflict and competition in society which takes into account the diversity of human interests and concerns and which can legitimately say that it represents 'universal' concerns about what is just and unjust.

In the discussion on justice, one encounters the debates on interests, entitlement and needs, spanning such diverse fields as political philosophy<sup>17</sup> and theories of economic development,<sup>18</sup> as well as the discussion of impartiality as being the basis for determining the standards of justice. As Okin says 'the reason different societies have such different conceptions of what constituted just treatment is that they have considered different

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17 For example, see the work of Agnes Heller.

18 See the work of A.K. Sen; e.g. Inequality Reexamined, 1992; also, other work on 'entitlement systems' e.g. Bas de G. Fortman in 'Human Rights, Entitlement Systems and the Problem of Cultural Receptivity'; see Bibliography for reference.

qualities to be the grounds for departing from impartiality' (1979, p.214). This leads on to the on-going discussion regarding rights and justice, which juxtaposes 'universality' with ideas of 'cultural relativity'. It is impossible to encompass all the dimensions of the discussion on justice and equality in this paper; I will only pursue the discussion in terms of its relevance to the focus on women's human rights.

John Rawls is acknowledged as one of the leading theorists of the liberal concept of justice. In his book titled A Theory of Justice, Rawls has theorised a perspective of 'justice as fairness' that 'begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented' (1972, p. 221). According to Rawls, principles of social justice are those that 'provide a way of assigning rights and duties in the basic institutions of society and define the appropriate distribution of the benefits and burdens of social cooperation' (op.cit., p.4). McKean encapsulates Rawls' formulation as follows: 'Just social arrangements are those which would result from a mutual acceptance of basic principle by a community of rational egoists seeking to organise a new society but ignorant of their status within it' (1983, p.6).

Nowhere in the work of Rawls can you find any specific references to women or to the particularities of justice as regards women. In their discussion on the work of Rawls, Kittay and Meyers have pointed out that his perspective 'posits an autonomous moral agent who discovers and applies a set of fundamental rules through the use of universal and abstract reason' (1987, p.3). However, a thorough reading of his work reveals that in fact when he refers to 'agents' or 'individuals' or to 'heads of household', Rawls is always referring to men. The presumption of equality and the assumption that equal access and opportunity will automatically lead to social justice which is implicit in his writings points to the liberalism that imbued Rawls' vision.

In her critique of Rawls, Okin comments that his 'rare and interesting discussion of moral development...rests on the unexplained assumption that family institutions are just' (1989, p.22); she also refers to his gender-blindness, pointing out that he regards sex 'as one of the irrelevant contingencies that are hidden by the 'veil of ignorance'' (op.cit.p.91).

The 'justice' perspective as put forward by Rawls and other scholars who pursue the same trend of thought assumes an equality among individuals in society that does not exist in reality; this has been identified as its main weakness by many of its critics, including Carol Gilligan (1982). However, Gilligan responds to the shortcomings of the perspective of a gender-neutral system of justice based on an assumption of equality by presenting us with a perspective of justice as 'care' that is premised on a morality of non-

violence, affective relationship and responsibility, on preventing harm and maintaining relationships, that she identifies with women's specific life experiences.

Gilligan's argument is that the 'justice as fairness' tradition fails to take into account the considerations that women bring into play when making moral decisions and ignores women's specific positioning in society. Unfortunately, her focus on the **distinctive** moral development of women and the ways in which she confronts the 'morality of rights' with the 'ethics of care' have laid her open to charges of essentialism and of reducing women to their traditional role as care-givers.

In my reading, however, Gilligan's work does not posit the 'care' perspective of justice in opposition to the 'justice as fairness' tradition; instead, she speaks of the need for a dialogue between the two traditions, which would lead to a 'more complex rendition of human experience'. Discounting some of the criticisms of Gilligan's work, Cornell has pointed out that Gilligan's appeal for listening to a 'different voice' should be heard from the perspective that this 'different voice should not be viewed as inherently inferior simply because it was a woman's' (1991, p.136). According to Cornell, Gilligan asks us to question the privileging of the masculine as the only legitimate voice and presents us with a 'normative critique of a context in which the masculine view is assumed as the norm' (op.cit.p.137).

Several other feminist scholars who have worked on the concept of justice have also identified the specific aspects of women's life experiences as child-bearers and child-rearers as having a profound and deep effect on their approach towards moral and ethical issues. Sara Ruddick speaks of 'a morality of love' and of 'maternal thinking' which, for example, colours women's attitudes towards war and violence. She contends that 'in living through the conflicts endemic to their work, mothers develop a practice of nonviolent action' (1987, p.249). Like Gilligan, she is careful to avoid 'stereotyping' motherhood; throughout her work, she emphasises that 'mothering' need not be an exclusively female activity, and that mothers need not necessarily be non-violent. However, as she points out, given contemporary social and historical circumstances, 'it is now impossible to separate, intellectually or practically, the female from the maternal condition' (op.cit. p.24).

Advocates of 'maternal thinking' argue for the privileging of women's identity as mothers as a way of validating the private sphere and as a way of exploring the construction of maternity as a political status. Pateman, for example, puts forward a proposal for a sexually differentiated conception of citizenship, which attaches political significance to motherhood. While we cannot deny the present situation in which the majority of women worldwide are confined and limited by their roles as mothers and caregivers, and while the

construction of the 'maternal' as a social category presents us with a space within which both men and women are free to explore their affective selves, the problem with the 'maternalist' constructions is that they do not move away sufficiently from the dichotomy of male/female as opposite categories.

However, what becomes clear from the emphasis placed on the 'maternal' or 'caring' aspects of female behaviour when discussing issues of justice, ethics and morality is that the links between woman's reproductive roles and her capacities for reasoning need to be more deeply examined and explored, rather than rejected out of hand as being essentialist and therefore reactionary. As Mary Dietz has pointed out, 'maternalists' remind us of 'the inadequacies and limitations of a rights-based conception of the individual and a view of social justice as equal access' (1987, p.12).

#### Injustice as a starting point of inquiry

Determining the basis on which we decide what is 'just' and 'unjust' remains, however, an extremely difficult question. The theorising on justice from the perspectives of 'fairness' or of 'care' that I have outlined above still leave us with an incomplete perception of justice and of methods of redressing injustice, especially in the context of women. Interestingly enough, one tendency in recent feminist and legal inquiry into the concept of justice has been a shift to a focus on 'injustice' and on the principles of justice, such as impartiality, which also need to be re-defined. Thus, rather than trying to quantify 'justice' in empirical terms or to make it tangible in material terms, we venture to identify the basis on which people suffer injustice, as a first step towards defining the ways in which the injustice can be overcome.

For example, the conceptualisation of the family as an institution which is basically just is one which creates a number of difficulties in discussing the subject of justice in relation to women. Okin, commenting on the perception of the family in the writings of Rousseau and Hume, points out the shortcomings of the liberal perception in assuming that 'the affection and unity of interests that prevail within families make standards of justice irrelevant to them' (1989, p.27). There have been many critiques of the family from the feminist perspective which question its role in the continuing subordination of women and the 'myth' of the benign family; at the same time, economists such as A.K. Sen have put forward a view of the family as a unit within which different interests are placed in a situation of 'cooperative conflict'.<sup>19</sup>

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See A.K.Sen; 'Gender and Cooperative Conflicts' in Persistent Inequalities, ed. Irene Tinker; Oxford Univ. Press, 1986.

Jerome Shestack's discussion of the contribution of Professor Edmund Cahn to the discussion on justice is one which focuses on injustice as the starting point. According to Shestack, Cahn's contention is that 'it is easier to identify injustice from experience and observation than it is to identify justice' (1984, p.93). Therefore, justice is seen as the active process of remedying or preventing what arouses the sense of injustice and of resolving conflicts in human society.

A significant contribution made by feminist scholars to the discussion of injustice and justice has been the critique of impartiality and equal treatment in law. Okin points out that the idea that 'all persons are deemed to have a right to equality of treatment except when some recognised social expediency requires the reverse' is crucial to the concept of justice. According to her analysis, it is 'only when social inequalities have ceased to be considered expedient that they come to be regarded as not only inexpedient but also unjust' (1979, p.214). Formulating her critique of the concept of impartiality as a prerequisite for justice, Young points to the idea that for an agent to attain objectivity she must adopt a universal point of view that is the same for all rational agents and says that this 'masks the ways in which the particular perspectives of dominant groups claim universality and helps justify hierarchical decision-making structures' (1990, p.97). Young therefore argues for a perception of justice that is rooted in the concepts of oppression and domination as the two factors that define injustice. She opposes a 'distributive' paradigm (as per Rawls) that restricts the meaning of social justice to the 'morally proper distribution of benefits and burdens among society's members' and instead proposes an 'enabling' conception of justice that takes into consideration the need to create the institutional conditions necessary for the development and exercise of individual capacities and collective cooperation.

#### Does being equal mean being the same?

Issues of difference and sameness and the concepts of equality and equal status are key words in the discussion on justice and rights. Many feminists have argued against the contemporary formulation of equality that places us, as women, in a struggle to be 'equal to', similar to, like, men. They argue that in circumstances in which women's subordination is the rule rather than the exception, it is not the biological/physiological differences between male and female but the imbalances in power between men and women and gendered hierarchies that are constructed on the basis of unequal power relations that create a situation in which equality for women remains forever out of reach. At the same time, feminists argue against the imposition of what Young has called 'the ideal of the impartial transcendental subject' which is a focal point of liberal theorising on the subject of equality; as Young says, this ideal 'denies or represses difference' (1990, p.101).



The 'disembodiment' of the human person in the process of constructing the 'non-gendered' liberal individual who is then entitled to 'equal' treatment under the law is a key area of concern in the discussion of 'equality' and difference. As Carole Pateman and Elizabeth Gross say, 'There have been many famous critiques of the abstract character of liberal individualism but none has ever questioned the most fundamental abstraction of all: the abstraction of the 'individual' from the body' (1986, p.8). However, in the contemporary feminist discussion of equality, there is no denying the fact that, as Joan Scott has said, 'our culture has embodied difference in generative organs and skin colour' (1987, p.94).

The tension between acknowledging the specificity of our lives, especially because of our reproductive capabilities, on the one hand and rejecting and resisting attempts by the state and by societal structures to restrict our potential because of our reproductive capabilities on the other is something familiar to women's activists throughout the world. Anne Phillips points to the dilemma faced by the women's movement in confronting this situation: 'feminism has moved recurrently between the emphasis on equality and the focus on difference, between a politics that points out the irrelevance of sex and insists that we should be treated the same, and an alternative that takes sexual difference as its starting point' (1993, p.44). Cornell speaks of our need for 'the recognition of feminine difference in those circumstances when we are different, as in our relationship to pregnancy, while simultaneously not reinforcing the stereotypes through which patriarchy has attempted to make sense of that difference and has limited our power because of it' (1992a, p.293).

The debates between advocates of 'formal' equality (gender neutral, where all receive similar treatment, under a single standard) and those who argue for 'substantive' equality (where individuals are sometimes treated differently, i.e. 'affirmative action', under a double standard) feature prominently within the feminist discussion on 'difference'; it is also reflected in the focuses on 'sameness' - that is, those who believe that women must strive for equality and struggle to be treated 'like' men - and 'difference' - those who argue for the highlighting of sexual difference and all it implies when it comes to the treatment of women - in the legal world.

The dilemma created by perceiving equality within the dichotomy of sameness/difference is well expressed by MacKinnon: 'Under the sameness standard, women are measured according to our correspondence with men;...under the difference standard, we are measured according to our lack of correspondence with them...masculinity, or maleness, is the referent for both' (1987, p.34). Martha Minow has described it as follows: 'If to be equal, you must be the same, then to be different is to be unequal' (quoted in Kapur and Cossman, 1993, p.2). Flax, in her contribution to the discussion, has referred

to the problems created 'Precisely because equality as currently understood and practised is constituted in part in, and by, a denial and ranking of differences' (1992, p.193).

In trying to move beyond the sameness/difference debate, Young proposes looking at 'similarity' rather than 'sameness' on the basis that 'the similar can only be noticed through difference' (1990, p.98); in the same vein, Cornell puts forward the possibility of speaking of 'equivalence' rather than of 'equality' in considering issues of justice, because according to her, 'equivalence does not demand that the basis of equality be likeness to men' (1992a, p.283). According to Cornell's categorisation, among other things, the concept of equivalent rights 'recognises that the human species... is composed of two genres, irreducible to one another' (op.cit.p.282). Cornell links her argument on equivalence to A.K. Sen's (1992) conceptualisation of equality as 'capability' (a person's freedom to choose between different ways of living) and 'well-being', only stating that she would expand the meaning of capability to also include sexual expression.

#### An alternative theorising of equality and difference

The biological difference between male and female and the socio-cultural difference between masculinity and femininity as social constructions, as well as the unravelling of the links between biology and acculturation - between biological sex and constructed gender - has been a key feature in feminist theorising on difference in the 1970s. The concept of 'difference' was later expanded to include those variables constructed by racial, ethnic, linguistic, religious, regional and other differences. Strong interventions by women of colour and women from the South led to the feminist discussion on difference becoming more sensitised to the issue of differences among women as well as between women and men; lesbian activists brought the issue of discrimination on the basis of one's sexual preference into the discussion. Thus, contemporary feminist analyses pay a great deal of consideration to the 'inter-sectionality' of factors such as class, race and sexual preference when discussing issues of differences. However, in the context of my focus in this paper, at this juncture I will concentrate on the issue of difference as constructed within a male/female divide.

The question of difference and of dealing with difference becomes critical to my discussion because of the manner in which, on the one hand, the law and legal systems have constructed differences between men and women in a way that I feel is blatantly discriminatory to women and, on the other hand, feminists and activists have responded to these constructions. While the law is, in general, quite unanimous in its treatment of sex-based difference, as feminists and activists we are divided in our response. As Bock and James elaborate, 'The issue concerns whether or not a feminist politics based on a

goal of equality aims to assimilate women to men, to erase gender difference and construct a gender-neutral society...and whether or not a feminist practice based on the ideal of difference...plays into the hands of a tradition that has used the notion of female difference to justify inequality' (1992, p.4).

One key aspect of the feminist debate on 'difference' relates to the concept itself, and how useful it is to construct and define male/female inequality in terms of difference. Prior to the influence of postmodern thought on feminist theory, the conceptualisation of difference had always taken place in a binary and dichotomous opposition to equality. As Joan Scott points out, when paired in this way 'they structure an impossible choice. If one opts for equality, one is forced to accept the notion that difference is antithetical to it. If one opts for difference, one admits that equality is unattainable' (1988, p.43). Scott maintains that one has to 'refuse to oppose equality to difference and insist continually on differences...differences that would confound, disrupt and render ambiguous the meaning of any fixed binary opposition' (op.cit.p.46). Thus, the focus on 'shifting and multiple identities' that is also taking place within contemporary feminist theorising becomes another dimension of this approach.

The debate on difference also takes into consideration questions of identity and identity-formation. Young speaks of the 'logic of identity' which seeks 'to reduce the differently similar to the same' and which thereby 'turns the merely different into the absolutely Other' (1990, p.99). She warns of the negative implications of blindness to difference, on the basis that it could disadvantage groups whose experience, culture and socialised capacities differ from those of privileged groups; it could also allow privileged groups to ignore their own group specificity and produce and internalise devaluation by members of those groups themselves. Avtar Brah, in her turn, contends that difference should be looked at as something that is constantly in progress, neither unified nor fixed; according to her, 'struggles over meaning are also struggles over different modes of being' (1992, p.142). By proposing that we treat 'difference' as a phenomenon that can change and transform itself, Brah advocates moving away from fixed categories of difference.

Carol Bacchi also supports the notion that positions in the sameness/difference debate are 'historically specific and politically determined' (1990, p.69); in the discussion on difference, her argument is that 'women are not different; they are disadvantaged' (op.cit. p.177). The idea of 'disadvantage' is also put forward by Kapur and Cossman on the basis that 'discrimination consists of treatment that disadvantages or further oppresses a group that has historically experienced institutional and systemic oppression' (1993, p.4). Deborah Rhode (1992) argues for a shift from considering 'difference' to considering 'disadvantage' on the basis that this

will encourage a more contextual analysis and a closer examination of the social conditions that perpetuate disadvantage. Thus, it seems clear that many feminist scholars who are addressing themselves to the questions of difference are speaking of the need to have a 'relational' understanding of the concept, a contextualised meaning of difference.

The discussion on difference leads us on to consider the re-conceptualisation of equality in feminist thought. In recent years, theorising on the concept of equality has become more sophisticated and more complicated, with some feminist scholars advocating that we abandon the concept of equality altogether. For example, MacKinnon contends that 'sex equality is conceptually designed never to be achieved' (1989, p.45). She suggests that we should instead focus on inequality as lying at the root of women's oppression and subordination. She argues that gender is in itself an inequality, 'constructed as a socially relevant differentiation in order to keep that inequality in place'. Thus, according to her, 'sex inequality questions are questions of systemic dominance, of male supremacy' (op.cit., p.42) and 'The question of equality...is at root a question of hierarchy' (op.cit., p.40). Therefore, she argues, 'a discourse and a law of gender that centre on difference serve as ideology to neutralise, rationalise and cover disparities of power even as they seem to criticise or problematise them (1989, p.219). Thus, the discussion comes back to the critical issue of power and of the gendered construction of power hierarchies in modern society.

Other feminist scholars have joined the discussion from a range of vantage points. Janice Wetzel has proposed that 'the concept of equity is more appropriate than the term equality since equality does not exist in the basic process of reproduction' (1993, p.156) while in an innovative contribution to the discussion of equality, Diana Majury proposes that women should deal with the concept of equality as a strategy rather than as a goal. According to her 'An inequality-based approach asks how to redress the power imbalance which inheres in a specific inequality rather than whether or not it is appropriate to treat women the same as men in specific circumstances...Equality does not define inequality; inequality defines equality' (1991, p.324).

In the context of my paper, we begin to perceive the limitations of the 'equality doctrine' in terms of women's rights. As Merle Thornton comments, because equality implies commensurability, 'it is much more difficult to determine what simply advances women than to determine what brings women close to the male model' (1986, p.95). In seeking an expansion of the concept of equality as well as of its implications, Pateman proposes that 'The meaning of sexual difference has to cease to be the difference between freedom and subordination'. Instead, she argues, we should consider that 'The issue in the problem of difference is women's freedom' (1992, p.28). Given that the achievement of full freedom for women remains the goal of most women's

movements in the world today, this discussion places the issue of difference firmly on the agenda for the future.

### Beyond Equality: Being in Solidarity

The framework of the debates on justice and rights, equality and difference that I have outlined above will serve to clarify the complexity of the issues being discussed, which continue to pose a set of interlinked questions to those who are concerned with issues of justice - for women, and for all disadvantaged persons.

As feminists, we confront fundamental questions, such as 'Given a situation in which men and women are not equal, and in which the achievement of equality has been constructed to mean attainment of male standards, why should women struggle to be equal?'; 'Can struggling for equality help advance the position of women?'; and 'In our struggle to achieve the goal of equality, are we ignoring or neglecting certain realities of the construction of differences in human society?'

The discussion is not purely an epistemological one; it is one which has fundamental political implications for any process of social transformation and empowerment of women. On the one hand we confront the need to address differences based on the dichotomy of male/female; we speak of this manifestation of difference as being one which affects women deeply and in every aspect of their lives. On the other hand, we fight against being classified as different and therefore not equal.

At the same time, we must also take into consideration the multitude of differences between women themselves and try to find a way to build strategic and political alliances across these differences while acknowledging and recognising that they exist. In this context, I see the postmodern and feminist theorising on 'equality' and 'difference' as broadening the parameters of the discussion on the seeming conflict between 'difference' and solidarity, allowing us to consider what Donna Haraway calls 'the complex, open fields of criss-crossing plays of dominance, privilege and difference' (1991, p.140).

The other significant aspect to take into consideration here is that of the impact of the re-conceptualisation of equality and difference from a feminist perspective on women's movements worldwide, in particular on activities of organising and mobilising women across differences on 'common' issues. While the focusing on differences among and between women can be manipulated to deny the possibilities of global solidarity, for example, the challenge of the discussion for the movements has been to recognise the significance of

differences while affirming the capacity of women to unite across these differences on certain issues that affect them in common, as women.

In the final analysis, I must also point out that the question of equality is in fact much more complex than even that of dealing with inequalities constructed by differences in sex, race, ethnic origin or sexual orientation. As Phillips points out 'as long as people have different needs or capacities, then the kind of equality that metes out exactly the same to each of us will effectively mean inequality' (1993, p.44). Gayatri Spivak quotes Rosalind Petchesky on this issue, highlighting Petchesky's statement that 'For any society, there will remain a level of individual desire that can never be totally reconciled with social need without destroying the individual personalities whose 'self-realisation' is the ultimate object of a social life' (p.395). In a recent review, G.A. Cohen points to current work by economist Sen which argues that 'because of human diversity, equality in one dimension means inequality in others... Since all equalities generate companion inequalities, we have to decide which ones to combat and which to tolerate' (1993, p.2159). Thus, one can see that the issue of equality remains a highly contentious one.

In this chapter, I examined various aspects of the feminist critique of the existing systems of 'justice' and 'rights' and the principles on which they have been formulated with a view to broadening the discussion on the law and legal standards as they apply to women. I also reviewed recent feminist re-conceptualisation of equality and difference because of my intention, in the next chapter, to consider the implications of this theoretical base for working in the area of women's human rights. I also tried to place on record the philosophical implications of such re-conceptualisation in the context of re-visioning the future.

In terms of feminist activism in the present context, I would view the totality of the discussion as one which takes us on to a consideration of the ways in which we can move forward to build what Nancy Fraser and Linda J. Nicholson have called 'a practice made up of a patchwork of overlapping alliances... a broader, richer, more complex and multilayered feminist solidarity, the sort of solidarity which is essential for overcoming the oppression of women in 'its endless variety and monotonous similarity'' (1990, p.35). This commitment to re-conceptualising equality and difference in a way that will enrich and expand solidarity among women across the globe while also strengthening their participation in the evolution of a common 'human' agenda that is based on principles of human dignity and of the integrity of the person is critical to my discussion in this paper.

## CHAPTER FOUR

### WOMEN'S RIGHTS AS HUMAN RIGHTS

#### Locating the rights of women

In the earlier chapters, I dealt with the concept of equality as it has been defined by the United Nations and by international legal standards within the framework of non-discrimination; then I looked at feminist theorising on equality, in particular in the context of the critiques of the institutionalisation of the separation between the private and public spheres and of the perception of the family and of woman's role within the family as 'natural' and therefore unchanging and unchangeable. I would now focus attention on this un-natural division of the world in terms of its impact on law-making and legal standard-setting processes which affect women at the very core of their lives.

Whether it is at the level of the UN or at regional, national or even local and community level, discrimination against women on the basis of their sexual and reproductive roles is clearly articulated in law and legal systems as well as in social practice in almost every society in the modern world. The struggle for women's rights has, on many occasions in the past, been articulated within the framework of achieving equality. According to my understanding, however, when one observes the results of centuries of struggle and legal reform, we can see that the achievement of 'equality' for women remains an abstract and distant goal. Recent feminist theorising only confirms what our experience shows us; that unless there is a fundamental challenging of almost every single assumption about equality that we have founded our laws and our societies on, women will continue to be unequal partners in society and in the world.

In considering the question of the continuing inequality of women, it becomes critical to keep in view the classic liberal separation between public and private spheres as well as the contradiction between the public realm of political equality and the private realm of continuing economic and social subordination. As Phillips observes, we have to understand the public/private divide as 'the crucial underpinning to patriarchal political thought' and see it as what she calls 'a major sleight of hand that had excluded women from centuries of debate on citizenship, equality, freedom and rights' (1992, p.17).

The division of the world into two separate spheres, public and private, and the identification of these two spheres with 'masculine' and 'feminine' arenas of life and action have been the basis of the institutionalisation of discrimination against women; challenging this fundamental inequality has been

a focal point of feminist struggle throughout this century. On the one hand, women demanded the right to participate in the world outside the home, to work, to vote, to run for public office. Demanding the right to vote, for example, was, as Pateman has described, 'one of the most important theoretical and practical examples of feminist attacks on the dichotomy between the private and public' (1989, p.126). On the other hand women challenged institutions, including legal systems, that denied them control over their bodies and that regulated female sexuality in a coercive and oppressive way. The struggles for reform of rape and abortion laws, for access to contraception, for decriminalising prostitution are among those campaigns that have challenged male domination and patriarchal control. At both levels, the struggles have aimed at achieving a fundamental transformation of social norms and attitudes about women, and have had a strong strategic focus on legal reform.

#### Putting the 'body' back into the law:

'Embodying' the law and legal practice, acknowledging women's bodies and their reproductive functions (both social and biological) and defining methods of taking women's bodies into account without confining women because of their bodies remains our fundamental challenge; at the same time one faces the prospect of posing this challenge within the framework of religious and traditional or customary norms and practices that endow patriarchal institutions and social formations, in particular the family, with the ideological and moral rationale for controlling and regulating women's sexuality and sexual behaviour and for subordinating women to male authority within the family and home as well as in the workplace and in the society at large.

In order to understand the phenomenon fully, we must recognise what Carol Smart describes as the 'informal, private, virtually invisible forms of regulation not acknowledged as such in mainstream criminology or sociology of law' (1992, p.2). In her work in this area, Smart points to the need 'to explore how legal, medical and early social scientific discourses intertwine to produce a woman who is fundamentally a problematic and unruly body, whose sexual and reproductive capacities need constant surveillance and regulation because of the threat this supposedly 'natural' woman would otherwise pose to the moral and social order' (1992, p.8).

In the liberal and humanist definition of the concept of equality, there is an assumption that biological sex should not matter; all men and women are equal. Our experience as women shows us that this is not so; our bodies and our reproductive and sexual functions intervene in determining our access to education and employment, in determining our role and status in political and



social life, in determining our capacity to be decision-makers about our own lives as well as about the lives of those around us.

This is why, in my opinion, it is perhaps timely to re-interpret the feminist slogan of the 1960s that 'The Personal is the Political' in a contemporary context. Despite the many negative connotations and associations of this slogan with white/western or separatist feminism, I feel the phrase eloquently expresses our present need to challenge the private/public divide that has been institutionalised in the law and 're-embody' the law and legal institutions that for so long have been blind to the specific needs and interests of women. As Mackinnon points out, 'the private is public for those for whom the personal is the political' (1989, p.187).

According to my understanding, feminists who hold that the personal is the political are in fact emphasising the dynamism of the links between what is considered 'public' and 'private' in most modern societies and calling for a rejection of the artificial separation of these two spheres. As Pateman points out 'When feminists in the past demanded juridical equality and recognition as women and proclaimed that what they did as women in the private sphere was part of their citizenship, they grappled with the political problem of expressing sexual difference' (1988, p,227).

The need to understand these linkages becomes all the more significant when one considers that the modern state, at many levels, is seen to stand outside the private sphere; the perpetuation of the myth of the non-intervention of the state into 'private' matters, into what takes place within the family, within the four walls of the home, within the community is one which is most graphically challenged by the feminist call to make the personal the political. Okin has articulated feminist concerns in this area as follows: 'Until there is justice within the family, women will not be able to gain equality in politics, at work or in any other sphere' (1989, p.4).

There has been a great deal of work done in the past years on the many and varied ways in which the state 'intervenes' in the private lives of its citizens despite legal restrictions which guarantee the rights of freedom of the individual. Laws that regulate marriage and divorce, abortion and contraception, policies that regulate allocation of child-care or maternity benefits, laws that criminalise prostitution and demand that women prove that they have been raped and, above all, the validation of legal interpretations of the sex- and gender-based division of labour within the home and in the workplace are all examples of state regulation of and intervention in the private sphere. Pateman has pointed out how, 'through legislation concerning marriage and sexuality and the policies of the welfare state, the subordinate status of women is presupposed by and maintained by the power of the state' (1989, p.133). However, when faced with issues of rape, domestic violence and

abortion, for example, the state and legal systems have been quick to fall back on positions of non-intervention and respect for privacy of the individual.

The existence of double standards in law as it is applied in the private sphere is one particular area of immense concern to women's human rights activists; growing attempts to legitimise discriminatory practices against women, citing religion or culture as a referral point, prove how difficult it is to dislodge patriarchal forms of control from society.<sup>20</sup> In several of the South Asian countries, for example, marriage, divorce, maintenance, inheritance and custody of children are governed by laws that have been framed in accordance with a variety of traditional and religious practices which exist side-by-side with civil laws that govern the same areas of societal life. However, the 'personal' laws take precedence over the civil laws, leading to the institutionalisation of discrimination against women of particular ethnic groups and religious communities in many situations and denying them recourse to their constitutional rights of equal treatment in law.

At the same time, the legal definition of the 'family' and the roles assigned to women within that social unit also come into question. As Smart has commented, '...law does not just affect patriarchal relations but in addition reproduces patriarchal relations inside the family' (1984, p.221). In most countries today, marriage is still conceptualised as a legal union of a heterosexual couple and the family is perceived to be the social unit created on the basis of this legal union. The debates on the imposition of standards devised for 'nuclear' family systems in liberal industrialised societies on 'extended' and 'joint' family systems which prevail in many societies up to the present are well-documented, and I will not go into them here. What is significant to note in terms of my argument is the fact that these debates contributed to a major challenging of the institution of the 'family' as conceptualised in liberal theory.

In the past years, demands for the re-conceptualisation of the 'family' have come from many different areas and spheres of interest. Sociologists, economists, even development theorists have acknowledged the need to expand the notion of the 'family' to include diverse formations that take into account cultural and societal specificities. Feminists as well as activists for social justice have fought for recognition of the rights of the partners and children of non-legal unions, and also for rights of children born 'outside' of marriage to be acknowledged as 'legitimate' persons in terms of

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20 The arguments and debates juxtaposing universality of human rights with cultural relativism are many and varied; see Alison Renteln for some details.

the law. In recent years, the struggle has been extended to achieve recognition for same-sex unions.

Given the circumstances that women's legal and social status are so often defined in terms of their position within the 'family', this process of re-conceptualisation has been a critical one for women. The inclusion of the phrase 'various forms of the family and diversity of family structure and composition',<sup>21</sup> in the Declaration emanating from the UN Conference on Population and Development held in Cairo, Egypt in September 1994 indicates the impact of this struggle for re-definition in the international arena.

The demand for the re-definition of violence against women as a human rights abuse played a significant role in drawing attention to the need to break down the separation between the public and private worlds. Lori Heise has commented that the attempt has been to recognise violence against women 'as an extension of a continuum of beliefs that grant men the right to control women's behaviour' (1994, p.2). She goes on to say that confronting violence against women means 'challenging the social attitudes and beliefs that undergird male violence and re-negotiating the meaning of gender and sexuality and the balance of power between women and men at all levels of society' (1994, p.1).

Feminist scholars working on the issue of women's human rights have also affirmed the significance of the family and family relationships in determining women's access to the enjoyment of human rights. Arati Rao has pointed out that 'the construction of a rights framework in which the individual qua individual is the primary subject of inquiry and which focuses on the activities of this individual in certain areas of life and not others, relies on a false notion of the private realm' (1993, p.72). Protesting at the affirmation of the 'comprehensive rights of the husband over the wife' in law, she argues that 'The man's inclination and ability to unleash violence on his female partner must be situated in the wider contexts of permissible behaviour and litigable acts' (op.cit., p.75). Drawing on her experiences of work in Lebanon, Suad Joseph reiterates the need to focus on the family 'as a site in which rights are constructed and continually contested and reworked'. Her argument is that 'since the family is a crucial site of cultural creation, self-creation and creation of rights, then the family must be a site of contestation over women's human rights' (1993, p.150).

#### Our bodies are not our own

The ways in which human communities have, for centuries, linked women's bodies and sexual behaviour to issues of identity of tribe, race or nation and in which women have been perceived as responsible for the 'honour' of the group

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21 See Cairo Declaration and Platform of Action, 1994; Chapter V.

are well documented; so are the ways in which women's assertion of the right to control their reproductive functions have been viewed as subversive and 'criminal'.

Even in the most modernised societies of today, women victims of rape are questioned as to their previous sexual behaviour; determining a woman's 'fault' or complicity in the act of rape is seen as a critical part of the legal process. While rape as an act of violence against an individual woman is often looked at in the context of the woman's 'moral character', the articulation of rape as a crime in times of war and conflict is complicated by references to 'honour' and the identity of the community. The possession of the women of the 'enemy' through abduction and rape have become 'weapons of war' in modern human society. The legal consideration of rape as an act of violence has overshadowed the fact that it is a manifestation of discrimination against women and a consequence of her unequal and subordinate status in society.

In many countries in the world, up to today, the legal definition of rape is that of coerced vaginal penetration; whether or not it will be legally determined that rape has been committed depends on the issue of consent - whether the woman can be said to have consented to the act of intercourse or not. Difficulties in gaining acceptance for the concept of 'marital rape' have been caused by this fact of consent, since, in marriage, it is assumed that the woman is available for intercourse at any time. In these circumstances, winning legal recognition of non-consensual intercourse between a husband and wife as an act that violates the rights of the wife has proved to be extremely difficult. As Pateman describes, an 'aspect of conjugal subjection lingers on in legal jurisdictions that still refuse to admit any limitations to a husband's access to his wife's body and so deny that rape is possible within marriage' (1988, p.7).

The issue of abortion is another area of controversy in terms of the rights discourse, since it involves a conflict of two liberal rights; the right to choose of the woman and the right to life of the unborn. Nowhere is abortion conceived in terms of the primacy of a woman's right to self-determination; instead, in many societies, it is viewed as a crime against the state. In the U.S.A. where the women's movement has fought many battles over issues around access to abortion, women's right to abortion has been subsumed under 'privacy' clauses in the Constitution. Thus, women are granted the right to have an abortion as a privilege accorded to each one of them as individuals who are exercising their right to private decision-making, not as a publicly acknowledged right to control their lives.

Even in societies where abortion is legal, women's choice is still constrained by a number of considerations, including those of social stigma and ostracism.

In her work on the legal implications of considering abortion as a question of privacy rather than women's right to choose, Mackinnon has pointed out that 'Through this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape and women's exploited domestic labour. It has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition' (1989, p.193).

The unwillingness of the state and of legal systems to consider rape and abortion as logical consequences of discrimination against women in society may be perceived as the other side of the coin which defines protective labour legislation within the framework of what Okin calls 'romantic paternalism' and which, for example, permits women workers to be denied maternity benefits on the grounds that pregnancy is a 'temporary disability'. In 1976, when the Supreme Court of the U.S.A. decided to exclude pregnancy-related disabilities from disability insurance coverage guaranteed to all workers, they did not view this as a form of gender-based discrimination; the distinction they highlighted was that between pregnant women and non-pregnant persons. As Rhodes points out, 'men's physiology set the standard against which women's claims appeared only additional' (1992, p.153). The judgement was structured within a framework that required similar treatment for those similarly situated; the demand was for equality in form rather than in fact.<sup>22</sup>

#### Making the 'private' a public matter in the international arena

From the discussion above, the role played by the law and by legal institutions in all societies in maintaining and perpetuating the separation of the public from the private sphere becomes clear. It should not therefore come as a surprise to discover that the same divisions and distinctions prevail in terms of international human rights standards and law-making.

The most obvious example I can take is that of the Women's Convention (CEDAW) and the reservations to it, in particular under Article 16 which refers to equality between men and women on the basis of the 'same right' to enter into marriage, to freely choose a spouse, to decide freely and responsibly on the number and spacing of their children, to choose a family name, a profession and an occupation, among others.

Scholars who specialise in work on the Convention have pointed out the ways in which reservations made by certain states restrict women's legal capacity by constructing them as minors, unable to own property, obtain credit or make

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There is an extensive feminist discussion of issues relating to sex-based discrimination in the workplace, and to the ways in which women's right to work outside the home is affected by her domestic and familial responsibilities. Although the limited scope of this paper does not allow me to go deeper into this area at the present time, this remains an area of great concern in considering the overall discussion on women's rights.

legally effective decisions affecting their children. However, the main obstacle to the achievement of women's equality in terms of the Convention remains the citing of religious or cultural norms and traditional practices as being superior to the norms set out in the Convention. In discussing the reservations made by the government of Egypt to Article 16 of the Convention stating that its adherence 'must be without prejudice to the Islamic Shariah's provisions', for example, Sullivan (1992) points to the contradictions between the Convention and Islamic Law with regard to rights and responsibilities during marriage and at its dissolution; Mernissi uses more uncompromising language, simply describing it as 'double talk' (1993, p.66).

While sensitivity to religious and cultural sentiments must be an essential component in building mutual respect in the international community, there must be acknowledgement that claims of cultural relativity, as An-Na'im has noted, 'including allegiance to a religious legal system such as Shari'a are limited by minimum standards of universal human rights' (as quoted by Sullivan, 1992, p.818). Marsha Freeman, in her discussion of the Convention points out that 'The use of cultural preservation as a justification for discrimination against women is no more acceptable than the now discredited use of national sovereignty as a justification for other human rights abuses (1994, p.3); she quotes a recent judgement of the Court of Appeal of Botswana where it was stated that 'The custom will be as far as possible be read so as to conform with the Constitution but where this is impossible, it is custom, not the Constitution, which must go'.

As Sullivan has pointed out, 'The object of the basic guarantee of gender equality articulated in the Women's Convention is not to ensure that women receive treatment identical to that of men nor that laws and practices will impact women and men in the same way. Rather, the aim is to ensure that gender does not impede women's ability to exercise rights protected by international human rights law and to dismantle the political, economic and social structures that perpetuate their subordination' (1992, p.800). However, current difficulties around the implementation of the Convention speak for themselves.

The controversies around the issue of reservations to the Women's Convention and the continued use of religious and cultural grounds to perpetuate discriminatory practices against women despite the fact that the Convention includes a comprehensive obligation to eliminate discrimination in all its forms is, I feel, indicative of the prevailing situation with regard to women's human rights.

## Rape as defined in the international human rights framework

Within the framework of the existing human rights discourse, the issue of rape has been historically perceived as pertaining to 'dignity' and 'honour'.<sup>23</sup> The Geneva Convention of 1949 specified that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault'.<sup>24</sup> In a later Additional Protocol to the Convention<sup>25</sup> certain fundamental guarantees were placed on record, and some acts classified as prohibited 'at any time and in any place whatsoever, whether committed by civilian or by military agents'; rape was not specified, but was subsumed under 'outrages against personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any forms of indecent assault'. By the time Protocol II was agreed upon<sup>26</sup> rape was once again a specified offence, defined as an act which infringed upon the right of 'respect for the person'.

In recent years, the mass rape of women in the process of the conflict in former Yugoslavia and the claims of Korean 'comfort' women for reparation from Japan for being forced into prostitution during the Japanese occupation of the South-East Asian mainland during the Second World War have focused the attention of the world on the specific circumstances of abuse and violation of women in times of armed conflict. However, a close look at the analysis shows that the women have been perceived as being under attack as members of a particular ethnic community, and are therefore primarily identified on the basis of their ethnicity and not of their sex. The horror of violation of each individual woman concerned is subsumed by the political context of conflict and conflict-resolution. As the Women in the Law Project of the International Human Rights Law Group (WLP) points out, the focus is on women as 'repositories of cultural identity' (1993, p.7) and not as women per se.

In more recent years, there has been a recognition of the use of rape as a form of torture within the international human rights framework. According to

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23. For greater detail, see Dignity and Honour of Women as Basic and Fundamental Rights by Yougindra Khushalani; Martinus Nijhoff, The Hague, Boston and London; 1982.

24. see Article 27 of the 1949 Convention.

25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

26. Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of July 1977.

the Convention Against Torture,<sup>27</sup> torture is distinguished from other cruel, inhuman or degrading treatment on the basis of the severe pain or suffering caused. In an insightful analysis of the work of the Special Rapporteur on Torture, who reports to the UN Commission on Human Rights, the WLP examines the evolution of the concept of rape as a form of torture. In the report to the UN Commission on Human Rights in 1986,<sup>28</sup> the Rapporteur of the time, Professor Kooijmans, defined sexual aggression as a method of physical torture; in his oral presentation of his report of 1992, he stated that 'it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being' (quoted by WLP, 1993, p.8).

However, the ambiguity of both the definitions and conceptualisations of rape and other forms of sexual assault and violence against women as a form of torture are to be clearly seen in the work of the Special Rapporteur. An overview of the reports of successive years shows us the confusion that prevails over definitions of rape (insertion of a truncheon and a gun barrel into the anus of a woman was described as torture and not rape) and sexual harassment. As the WLP points out, 'he has not examined the gender-specific dimensions of sexual abuse' and has 'failed to address the link between women's status and the targeted use of rape against women' (1994, p.7).

I have used the case of rape as an example to illustrate the ways in which international human rights mechanisms are as yet not able to move away from more traditional and biased formulations, towards standards that take women's real position of subordination into consideration and that are sensitive to women's special concerns.

#### The post-Vienna experience - the UN Sub-Commission of 1994

Each year in August, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities meets in Geneva. In 1994, the Sub-Commission held its 46th session. Despite the many commitments regarding the integration of the human rights of women into the mainstream of UN systemwide activities, in particular in the Vienna Declaration, this session clearly demonstrated the difficulties faced by the UN and by the women's movements in working towards the achievement of this objective.

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27. The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; adopted by UN on December 10, 1984.

28. UN Doc. E/CN.4/1986/13.



A brief examination of some of the key documents presented to the Sub-Commission provide us with concrete examples of the reality. Under Agenda Item 19, which refers to freedom of movement, no mention was made of the special difficulties faced by women whose mobility is restricted due to a variety of reasons, including cultural and social sanctions. In a Working Paper setting out a proposal for a 'Comprehensive Programme for the Prevention of Discrimination and Protection of Minorities',<sup>29</sup> there was no reference to women as being particularly vulnerable; this is despite the fact that the paper discusses 'new expressions of racism, racial discrimination, intolerance and xenophobia' all of which are having a very specific and disastrous impact on women worldwide, whether it be in the guise of religious fundamentalism in Algeria or racism in Germany.

A document on the relationship between the enjoyment of human rights and income distribution<sup>30</sup> did not mention women at all, although the impact of gendered power differentials on income distribution is an area on which there has been much work done in the recent past. In the report on 'Human Rights and Poverty',<sup>31</sup> there was no mention of women or of the specific ways in which women have become the 'poorest of the poor', again in spite of a great deal of contemporary research and study into the 'feminization of poverty'.

The references to women were set out mostly within contexts which referred to their bodies. For example, the discussion of the report on the regional seminar on 'Traditional Practices Affecting the Health of Women and Children' (under which euphemism female genital mutilation is discussed at the UN) was primarily focused on women. The Working Group on Contemporary Forms of Slavery, which covers issues related trafficking in persons and prostitution, in their report for 1994<sup>32</sup> referred to links between debt bondage and the sexual enslavement of women (in Brazil and Nepal); the consideration of problems created for women by factors such as early marriage and the particular problems of military sexual slavery were also included in this report.

What the above details make increasingly clear is that despite the rhetoric, women continue to be constituted by their bodies and by what is considered 'sexual' in terms of international human rights law and standards. However, the widespread impact of the women's human rights campaign has led more and more women's rights groups and platforms to take on the language and concerns

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29 UN Doc. E/CN.4/Sub.2/1994/36; Asbjorn Eide.

30 UN Doc. E/CN.4/Sub.2/1994/21; Asbjorn Eide.

31 UN Doc. E/CN.4/Sub.2/1994/19; Leandro Despouy.

32 UN Doc. E/CN.4/Sub.2/1994/33; chaired by Ioan Maxim.

of human rights in conceptualising their issues and in putting forward their demands to the international community. The transformation of concerns regarding women's health and their reproductive choices into formulations of 'reproductive rights' is a good example of how the human rights language is entering women's movements and influencing women's activism. The dynamism of this tendency is, in turn, having an impact on the international human rights system.

However, it must be accepted that the campaign for the recognition of women's human rights and for the integration of women's concerns into every area of human rights activity at the international level has as yet only made a very initial foray into the arena; the challenge of consolidating the gains of the campaign for women's human rights and of transforming verbal commitments to reality for women across the globe lies ahead.

## CHAPTER FIVE

### MAKING HUMAN RIGHTS A REALITY IN THE 21ST CENTURY

#### Conclusions

When the idea of 'human rights' first became a focal point in international relations, it was in the context of the post-World War II situation, at a time when the need for reconstruction and reconciliation at the global level were of paramount importance to the world community. In later years, throughout the process of de-colonisation, 'human rights' offered many colonial peoples a set of principles on which their struggles for emancipation could be based. In the 1990s, 'human rights' has emerged as a major focus for many social movements working with disadvantaged groups such as women, indigenous peoples, gays and lesbians and the disabled; for us, using the rights language has become critical in claiming our place and our entitlements in human society, as well as in organising and mobilising our communities against injustice.

At the same time, human rights has become part of a politically divisive terminology in the international community; for example, the issue of linking human rights conditionalities to aid is an extremely controversial one. The impact of the concepts is reflected, for instance, in the way northern agencies, including the International Monetary Fund, have co-opted human rights and democracy as their key words for the 1990s. For some southern governments the issue of 'human rights' has become a rallying point to oppose northern domination of the international arena; for many oppressed peoples, holding up the principles of human rights remains their only lifeline to survival.

It is in this context that the present critique of human rights concepts becomes significant, especially since a re-conceptualisation based on this critique could lead us to the formulation of a political agenda for radical social transformation that is founded on principles of respect for personhood. Thus, for example, the questioning of the processes of exclusion and marginalisation of certain social groups and communities within the existing human rights framework in recent years has posed a major challenge to the assumption that the concerns of all persons are covered under the term 'human'. Recent struggles by members of minority communities for self-determination, by members of indigenous communities for respect for and recognition of their traditions and by women for recognition of violence against women as a human rights violation have all challenged this assumption and created a space within which we can search for a more inclusive and holistic concept of human rights.

In any analysis of contemporary society, the reality that confronts us with regard to women is that a coherent modern social and political structure has evolved out of the contradictory position of women having juridical equality while being unequal in terms of their overall social status. On the threshold of the 21st century, women remain subordinated and denied their rights to personhood despite centuries of commitment to democracy and the equal rights of persons. Thus, the challenge being taken up by feminist activists at all levels is that of evolving a political practice that will transform social relations based on inequality and injustice. Many believe that it could be within the framework of 'human rights' that we can discover a structure that will accommodate the concerns and aspirations of diverse groups of people while preserving our capacity for acting collectively to improve our conditions of life and existence.

In the context of my paper, I have examined the discourse on rights both from the perspective of the international human rights law and practice, and from the point of view of feminists and activists campaigning for women's human rights. It seems clear that at the moment the two discourses proceed somewhat parallel to one another, with not much interlinking. This is a pity, since the process of linking could be mutually enriching to both points of view. If in my discussion I have managed to take a small step towards making such a linkage, I would have achieved one part of my objective.

The other part of my objective remains the much larger one, that of becoming a part of the on-going struggle to bring together the different critiques of political theory and philosophy in a way that will help us devise a new paradigm for the future. The critique of the meta-narrative, of the universal, of the male norm are all well-known; so are the limitations of the use of the law to achieve social reform. While much of the contemporary feminist theorising on justice and equality, on democracy and citizenship, on difference and solidarity overlap in many ways, in the following, and final, part of my paper, I try to encapsulate the totality of the argument in order to define some possible areas of collective action for women in the human rights arena.

Feminist critique of the law and legal institutions have pointed out the many ways in which existing legal structures affirm social divisions and inequalities. Smart, speaking of the indirect relationship between the law and the oppression of women, has pointed out that while 'the law does not 'give' power to men over women in the family...it legitimises the preconditions which create an unequal power structure' (1984, p.xii). Martha Fineman comments on the marginalisation of women in law: 'Historically, law has been a 'public' arena and its focus has been on public concerns. Traditionally, women belonged to the private recesses of society, in families, in relationships controlled and defined by men, in silence' (1991, p.xiii). Thus, the on-going debates

within critical legal theory, and especially the growing emphasis on the family and the home as major areas of concern in law, play a significant role in the re-conceptualisation of rights, equality and justice from a perspective that is respectful of women's rights.

Feminist scholarship has also challenged concepts such as the family and the 'private' sphere, in their attempt to break down the artificial divisions between the private and the public and establish women's rights to full personhood. Virginia Held, for example, sees the challenge to 'the public domain (as) the appropriate locus for the development of moral theory' (1987, p.112) as a key contribution to the debate. Pateman and Gross argue that 'to develop a theory in which women and femininity have an autonomous place means that the private and the public, the social and the political also have to be completely re-conceptualised; in short it means an end to the long history of sexually particular theory that masquerades as universalism' (1986, p.9).

The re-conceptualisation of democracy and citizenship from a feminist perspective, taking into consideration Pateman's contention that 'women are incorporated into the civil order differently from men (1989, p.4) adds yet another dimension to the discussion. Dietz, in her critique of liberal democratic practice, focuses on how 'under liberalism, citizenship becomes less a collective, political activity than an individual economic activity... and democracy is tied more to representative government and the right to vote than to the ideal of the collective, participatory activity of citizens in the public realm' (1987, p.5). The impetus to re-define the parameters of democratic practice in the context of this critique is broadened by feminist scholars who, as described by Ann Curthoys, have shifted 'from the problem of how to characterise the state to one of de-constructing the idea of the citizen who inhabits that state, from a focus on social structure (state) to one on political discourse and culture (citizenship)' (1993, p.34).

At the same time, recent feminist theorising on the notion of equality raises fundamental questions about the concept of equality as a guiding principle in political theory and practice. Pateman points to the exclusion of women from the formulation of the 'individual' as 'the most serious failure of contemporary democratic theory and its language of equality, freedom and consent' (1989, p.218); Okin refers to the ways in which women continue to be defined by their biological functions, thereby restricting their capacities to act as full human beings: 'women cannot become equal citizens, workers or human beings - let alone philosopher queens - until the functionalist perception of their sex is dead' (1989, p.304).

The development of the concept of gender as a social construct is also one which has a relevance to the topic of women's human rights, since it is linked to the discussion of sex-based difference. As Donna Haraway says, the concept

emerged at a moment when feminists felt the need to 'contest the naturalisation of sexual difference in multiple arenas of struggle' (1991, p.131). As Dietz argues, 'By using gender as a unit of analysis, feminist scholars have revealed the inegalitarianism behind the myth of equal opportunity and made us aware of how such presumptions deny the social reality of unequal treatment, sexual discrimination, cultural stereotypes and women's subordination both at home and in the marketplace' (1987, p.7). However, in the 1990s, feminists working within the discursive frameworks of post-structuralism and postmodernism have become more critical of the use of 'gender' because, as Christine di Stefano points out, it is creating a 'fiction of woman' that can be seen 'riding roughshod over multiple differences among and within women who are ill-served by a concept of gender as basic' (1990, p.65).

The feminist discussion of difference and the continued questioning of the category 'women' within this discussion has, in fact, been a significant feature in the re-envisioning of political formations that challenge existing structures of democracy and that acknowledge and address diversity and plurality in an innovative and inclusive way. In the first instance, feminists challenge the structuring of male/female difference; they then go on to deconstruct the various differences among women themselves. Both aspects of the discussion are equally important to my understanding of the situation.

In considering the issue of sex-based difference, Cavarero says: 'The dimension of sexual difference cannot be accommodated by adjusting and integrating it to the existing model of society and politics, but demands a radical re-thinking of the basic logic of the model. It demands a novel view of ways of coexisting and of liberty in a humanity made up of men and women' (1992, p.45). The discussion on difference among women demands, as Brah points out, an understanding that 'we do not exist simply as women but as differentiated categories' (1992, p.131); Haraway speaks of 'female' as a 'highly complex category constructed in contested sexual scientific discourses and other social practices' (1990, p.197). Thus, looking at the intersectionality of class, race, ethnicity, sexual preference and many other factors that provide a basis for identity-formation in modern society becomes fundamental to our understanding of difference.

The issue of difference is especially important because it plays a major role in determining the ways in which we build linkages for collective action, as women. While we have many concrete experiences that demonstrate the possibility of solidarity that, at least temporarily, transcends the boundaries created by difference, we cannot ignore the conflicts and tensions within those same experiences that caution us against any attempt to homogenise or universalise the experience of different women as being that of 'Women' in general.

On the one hand we have to accept that, as Haraway has pointed out, 'there is nothing about being 'female' that naturally binds women' (1990, p.197). This means we face the need to develop what Bacchi calls 'a carefully constructed political identity based upon women's shared disadvantage' (1990, p.253); Haraway describes it as 'the capacity to act...on the basis of conscious coalition, of affinity, of political kinship' (1990, p.198). In order to strengthen the linkages across difference, Gayatri Spivak (1987) has spoken of building 'a false ontology of women' for strategic purposes. Yet, we have also to be cautious of essentialist assertions of difference within the women's movements, especially when it is couched in the affirmation of a particular collective experience; this is particularly so in the context of the growing fundamentalist and chauvinist nationalist movements in many parts of the world today that invent and reconstruct traditional and cultural values that affirm women's subordinate position.

In this respect, linking with other groups that are working on issues of difference on the basis of political kinship becomes of critical importance, since there are many similarities in the ways we approach questions of representation, symbolic boundary formation and the politics of identity. James Donald and Ali Rattansi (1992) have characterised the dichotomy faced by those engaged in the study of difference within the framework of a politics based on racial or cultural difference: either you have a multicultural 'celebration' of identity or you have a naive postmodern embrace of an endless multiplication of cultural identities. Speaking of formulations that acknowledge diversity and yet strive for a basis for collective action, Stuart Hall has identified the search for a new form of politics which 'engages rather than suppresses difference' instead of basing itself on 'an ethnicity which is doomed to survive by marginalising, dispossessing, displacing and forgetting other ethnicities...' (1992, p. 258). If one were to substitute the word identity for ethnicity in Hall's statement, the text would read true for many movements engaged in the struggle for the transformation of political structure in the world today.

From the point of view of women's concerns in this scenario, Scott articulates the challenge as being one of searching for a theory 'that will let us think in terms of pluralities and diversities rather than of unities and universals; that will enable us to articulate alternative ways of thinking about (and thus acting upon) gender without either simply reversing the old hierarchies or confirming them' (1988, p.33). The dilemma is one faced by all of us; the paradigms we evolve will hold true not only for women but for organising and engaging in political work based on different interests in general.

The challenge is also to work through the issue of difference to the point where the possibilities of conflict and division can be acknowledged, on the understanding that as Scott has pointed out, 'the political notion of equality

includes, indeed depends on, an acknowledgement of the existence of difference' (1988, p.44). It is only when we accept the fact that difference could be conflictual that we can begin to evolve ways of confronting and dealing with differences among us without letting the conflicts become divisive or destructive. The Belgian political philosopher Chantal Mouffe presents us with formulation that 'Once it is accepted that there cannot be a 'we' without a 'them', and that all forms of consensus are by necessity based on acts of exclusion, the question cannot be any more the creation of a fully inclusive community where antagonism, division and conflict will have disappeared'(1992, p.379). Thus, transforming our theorising into practice compels us to confront the antagonisms, divisions and conflicts that are very much a part of our lives, and of women's movements everywhere; the issue of how best to deal with this reality is one that occupies a prominent position in discussions around organising and mobilising women today.

In the final analysis, our aim is to work towards evolving a new and radically different form of democratic politics which will create an environment in which all human beings would be able to live without threat to their integrity - both physical and mental - and with dignity and respect. The form that this politics can take must, of necessity, be a fluid and dynamic one, as well as one which creates a space for affective relationships to flourish. The rights discourse becomes important here, as human rights can be considered a primary vehicle for resolving conflict on the basis of mutual respect. As Heller has pointed out, in theorising what she identifies as 'symmetric reciprocity' in human society, 'rights language is, should be, the lingua franca of modern democracy' (1992, p.353).

The implications of creating a political practice that is based on respect for diversity challenges us to define a universality, an idea of common human-ness, that can still continue to bind us together and provide the impetus for collective action. Benhabib (1987) has coined the phrase 'interactive universalism' as a form of universalism which acknowledges the plurality of modes of being human and which regards difference as a starting point for reflection and action. The attempts to re-conceptualise universalism without falling into the trap of cultural relativism lead us to the philosophical dilemmas of defining the 'common good', the bottom-line, if you like, of what we consider makes us 'human'. Phillips has articulated the dilemma we face when we confront, on the one hand, 'the dangers of abandoning the aspirations towards universality' and, on the other hand, 'a growing unease with the universalizing pretensions of Enlightenment rationality' (1993, p.7). Her conclusion is that while 'We cannot do without some notion of what human beings have in common; we can and must do without a unitary standard against which they are all judged' (1992, p.20).



The feminist challenges to existing theory as I have set them out above have defined equality, democracy and the common good as abstract ideals, as aspirations, rather than as attainable goals; Mouffe has described the common good as a 'vanishing point: Something to which we must constantly refer but that can never be reached' (1992, p.278), and speaks of the 'very impossibility of a full realisation of democracy' (1992, p.379). Yet, as Phillips emphasises, 'the impulse that takes us beyond our immediate and specific differences is a vital necessity in any radical transformation' (1992, p.28).

The arguments seem indeed quite terrifying; what is required is that one abandon all familiar ground and launch out in a process which consists of recognising and acknowledging shifting identities and multiplicities of difference in the hope of evolving a political practice that will coincide with our philosophical understanding of the world. In my view, however terrifying the prospect is, one needs to venture into this terrain at both the philosophical and political levels. To quote Mouffe, 'It is only when we discard the view of the subject as an agent both rational and transparent to itself, and discard as well the supposed unity and homogeneity of the ensemble of its positions that we are in a position to theorize the multiplicity of relations of subordination' (1992, p.372); Phillips looks forward to coming to terms with 'a complex unity constructed out of different and potentially conflicting solidarities, a unity that is then fragile and perhaps always and inevitably incomplete' (1994, p. 8).

What does all this theorising mean in terms of our concrete experiences of organising women and mobilising them to become aware of their oppression, to become empowered persons and to take collective action at the local, community, national, regional and international levels to change their situation? If democracy, justice and equality are seen as unattainable goals, what can inspire us to action, what can drive us to engage in the struggle against injustice and for social transformation? How can we use our affirmation of differences and diversities to strengthen our basis of solidarity and collective action not only with women but with all other disadvantaged social groups?

In this context, the need to develop theories, methodologies and programmes of action that will encompass the needs and concerns of women and men of all categories in their search and struggle for overcoming inequalities and injustice becomes a major concern. We have to see that, as Bacchi has pointed out, 'in contention are competing social visions, one which acknowledges social responsibility for a wide range of human needs and the other which feels it adequate to prevent one individual from infringing on the rights of another' (Bacchi, 1990, p.177). On the one hand we face the challenge of evolving and developing theories, methodologies and programmes of action that

can transcend these 'contending visions'; on the other hand, we face the challenge of evolving a basis for collective action that can allow us the space to transcend the many differences between us. The human rights framework, with its guarantees of maximum protection of the law and equal access to communal and political decision-making to every human person, can provide us with a set of guidelines for human behaviour which can help us face this challenge in a positive and constructive way.

In conclusion, therefore, I argue in favour of on-going moves to re-conceptualise principles of equality, justice and rights within a framework that is inclusive of difference and plurality. This re-conceptualisation must base itself on the questioning of the 'neutrality' of terms and concepts such as equality, justice and rights; it must also challenge existing assumptions about the 'un-natural' division of the world into the separate spheres of public and private, and focus on the family as the critical site of contestation in the discussion of women's human rights.

This framework must, of necessity, be constructed both as a political agenda which can lead us, women and men of many different persuasions, to collective action for the achievement of a radical transformation of society and as a philosophical basis for considering the dilemmas of human existence. I believe that the concept of 'human rights', when re-defined in the context of the critiques I have outlined in the preceding chapters, could provide us with a strong basis for constructing such a framework. Mutual and reciprocal respect for one another on the basis of certain inalienable rights that one enjoys purely because of the human condition is implicit in the concept; so is the principle of non-discrimination on the basis of difference. At the same time, by defining the parameters of human behaviour, by drawing the bottom-line beyond which we do not go if we want to remain human, the concept of human rights helps us construct a framework of conflict resolution and enforcement of rights of all persons in a humane way. For women, who have so long been denied their rightful place as full and equal human beings, human rights holds out the promise that we could aspire to our dreams. To the millions of women all over the world who have pledged themselves to the struggle for women's human rights at many levels, it is this promise that keeps us active and full of hope for the future.

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