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**WOMEN'S RIGHTS AND CHILDREN'S RIGHTS:
THE UNITED NATIONS CONVENTIONS AS
COMPATIBLE AND COMPLEMENTARY
INTERNATIONAL TREATIES**

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EXECUTIVE SUMMARY

Women and children in most societies throughout the world have traditionally been associated as groups without independent legal and social status, and therefore placed under the protective power of male authority within the family. Initiatives on women's rights this century have focussed on the oppressive nature of the family as an institution and the importance of emancipating women from their stereotyped roles in procreation and child care. The more recent international concern for children's rights is therefore viewed with certain misgivings by some as a new ideology which can be used against women, a means of diluting gains made in the area of women's rights.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 and entered into force in 1981. The United Nations Convention on the Rights of the Child was adopted and entered into force a decade later in 1989 and 1990 respectively. A comparison of these two landmark international instruments can point to the kind of issues that need to be addressed in regard to the compatibility and potential conflicts between women's and children's rights.

These two Conventions are important human rights treaties, situating women's rights and children's rights within the scope of international standards on human rights. This paper argues that the Conventions are derived from the same value base in regard to the institution of the family and the relationship between the child, the family and the State. Neither Convention assumes that the family is *per se* an 'oppressive' institution, but they envisage the participation of both men and women in making the family more supportive of the rights of women and children.

Both Conventions require the development of a State family policy which will make the public and private sectors share in providing supportive child care services. Child care is viewed as a joint parental and community responsibility. The father's role and responsibility is a basic value in both Conventions, and an important principle underlying the development of a holistic family policy.

While recognizing the concept of family privacy, both Conventions envisage a protective role for the State when there is a risk of the family becoming a source of exploitation and abuse. The gender-neutral value systems underlying the two Conventions can help to link initiatives for girl children with women's issues.

The concept of the 'best interests of the child' is crucial to both Conventions, with the Convention on Women's Rights even postulating a higher standard in this regard. It refers to this concept as a "paramount" consideration, whereas the Convention on the Rights of the Child refers to the commitment of States Parties to ensure that the child's best interests receive "primary" consideration.

The paper addresses the issue of incompatibility between the two Conventions, identifying the approach to cultural rights and customary and religious laws as the single area of diversity. It is suggested, however, that this divergence may be resolved through the development of a uniform legal value system.

Finally, the Convention on the Rights of the Child has some innovative provisions on implementation and enforcement, which can strengthen the process of monitoring country performance and policy implementation. Cooperation between the international committees set up under each Convention would increase their capacity for effective monitoring, thus contributing to the development of a new global ethos on women's rights and children's rights.

I. THE LEGAL STATUS OF WOMEN AND CHILDREN: A HISTORICAL OVERVIEW

The Convention on the Elimination of all Forms of Discrimination against Women* and the Convention on the Rights of the Child were adopted by the General Assembly of the United Nations at the beginning and the end of one decade, and represent important contributions to the development of international law and norms on human rights. They derive from and are based upon the general value system and the human rights articulated in the Universal Declaration of Human Rights and the International Covenants on Human Rights¹. They also represent the culmination of a process by which means the particular and special interests of women and children gained recognition in international instruments this century. It is somewhat ironic, however, that this development, the product of a concerted effort to improve the situation of two traditionally disadvantaged groups of humanity, should sometimes be viewed as undermining international commitment to better the situation of one of them – namely women.

The patriarchal organization of the family unit in most societies has led to women and children being categorized, historically and traditionally, as human beings without independent legal and social status. Very few societies have been founded on the concept of a 'female-headed' household. Inevitably, the concepts of 'male breadwinner' and male 'parent lord' have permeated socio-cultural and legal concepts and economic relations within the family in most communities as well as the major legal systems of the world.

Roman law, Anglo-American law and Islamic law reflect these patriarchal values, placing women and children within the protective control of a male adult. The concept of '*patria potestas*' in Roman law, the concept of 'coverture' or the 'husband's wing of protection' in English common law, the concept of 'marital power' in European law and of '*wilaya*' in Islamic law, all contributed to the perception of women and children as persons lacking independent social and legal status. In both English common law and civil law systems derived from Roman law or the Napoleonic Civil Code, married women and children were classified with insane persons as people who lacked maturity and the capacity to have legal rights. The principle formulated in the Napoleonic Civil Code that "those persons without rights at law are minors, married women, criminals and the mentally deficient" is echoed in the writings of Blackstone in early English common law². Though Is-

* Hereinafter referred to as the Convention on Women's Rights.

lamic law conceded property and custodial rights to women – rights which were not recognized in early civil law and English common law – the concept of men as ‘protectors and maintainers’ of women placed them under the guardianship of fathers and husbands. A woman’s economic contribution was undervalued as that of a ‘secondary’ earner since men were considered the ‘breadwinners’. Male violence was legitimized in many legal systems by the concept of the right of ‘reasonable chastisement’³. The husband’s guardianship (*munt*) of his wife in early Germanic law even gave him the power to sell or kill her. Parental power was described in Roman law, English common law and in Western European legal systems essentially as ‘paternal’ power.

These patriarchal notions inevitably resulted in the adoption of a protective attitude towards women and children in most legal systems based on English common law or civil law or Islamic law. Similar patriarchal perceptions are also found in Hindu law and in many customary legal systems in Asia and Africa. A text from Manu has been cited to support the view that for Hindus “the father protects a woman during maidenhood, her husband protects her during coverture, sons protect her during widowhood; a woman is never free”⁴.

The concept of a ‘female-headed’ household and value systems recognizing equality in gender relations have been discerned in communities in East Africa and in traditional laws in Sri Lanka and the State of Kerala in India. However, recorded customary laws in these societies clearly testify to the erosion of these concepts by indigenous patriarchal influences. British and Dutch colonial legal values derived from an exclusively patriarchal notion of coverture, or protection by a male head of household, successfully eroded the concept of women’s independent social and legal status, strengthened existing patriarchal values and created new patriarchal norms.

The concept of the father as ‘natural guardian’ of minors and the concept of marriage guardianship of the husband became firm legal values in India during the British colonial period. Hindu law contained principles referring to the guardianship of elders in the family in the absence of parents. However, there were no principles analogous to the early English and Roman-Dutch law concept of the father’s ‘natural guardianship’. Yet existing patriarchal values in regard to family relations were transformed into legal concepts that influenced decision-making in the courts. They became further entrenched in the legal system when they were stated as key principles of statute law. In *Besant v. Narayaniah* (1914)⁵, for instance, the Privy Council in an Indian appeal stated: “there is no difference in this respect between English law and Hindu law. As in this country, so among the Hindus, the father is the

natural guardian of his children during their minorities." The automatic identification of Hindu law with English law in the area of family relations by the judiciary had by this time impacted on statute law. Legislation reiterated the early English law principle of 'the natural guardianship of the father', transforming it into a new legal concept of a husband's guardianship of his minor wife. Based on English law, the Guardianship and Wards Act (1890), which still applies in India and Bangladesh and has a profound effect on the legal systems in the subcontinent even today, refers to the 'natural guardianship' status of the father as well as the husband of a minor wife⁶. Though legislation restraining child marriages has been on the statute books since 1929, these marriages are valid if solemnized⁷. Consequently, guardianship of a minor wife is still a recognized legal concept in India.

Similar developments concerning the impact of the father's natural guardianship and the husband's marital power can be observed in statutory and judicial developments in Sri Lanka, and have profoundly affected the value systems of indigenous laws as well as uniformly applicable legislation regulating family relations⁸. Even today, judges often do not acknowledge changes that have taken place, and apply received colonial law as 'traditional' law when deciding cases. This was dramatically illustrated in a leading divorce case in Sri Lanka⁹ when the Supreme Court refused to interpret legislation on divorce as indicating a shift away from the concept of matrimonial fault on the ground that this was a 'traditional' concept of Sri Lankan law. Yet traditional law recognizes consensual divorce and is based on the theory of the breakdown of marriage. The concept of matrimonial fault was incorporated into the law on divorce through legislation influenced by English and Roman-Dutch law.

Research on African customary systems in the pre-colonial period has also surfaced similar developments regarding the erosion of female authority in the community through the influence of English legal values. The political and economic powers of the *omu* or female head of the community in Ibo society, for instance, were curtailed through British legislative reforms that only recognized the status of the male head or *obi*¹⁰.

The protective approach to women and children received further legitimacy in Western Europe and the British colonies in the 19th century. Egalitarian legal developments in this period focussed on protecting women and children, who had become the worst victims of exploitative labour practices during the Industrial Revolution. Women and children as groups thus became linked in the area of employment laws and social security policies.

It was only in the latter part of the 19th century that the concept of women's rights became identified in Western European and Anglo-American law as a dimension of adult

rights, removed from the protective notion of an earlier era. Women acquired political rights, separate property rights, and even equal parental rights. From this time, the linkage between the social and legal status of women and children acquired less significance. Vestiges of a protective legal approach can, however, still be seen in legal systems in many countries where employment legislation still determines the rights of women and working children in terms of a male standard of performance, and regulates women's and children's work as a joint issue¹¹. Concepts of the 'disadvantaged' status of women and children can also be found in national constitutions of South Asia, which even today promote legislative and administrative affirmative action and policies on behalf of "women, and children", or "women, children and other categories of disadvantaged or 'disabled' persons"¹². Courts in common law and civil law jurisdictions are required to interpret the concept of the "best interests of the child". In doing so, they recognize the custody and guardianship rights of women, and sometimes use this concept to equalize the status of both parents¹³.

The 'protective' approach to the legal position of children has gradually diminished in significance in many countries this century in order to take account of what the United Nations Convention on the Rights of the Child now refers to as the "evolving capacities of the child". Yet the significance of this approach continues to be recognized in the area of children's status in society and in the legal system. Concern for the welfare of the child has been a value in many systems of customary law and in major legal systems such as Islamic law and English law. For instance, English courts administering principles of equity in the 19th century employed the concept of the 'child's welfare' to erode the all-encompassing rights of the husband/father in English common law. Concepts such as the 'option of puberty' were used in Islamic jurisprudence to recognize the right of a child to be protected from abuse by paternal and male guardianship powers. Yet it is the developments in Anglo-American and European laws this century that have impacted to introduce the concept of the 'best interests of the child' into many legal systems and societies both in the developed and developing world. Legislation and court decisions in several countries have articulated this concept as a criterion for judicial and administrative decision-making. This principle has also been used to recognize the participatory rights of children in guardianship disputes, as well as their right to be consulted in matters affecting them. Minority is thus given diminishing status as a child grows from childhood, through adolescence into adult status. Nevertheless, the basic approach to children's rights continues to be a protective one. The empowerment concept and the participatory approach to rights that have played a prominent role in the

area of women's rights and are now reflected in the Convention on Women's Rights are not as significant in the area of children's rights. Even the participatory rights recognized in the Convention on the Rights of the Child must be interpreted within the context of both parental responsibility and the child's 'evolving' capacity for autonomy. While international legal norms on both women's and children's rights focus on autonomy and responsibility, the area of children's rights includes a strong protectionism based on parental as well as State concern for the 'interests' of children.

The historical and traditional linkage between women's rights and children's rights had thus already diminished in importance in many developed countries at the time that the Convention on Women's Rights became an international legal instrument. The Convention was adopted in a context where radical feminist theory had produced an analysis of patriarchal ideology that viewed the institution of the family and women's traditional family and child care responsibilities as oppressive and primarily responsible for the denial of a woman's right to equality and justice. A woman's right to control her own sexuality had provided a rationale for the campaign to liberalize abortion laws. The Convention, as its name suggests, was concerned with eliminating discrimination between men and women, recognizing this as a necessary foundation for women's rights to justice and equity. Inevitably, the Convention reflected a departure from an earlier historical, social and legal tradition.

The importance of these developments in the area of women's emancipation and women's rights has sometimes fostered the view that this is a women's rather than a human rights issue. The Convention on Women's Rights, though described as a major human rights treaty, is not perceived as such by women activists in many countries who focus on women's issues as an independent area of concern. Activists have generally chosen to disassociate women's issues from children's interests in order to stress women's rights to equity and justice irrespective of their procreative and care-giving roles. Within this context, reservations may arise regarding an international and national focus on children's rights. Will this undermine an important historical trend? Will the association of women with children weaken women's rights?

An analysis of the conceptual and value framework of the United Nations Convention on the Rights of the Child, its substantive articles and implementation provisions can offer some insights on the potential for conflict between the two Conventions and the prospects

for ensuring that it will not undermine national and international concern for the achievement of justice and equity for women.

II. THE CONCEPTUAL AND VALUES COMPATIBILITY OF THE CONVENTIONS

Both Conventions are clearly anchored in the humanism and the value base of the main international human rights documents. Their preambles recall and reaffirm the concepts of human dignity and human rights articulated in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants, as well as all other international documents which promote the rights of women or children. Each Convention contains an article which clearly states that it must be interpreted as incorporating the benefit of any other national or international laws that reflect higher standards¹⁴. In this regard, the Convention on the Rights of the Child offers a broader interpretation in relation to domestic legal systems since it refers to national "law" rather than "legislation". In any event, both Conventions compensate for any gaps or inadequacies in coverage by permitting reference to higher legal standards. Both Conventions recognize the concept of a right to equity and fairness and the allocation of national resources to realize that concept – not vicariously through males or parents and adults, but directly.

The links between women's rights or children's rights and human rights are resisted by some non-governmental groups and social activists working for women and children, especially in countries with regimes that limit political rights and discourage dissent. They argue that the suspicion generated by, and the lack of political legitimacy for, human rights will prejudice efforts to promote the interests of women or children. Others maintain that the human rights perspective deflects attention from the interests of each group, in a context where 'human rights' has come to be associated exclusively with the assertion of individual civil and political rights. Some human rights activists, on the other hand, are concerned that children's or women's rights activism may deflect attention from broader **human** rights issues.

The preambles and value framework of both Conventions do not justify these misgivings. Countries that have ratified the Conventions accept the obligation of international human rights law articulated therein, and are required to adhere to them. There is no basis

for promoting women's or children's rights in terms of either Convention except on the foundation of human rights law. The preambles clarify that both Conventions seek to develop women's rights and child rights within the framework of the Universal Declaration of Human Rights and the International Covenants on Human Rights. Article 1 of the Convention on Women's Rights further clarifies that discrimination against women means "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 of ... human rights and fundamental freedoms". Equality on the basis of gender and the realization of child rights are therefore clearly perceived as human rights issues. Women's groups and activists have not understood or strengthened this linkage during the decade following ratification of the Convention on Women's Rights. It is a linkage, however, which has been made in relation to child rights from the outset, and which must be sustained. It is also important to emphasize that the recognition of human rights in general, and the rights of women and children in particular, are perceived in both Conventions as a crucial contribution to world peace and as a necessary foundation for achieving that goal. This focus supplements the human rights dimension of both Conventions.

The Preamble to the Convention on the Rights of the Child recognizes the concept of gender equality enshrined in existing human rights law. Substantive articles also recognize this concept and specify that the ultimate standard for promoting children's rights shall be the higher standard prevailing in any international instrument. Could this provision be used to confer on girl children the rights accorded by the Convention on Women's Rights? A link between women's rights and the rights of the girl child has not generally been developed since ratification of the latter Convention.

The Convention on Women's Rights focusses exclusively on the elimination of discrimination between men and women and on gender equality. It does not define the term 'woman', and uses the term 'children' as distinct from the terms 'men and women'. It also has a strong empowerment and participatory rights focus, which is less significant in the Convention on the Rights of the Child. This latter Convention is based on the concept of minority and adopts a traditionally 'protective' approach to children's rights, perceiving children as vulnerable and often unable to advocate their own rights. The Preamble reflects this protective value base by declaring that "childhood is entitled to special care and assistance". Most importantly, children do not have the political rights which feature so importantly in the Convention on Women's Rights. It may thus be argued that 'gender

equality' rights in the case of girl children must be interpreted exclusively in terms of the Convention on the Rights of the Child, which articulates the rights of an explicit category of persons – children under 18 years of age or minors under national laws. This argument would suggest, however, that the right to freedom from discrimination for girl children was not meant to be covered by the Convention on Women's Rights. This would therefore prevent reference to the substantive article on the application of the higher standard in the Convention on the Rights of the Child for the purpose of conferring any gender equality rights which postulate a higher standard in the Convention on Women's Rights.

The ideology and conceptual framework of the Convention on Women's Rights do not justify an interpretation which excludes girl children. Articles on education in this Convention contemplate affording opportunities, facilities and programmes for all children and attach importance to lowering school drop-out levels. A specific provision in this Convention extends coverage to girl children when it declares that the "betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage"¹⁵. This provision is clearly intended to refer to the practice of betrothal and marriage of girl children and the need to protect them from exploitation and abuse. Though the Convention on the Rights of the Child defines childhood so as to include girls between the ages of 16 and 18, many national laws and social norms would consider teenagers in this group as persons eligible to be deemed young women. The concept of a child's participatory rights and the right of personal autonomy, which acquires greater significance in relation to the evolving capacities of a child, also provides an important link with the Convention on Women's Rights. Both Conventions contemplate using legal and administrative policy to remove gender inequalities.

The Convention on the Rights of the Child gives importance to some areas, such as those pertaining to refugee status and armed conflict, which are not included in the Convention on Women's Rights. Environmental rights, however, are included in both Conventions as incidental to rights relating to access to land or water¹⁶. The substantive articles in each Convention, referred to earlier, enable the application of a higher standard of rights accorded in international law even in these areas. The differences cannot thus be perceived as gaps in coverage reflecting a conflicting value base.

The Convention on the Rights of the Child contains an explicit reference to the obligation of States Parties to promote and encourage international cooperation to ensure the progressive realization of child rights, and focusses specifically on development assistance

in a reference to the "needs of developing countries"¹⁷. A similar emphasis is absent in the Convention on Women's Rights. In addition to the concept common to the two Conventions that a State Party may enter a reservation on a particular clause of the instrument, the Convention on the Rights of the Child also contains a power of denunciation of the Convention¹⁸. The Convention on Women's Rights does not concede that a State Party that has ratified the Convention may subsequently denounce it. However, a procedure for amendment is provided for in both Conventions, though it is spelled out in greater detail in the Convention on the Rights of the Child.

Differences in the scope of the Conventions and their approach to implementation do emerge in an analysis of the conceptual and value base of these instruments. Yet both Conventions seek to promote the rights of two categories of persons who have traditionally and historically not received the attention they deserve, either nationally or internationally. They are founded on the premise that it is necessary to address the special problems of women and children in order to realize the human rights already confirmed by the Universal Declaration and other international instruments. There can be no question then of an inherent incompatibility or conflict of interests in articulating women's rights and children's rights in separate international instruments. The issue of incompatibility between the Conventions becomes relevant only in so far as it may be argued that the special focus given to children's rights in the one Convention undermines in some way the potential for using the other to achieve gender equality for women.

An examination of the content of the substantive articles in the two Conventions is required in order to determine whether any differences that emerge undermine the basic human rights values and policy compatibility of the two Conventions as well as to gauge the potential for using them to realize justice and equity for both groups.

III. THE SUBSTANTIVE ARTICLES

Some aspects of the preambles discussed in the previous section indicate both the commonality of values as well as the differences in scope of the two Conventions. Other aspects of the preambles help to elucidate the substantive articles of these Conventions.

Family Responsibilities and Child Care

The concept of the family that emerges from the Convention on Women's Rights is basically similar to the concept of family incorporated into the Convention on the Rights of the Child. This conceptual similarity is important in a context where the family is often both a source of support and oppression. The phenomenon of domestic violence, cultural practices that encourage son preference and female infanticide, and the inequitable treatment of girls and women in joint and polygamous families¹⁹ suggest that the institution of the family can perpetuate discrimination against women.

Though both Conventions refer to the vital importance of the family as a unit of society, this conceptual focus does not ignore the social realities of oppression and discrimination within family relationships that have been highlighted over the past decade. The Convention on Women's Rights redefines the concept of family in terms of a woman's right to equity by denying the patriarchal foundation of the family, perceiving it instead as a relationship in which parents share as equal partners in the nurture and care of children and family members. The Preamble of the Convention on Women's Rights clearly spells out the need for a "change in ... the role of women in society and in the family" and calls for a new concept of the family which recognizes the important contribution made by women to the family unit and the community as a basis for ensuring equitable treatment. The conceptual framework is therefore broad enough to encompass not only the nuclear family unit, but also other types of family systems found in different societies, the social reality of single-parent and female-headed families as well as the role of men in child care and parenting.

The focus in the two Conventions is on strengthening supportive relationships within the family in an environment of non-discrimination. The Convention on the Rights of the Child appears to be more traditional in its approach when it refers to "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". Yet, the clear emphasis on joint and shared parental responsibility in this Convention²⁰ ensures that the concept of family is complementary rather than in conflict with a non-patriarchal concept of the family unit. Both Conventions emphasize caring and meaningful family relationships, envisage a parenting role for men and the equal rights and responsibilities of men and women in the family. This focus, which is developed in other provisions on support for child care, provides a

framework within which the responsibilities in respect of children cannot be used to undermine the other rights of women recognized in the Convention on Women's Rights. It is important to clarify that recognition of the "social significance of maternity" emerges from both Conventions as a rationale for giving support to women in combining their multiple roles in the home and the workplace. The Preamble of the Convention on Women's Rights uses this phrase, and also contains several articles which refer to the need to prevent discrimination on the ground of maternity. These provisions reflect the concern that societies should recognize the nurturing and care-giving potential of men and women, and should provide support to enable both mothers and fathers to contribute to child care in the community²¹. Involvement of men in parenting and family responsibilities as well as the achievement of gender equality clearly emerges from provisions on the family in the Convention on Women's Rights.

The Convention on the Rights of the Child adopts a similar approach. It articulates a child's rights to survival and development in terms of a State Party's duty to realize the "highest attainable standard of health". This Convention contains a specific article on a State Party's obligation to provide "pre-natal and post-natal health care for mothers"²². Yet the main focus is on joint and shared parental or guardianship responsibility for children and support for child care services for working parents²³. The concern that maternity is in itself oppressive because it places women in a 'breeder/feeder' role that inhibits their right to personal autonomy finds no place in either Convention.

Both Conventions recognize that supportive policies to improve the health and nutritional status of women and children are intrinsic to the welfare of the whole family. In this sense they endorse the traditional link between women and children found in policy planning in many countries. Documented research in developing countries has clearly demonstrated the connection between maternal health and women's contribution to the improved health status of children. Yet the preambles and substantive provisions²⁴ on assistance for child care, social welfare and social security also contemplate paternal, family, community as well as State support for child care as a joint and shared responsibility. The emphasis on the nurturing and care-giving role of the family in these provisions envisages helping women in particular to combine their various roles within the family and the community.

Achieving the right to a high standard of health for children can therefore be perceived as easing the pressure on working mothers. Children's rights in this regard do not

warrant giving priority to their nutritional and health needs at the expense of a woman's right to choose to work outside her home, if she wishes to, for economic or other reasons. New policies directed towards realizing a child's right to be breastfed in the first years of life, for instance, must be combined with others that will help a working woman to provide this important nutritional and health resource without diminishing her capacity to hold a job or engage in economic activity. The Conventions encourage a gender-aware or gender-sensitive approach to policy-making on child health and nutrition, and do not support the seclusion of women in order to fulfill the nurturing needs of children.

Most national legal systems today contain conflicting principles regulating family relations and the rights and responsibilities of men and women in the family. Policies aimed at absorbing women into development in fact create situations where women's labour is exploited and where they receive little or no support for their nurturing and care-giving role. Parenting continues to be perceived in law and policy as an exclusively female role. Women's work becomes, in this context, a source of stress for women, thereby diminishing the quality of child care and nurturing. Both Conventions contemplate States Parties developing a range of health services and social security measures, such as child benefit schemes, child care services, and maternity as well as parental leave, to strengthen the family as an institution and to enable it to fulfill its role in the community as the main source of care for its members. These provisions do not encourage non-intervention, but rather law reform and administrative action by the State in line with a consistent family policy. They urge a review of those public policies which undermine the capacity of a family to care for its members. Many constitutions and legal systems contain provisions that focus on the family without a consistent approach to strengthening its role in society. Both of these Conventions encourage States Parties to develop a holistic family policy in place of complete non-intervention, so that the established legal norms on the importance of the family do not become merely empty rhetoric.

Fulfillment of these commitments will clearly help to ameliorate what is sometimes referred to as the 'feminization of poverty', when single women are required to bear the exclusive responsibility for child care as female heads of households. This phenomenon has received increasing attention in industrialized countries due to a number of factors, including the rise in cohabitation outside marriage, liberalization of divorce laws, and increased public acceptance of single parenthood. It has been a less documented reality in Asian and African countries where unwed mothers or women deserted by their husbands have faced economic

hardship and stress due to the fact that they shoulder the responsibility for child care as single parents. The concept of the 'male as breadwinner' often prevents social and legal recognition of female-headed households. On the other hand, the absence of a male parenting role in laws and policy-making does not necessarily conform with reality. In South Asia, factors such as shared roles in agriculture and peasant farming, or migration of women for Middle East and overseas employment have placed men in situations where they are required to care for children.

The Convention on the Rights of the Child provides a framework for realizing children's survival and development rights that will, in the long-term, benefit women who shoulder child care responsibilities. Though more general, these provisions are compatible with those in the Convention on Women's Rights that refer to a woman's right to receive employment opportunities and economic support, maternity leave, appropriate services during pregnancy, and facilities for child care. The constraints placed on inter-country adoption in the Convention on the Rights of the Child can also operate to prevent exploitation of poor women who may be pressured to give up their children in adoption²⁵. Many of these protections, which were conceptualized in terms of the protection rights of children, will, if implemented, operate in fact to improve the quality of life for women and will encourage the kind of programmes that are complementary to those envisaged in the Convention on Women's Rights. Development of child care programmes and facilities for working women with child care responsibilities will inevitably help to realize both the rights of women and children. Some developing countries already recognize minimal concepts of paternity leave after pregnancy as well as the obligation of employers to provide child care facilities for workforces beyond a specified minimum. Maternity legislation in South Asia originated with the provision of this facility for low-income plantation workers. This legislation continues to cover this category and can give worker rights to landless peasant women who work as manual labourers in small agricultural units²⁶.

Education and Gender Equality

Both Conventions attach importance to the education of girls and to ensuring that they utilize educational opportunities²⁷. In many developing countries where the responsibility for care-giving continues to fall on women, female literacy is a powerful factor in achieving child survival, growth and development. High literacy among females contributes to postponement

of marriage, lower fertility and better family nutrition. A high activity rate in female employment may also contribute to keeping children, and especially small girls, out of the formal employment sector. The availability of a female labour resource of girls between the ages of 15 and 18 lowers the risk of children being absorbed into the labour force in new industrial production units that are proliferating with the transition to a market economy. The experience of female employment in free trade zones in South and South-East Asia points to the urgent need for laws and policies to improve working conditions. Children would be even more vulnerable as a docile and unorganized labour resource. The experience of Sri Lanka and the State of Kerala in India on child survival and development, female literacy and child labour indicates that women with some education tend to have high aspirations for their children, and are concerned that they should not be deprived of the opportunity for normal growth and development²⁸.

Utilization of education opportunities by girls has also contributed more than regulatory controls to a higher age of marriage. Sri Lanka's written laws permit child marriages, since solemnization of marriages of girls over the age of 12 years is not illegal, unlike in India and Bangladesh where legislative restraints have been placed. However, as a high percentage of girls remain in the education system up to secondary school level in Sri Lanka, child marriage is a rare phenomenon. The mean age of marriage in Sri Lanka is now 24 years in contrast to much lower ages in the other countries of South Asia²⁹.

Education policies formulated on the basis that a country needs educated women as caregivers in the family have been criticized for stereotyping them as wives and mothers. This criticism tends to undermine the impact of education policies in helping women become agents of change in societies where son preference exists and where young girls and women are exploited by female elders in the family. In these societies gender bias is perpetuated by women themselves who are manipulated by existing social norms and thus further entrench deep-rooted negative patriarchal perceptions of women. Education and high levels of female literacy can contribute to overturning these accepted social norms and can prevent women being used to perpetuate discriminatory attitudes and practices. Programmes targeted towards women's education, health and employment thus appear intrinsic to improving the quality of life of both women and children.

The Convention on the Rights of the Child links the provisions on education rights with the issue of child labour when it declares that a State Party has an obligation to recognize a child's right to protection from economic exploitation and work that is likely to

be hazardous or to interfere with his/her education and survival and development rights³⁰. This approach is clearly in harmony with the viewpoint on female education and employment reflected in the Convention on Women's Rights³¹. Girl children in developing countries are often required to care for younger siblings, and suffer discrimination and denial of equal opportunities. Access to all types of education and vocational education in particular, without gender bias, will benefit them. The provisions in both Conventions encourage States to develop such policies as part of their commitment to implement the provisions relating to work and education.

The risk of policies on compulsory education for children conflicting with the interests of working women in developing countries by removing the possibility of relying on female siblings for child care has surfaced in research studies³². Yet the experience of a developing country such as Sri Lanka where the absorption of women into the regular and informal sectors of the labour force is taking place suggests that employment opportunities for women increase when children are not exploited in labour³³. In any event, the equitable premises of the Convention on Women's Rights do not justify attaining the economic rights of women at the expense of the developmental needs of children in general, and girl children in particular. The constraints on exploitation of child labour endorsed by the Convention on the Rights of the Child can help to stimulate enforcement of minimum age in employment legislation and the development of programmes that will help to replace child labour with employment opportunities for women.

Gender equality – the key focus of the Convention on Women's Rights – is necessarily accommodated in the Convention on the Rights of the Child within the general framework of children's rights. Thus, gender equality is only one dimension, but an important one, that is recognized in broad terms in the Preamble as well as in a substantive article³⁴. Children's rights cannot therefore be interpreted differently according to sex. This important provision legitimizes interventions that are necessary in order to address problems of discrimination particular to girl children, especially in parts of Asia, Africa and the Middle East. Of equal importance is the article in the Convention on the Rights of the Child which states that a child's rights will not be determined according to the sex of the parent or guardian³⁵. This article attacks a basic social and legal constraint in many countries – the concept of illegitimacy. In many legal systems the filiation of a child born out of wedlock with the mother is recognized at birth; the natural relationship to the father is not accepted. Children fortuitously born outside marriage are thus designated as 'illegitimate'. This leads,

in an essentially patriarchal socio-legal culture, to the imposition of a range of social and legal disabilities. The Convention on the Rights of the Child endorses in clear terms the gender equality concepts of the Convention on Women's Rights. The concept of illegitimacy is rejected in this latter Convention in provisions which recognize equality for women irrespective of their marital status³⁶.

These complementary legal values and provisions requiring a positive commitment to the eradication of gender discrimination encourage issues related to discrimination against girl children to be perceived as the key to undermining and eliminating gender discrimination within countries. These values and provisions represent an important link for developing programmes and policies that will inspire support from organizations and individuals concerned with women's issues and child rights. They also commit States Parties to addressing issues of gender discrimination in vital areas such as family relations, health and work. There is some prospect that if this linkage is developed, States Parties will find it difficult to avoid confronting the basic issues of discrimination that continue to place constraints on women many years after the ratification of the Convention on Women's Rights.

The 'Best Interests of the Child' and Women's Rights

One of the key articles in the Convention on the Rights of the Child³⁷ refers to the obligations of all agencies, whether legislative, administrative or judicial, and public as well as private social welfare institutions to make the child's "best interests" a "primary consideration". While this article prioritizes the need for child-centred policy planning and decision-making, a child's "best interests" becomes the first among several considerations, rather than the "paramount" or only concern. This particular article can be interpreted so as to enable adequate consideration to be given to the impact of child policies or decisions on women. It can be creatively used to avoid a conflict of interests in policy programmes and decision-making, and encourages sensitivity to the intersecting interests of women and children.

The focus in both Conventions on the linkage between children's survival and development and women's procreative and nurturing roles neither excludes the male parent or guardian nor gives women preferred parental status. The Convention on the Rights of the Child, like the Convention on Women's Rights, emphasizes the importance of non-

intervention with family privacy, recognizing the vital place of the family as an institution in society. However, in addition to contemplating State support for strengthening the family, both Conventions envisage State interference with the disfunctioning family. State interference is an exceptional measure and is justifiable according to the Convention on the Rights of the Child only when "competent authorities subject to judicial review" determine that separation from the family is in the "best interests of the child"³⁸. These values are echoed in the provisions of the Convention on Women's Rights which refer to joint and shared parental rights and the denial of those rights in the best interests of the child³⁹. The concept of the child's 'best interests' is thus articulated in both Conventions and provides a strategy for recognizing a woman's custodial and guardianship status and the need for State intervention to protect a child from a parent of either sex who abuses his or her parental role.

The concept of parental rights is therefore clearly qualified by the traditional concept of parental responsibility. The Convention on Women's Rights in fact sets a higher standard in regard to protecting a child's interests by referring to them as the "primordial" or "paramount" considerations. We have observed that the Convention on the Rights of the Child merely refers to the best interests of the child as a "primary" consideration⁴⁰. We have also noted that the "best interests" of the child has been used by courts in some legal systems to recognize the mother's right to custody and guardianship. The concept can be used creatively to prevent subjectivity and unfairness to women and even to recognize a father's right to custody when this is in the child's best interests, if specific guidelines are developed within legal systems to ensure that it is interpreted in line with the value framework of the Convention, namely in terms of parental responsibility for children.

The emphasis on the child's "best interests" in the Convention on the Rights of the Child suggests that parental access issues can also be determined on the basis of a child's right to associate with both parents, rather than one parent's right to exclude the other. The Convention on Women's Rights complements these provisions since it does not perceive a woman's desire to exclude the father as a women's rights issue⁴¹. Yet, the general provision on support services for child care will invariably benefit women who continue at present to make a major contribution as caregivers and as female heads of household. Both Conventions seek to achieve a balance between the child's right of access to both parents and to care and nurturing from the family on the one hand, and adult parenting needs on the other.

The importance given to family privacy in the Convention on the Rights of the Child has not prevented recognition of the problem of domestic violence. The protection rights of

children articulated in this Convention impose commitment on States Parties in regard to the phenomenon of domestic violence and gender-specific violence in the community. Though the problem is not addressed by specific articles, the 'best interests' concept, general provisions in the area of discrimination and penal justice as well as general references to human rights, fundamental freedoms and personal liberty may be used to encourage legal intervention in this area. The Convention on the Rights of the Child reflects the traditional view in most legal systems that the State acting *parens patriae* can interfere to protect family members in the disfunctioning family unit. Empirical studies have established that a significant proportion of children and women in most societies are the distressed victims of male violence in the family. Protection rights articulated in the Convention on the Rights of the Child permit recognition of new areas of child abuse such as the phenomenon of boy prostitution, and in general it encourages recognition of the phenomenon of domestic violence and intervention in this area.

The right to protection from sexual violence, trafficking and traditional practices that create health risks recognized in the Convention on the Rights of the Child is endorsed in provisions regulating the same problems in the Convention on Women's Rights⁴². This is an area in which women's groups have been actively involved in lobbying for law reform and for stricter and more effective sanctions and regulatory controls⁴³. Women's groups in the Netherlands, Pakistan and Bangladesh have already taken up the problems of child pornography and trafficking in children for prostitution or for use as jockeys in camel-riding sports in the Gulf States as both gender and family issues. Legislation has been introduced in Bangladesh as well as in India through successful lobbying efforts on the part of women's groups and activists. The Mathura case in India in which a young girl was raped while in police custody was used by women's groups to agitate successfully for substantial changes in the law on rape in India. In South Asia, women have been concerned with the issue of child marriage as well as the poor conditions in State institutions for children. African women have organized themselves to undertake research and awareness raising to eliminate traditional practices affecting the health of women and children. Protection against sexual violence is a key issue that highlights the intersecting interests of women and children, since it is the traditional perception of male control over a woman's sexuality that encourages early marriage, harmful health practices and denial of educational opportunities. In a cruel irony, young South Asian children and women are sold into prostitution today, and sent across national borders under the guise of marriage⁴⁴.

Citizenship and Participation Rights

Western European civil codes and Anglo-American law have traditionally emphasized the principle of the unity of domicile of spouses and children born within marriage. Given the patriarchal notions of family relationships in these systems, 'unity' in fact has meant that a married woman and her minor children acquired and retained the domicile of her husband. This principle has been altered in many industrialized countries by legislation recognizing the concept of separate domicile and nationality. The Convention on Women's Rights articulates this concept of separate nationality and domicile, and suggests that a child should be able to acquire the nationality of his/her mother⁴⁵. This provision requires States Parties, particularly in Asia and Africa, to reform nationality laws which trace citizenship of children born within marriage exclusively through the male line. The recent Dow Case in Botswana has focussed attention on this problem, which many women in developing countries face. Mrs. Dow's application to obtain citizenship for her children was allowed by the Court on the ground that the constraints placed by a citizenship law violated Botswana's constitutional guarantee against gender discrimination. The Attorney General has appealed against this decision to the African Commission on Human Rights⁴⁶. In any event, a change in citizenship laws on these lines will require other legal changes so as to permit a child to have dual nationality until he or she is able to choose a particular nationality upon reaching majority. The Convention on the Rights of the Child is more ambiguous in this regard, referring merely to the right of the child to a nationality from birth. This Convention also concedes the possibility of States determining this issue according to the national laws⁴⁷. Yet the concept of joint and shared parental responsibility provides an important value base for the modification of existing discriminatory nationality and citizenship laws in domestic legal systems.

We have observed the difference between the two Conventions on the approach to participatory rights and empowerment. Since children's rights do not extend to political rights, the Convention on the Rights of the Child recognizes only limited rights in the form of freedom of a child of sufficient maturity to be heard and to express an opinion, especially in judicial and administrative proceedings concerning him or her. The child has limited freedom of association and assembly, and even the basic freedom of thought, conscience and religion is subject to some control by parents or guardians⁴⁸. The right of freedom of expression and the right to receive information, however, have been drafted in broad terms.

The latter provisions suggest that the right of girls even below 16 years of age to receive information on contraceptive use (recognized for English law in the opinion of the House of Lords in the Gillick Case [1986])⁴⁹ cannot be subject to constraints. It can be interpreted in the context of gender equality envisaged by the Convention on Women's Rights.

The concept of participatory rights in the Convention on the Rights of the Child, if clearly understood, will encourage reassessment of the goals of education and parental authority and will stimulate the involvement of children themselves in developing programmes and policies for them. At present, there is very little encouragement for participatory learning, freedom of access to information, or freedom of expression in many countries that have ratified this Convention. Genuine, even gradual, efforts to realize the participatory rights of children may stimulate a willingness to recognize social problems and the need for change, and may contribute to creating an environment that will foster the realization of human rights and women's rights.

IV. PROBLEMS OF INTERPRETATION AND PERCEPTIONS OF COMPATIBILITY

An examination of the conceptual framework of the two Conventions and their substantive articles clearly indicates that, while their scopes may sometimes vary, they do complement each other. In seeking to protect the rights and prioritize the interests of two separate categories, they in fact strengthen the potential for realizing equality and justice for both groups at the national level within a framework of international norms and a humane value system.

The idea that the Convention on the Rights of the Child is so child-centred as to focus exclusively on the woman's procreating and nurturing role, thus trapping her in an oppressive family situation, is incorrect. We have observed that both Conventions recognize an important role for men, the more extended family, the community and the State in regard to the responsibility for child care and development. Several provisions envisage intervention with family privacy by the State as well as State support to strengthen the family's capacity to care for children. Both Conventions therefore require the development of a holistic family policy that will enable the family to assume responsibility for children. It is because the concept of shared parental, family and State responsibility articulated in the Convention on

Women's Rights has not been used to link women's economic participation rights with support for their role in the family that many programmes and policies on women in development in the past decade have focussed exclusively on the issue of participatory rights for women. Both Conventions recognize the reality of a woman's role within the family but put forward a set of standards for creating a society in which men will assume a parenting role and the State will strengthen the family. In this way, procreation and family responsibilities do not become an excuse for denying women access to resources, the human dignity associated with human rights, and full autonomy and participation rights under citizenship and national laws.

The concept of the child's right to survival and development or provision rights do not conflict with giving priority to women as women because the development of policies on child health and nutrition as envisaged in the Conventions will help women and the family with child care and nurturing, relieving them from the pressure of coping with problems of child sickness and malnutrition. The Conventions also require that policies focussing on the provision of increased opportunities for breastfeeding are combined with a support system that encourages women to both work and breastfeed their babies. Maternity leave laws and employer responsibility in this regard will thus have to be developed to accommodate both the child's nutritional needs and the responsibilities of a woman working outside her home. The Conventions do not permit the provision rights of children to be realized at the expense of the woman's right to be treated as an individual rather than as a mere source of sustenance for her children. Unless the dimension of male parenting and the responsibility of the community and State for children is clearly understood and actually influences policy-making, realization of child rights in survival and development may be used to justify the seclusion of women within the family in developing countries.

The basic article against gender discrimination in the Convention on the Rights of the Child can be used to realize the status of equality and freedom from discrimination envisaged by the Convention on Women's Rights. The very fact that the latter Convention concentrates exclusively on the elimination of gender discrimination enables it to give an all-encompassing focus to this issue in broad general provisions on gender equality. The same approach has not been adopted in the Convention on the Rights of the Child, which, however, has worked out a more detailed and structured set of provisions to regulate a wide range of rights relevant for both girls and boys. For instance, this Convention addresses the issue of sexual exploitation of male children, rather than perceiving prostitution as an

exclusively women's issue. In any event, neither the value system of this Convention nor its substantive provisions place significant constraints on the attainment of gender equality for children. The Convention on the Rights of the Child can, if implemented progressively and with commitment, strengthen the position of women in all countries that have ratified it, and encourage policy intervention on their behalf.

Procreation Rights

The general compatibility of the two Conventions is weakened, however, by problems that surface in defined areas. The Preamble to the Convention on the Rights of the Child refers to the need to provide protection of children "including appropriate legal protection, before as well as after birth". A substantive provision on child survival and development also refers to a State Party's responsibility to "recognize that every child has an inherent right to life"⁵⁰. Could these provisions be used to place constraints on the liberalization of abortion laws in national legal systems? Some countries in Asia, India and China, in particular, have an entirely different value system on this controversial issue, due to priority given to the problem of population control. A man's refusal to allow his wife to have an abortion can be punished in China; abortion clinics advertise openly on street corners in India. Developing countries with strict abortion laws, often derived from Islamic law, Canon law and 19th-century English law, or indigenous religious beliefs and customary law, face problems of maternal death from septic abortions, child abandonment and even infanticide. These problems are compounded by strict laws on illegitimacy. There is social pressure to reject a child if a backstreet abortion cannot be obtained. On the other hand, a country like India that has liberalized its abortion laws for demographic reasons is confronted with the problem of maternal death from septic abortion as women are not aware of facilities available for medical termination of pregnancy. At the other end of the spectrum, the legality of medical termination in India has encouraged abortion of female fetuses, and this aberration of sex-selective abortions is practised through modern medical technology. Traditional social norms on son preference and customary practices on infanticide find expression in this new manifestation, which has even provoked a legislative response from the State of Maharashtra⁵¹. Abortion thus remains a controversial issue in most countries, over and above the frequent clash of views between the 'right to life' and 'pro-choice' lobbies in industrialized countries.

The concept of sexual equality and the procreation rights incorporated into the Convention on Women's Rights⁵² seem to be at variance with the Convention on the Rights of the Child, if the reference to the child's inherent 'right to life' is interpreted as conferring legal status and rights on the unborn child. Though the Preamble to the latter Convention refers to the child's need for "legal protection, before as well as after birth", the article defining a child specifies the upper limit rather than the beginning of childhood. The legislative history of this article clarifies that this emphasis was deliberate and a compromise as consensus could not be reached on the abortion issue⁵³. It is significant that the Convention on Women's Rights does not contain any specific provision that can be clearly interpreted as conferring a legal right to abortion. The ambivalence in both Conventions on this issue is striking and encourages an interpretation of the Conventions in accordance with the legal value system of domestic legal systems on this controversial subject.

Access Rights

Women's groups may argue that the mother's right to custody must be absolute, particularly in the case of a non-marital child. There may be reluctance to accommodate the father's access rights on the ground that this can undermine a woman's position as custodian parent. A problem of conflict of interests can therefore surface when the concept of the 'best interests' of the child is interpreted in such a way as to undermine a woman's claim to exclude the father who acknowledges paternity or is proved to be the father in affiliation proceedings. We have observed that since both Conventions contemplate intervention with the rights of parents in the best interests of the child, and also recognize shared parental responsibility, access has to be viewed from the perspective of a child's rights and interests rather than as a women's or parent's rights issue.

Cultural Rights

A clear area of potential incompatibility surfaces, however, in the approach of the two Conventions to indigenous and customary traditions and practices. This incompatibility can affect the possibility of achieving the rights of both groups, particularly in the developing countries of Asia and Africa. The Convention on Women's Rights contains several provisions which clearly commit a State Party to modifying "social and cultural patterns of conduct"

with a view to eliminating prejudices in customary traditions. States Parties also assume an obligation to take measures, including legislation to "modify or abolish existing laws ... customs and practices which constitute discrimination against women". A specific article refers to the need for state interventions, including legislation and administrative measures, to regulate the minimum age of marriage and compulsory registration so as to deny legal validity to child betrothal and marriage⁵⁴. Yet the Convention on the Rights of the Child adopts a somewhat different approach to customary practices because it emphasizes the importance of education, care and development of a child within the context of cultural identity and traditions⁵⁵. A specific article refers to the right of a child of a minority group within a State to "enjoy his or her own culture, to profess and practise his or her own religion"⁵⁶. It contemplates interference with cultural norms only in one substantive article, which declares that States Parties have an obligation to take measures "with a view to abolishing traditional practices prejudicial to the health of children"⁵⁷. This can, but need not, refer to practices on child marriage and circumcision.

It is clear that the Convention on the Rights of the Child is not as strong as the Convention on Women's Rights on the need to intervene in the area of indigenous cultural practices widely viewed as harmful to a child's well-being. A State Party can ratify the Convention on Women's Rights subject to a reservation on this clause, regarding custom; Bangladesh, for instance, has done so⁵⁸. Yet the Convention on Women's Rights articulates an international norm in this regard which can help persons within countries seeking to challenge the social or legal legitimacy of these practices. The Convention on the Rights of the Child, by contrast, reflects the traditional perception of other United Nations instruments and human rights laws⁵⁹ which attach importance to the recognition of cultural rights as fundamental rights essential for human development and the inculcation of a sense of self-respect and ethnic and cultural identity. This Convention, as well as these instruments, recognizes the positive aspects of indigenous value systems which can encourage group and community support for child care and can help to create a network of caring family relationships.

Activists in developing countries, faced with the reality of the suffering and distress caused to women and children through the perpetuation of cultural norms that violate international standards, question the protection given to culture and tradition in international instruments. Recent experiences in India, including the Roop Kanwar case involving *sathi pooja* (the self-immolation of a woman on her husband's funeral pyre), the controversial Shah

Bano case where the courts awarded maintenance under a national law for a divorced Muslim woman despite the conflict of this outcome with Islamic Law, and the issue of temple prostitution have mobilized women activists against the pressures of religious and cultural fundamentalism. Discrimination and son preference in the family in South Asia, entrenched through discriminatory property ownership, inheritance and other laws and customary practices on infanticide and abortion, have created environments in which problems of dowry violence and poor levels in social indicators such as mortality and malnutrition among females have reached serious proportions. Dowry violence has been extensively documented in recent years; a report recently issued in the Indian parliament indicates that illegal demands for dowry have caused more deaths than separatist violence has within the country. A 1984 report indicates that of 8,000 abortions performed in a clinic in Bombay, 7,999 were female fetuses⁶⁰.

The undervaluation of women inherent in some customary and traditional practices fosters disrespect for their human value and dignity, and places constraints on their own capacity to utilize the opportunities, services and facilities provided by governments. Deeply engrained cultural attitudes influence the development of new practices; sex-selective abortions and dowry violence by burning in India, for instance, are modern manifestations of the traditional practices of female infanticide and immolation of widows.

Recognition of group rights sometimes linked to indigenous cultures can be a positive factor, providing a sound basis for social mobilization and community participation. The empowerment of a community through the assertion of group rights can also help to achieve the rights of individuals who would not normally have access to legal procedures or other facilities. While the importance attached to the concept of group rights in recent developments in international law, Anglo-American jurisprudence and in the doctrine of social action litigation in India has enabled individuals and organizations to petition the Supreme Court in respect of the violation of the fundamental rights of communities, it should be recalled that underlying the principles of group rights is the concept of the human dignity and worth of the individual. The assertion of individual human rights should not therefore be considered as having the effect of undermining the potential for creating social progress through the strengthening of group norms.

Social and political realities in many developing countries demonstrate how the concept of cultural rights is used to resist meaningful change and to perpetuate the authoritarianism of a political elite, thus encouraging the violation of accepted norms of

humane conduct. The concept of an internationally guaranteed system of individual human rights then represents a strong basis for seeking relief from such oppression. Developing an ethos supportive of individual rights in that context becomes a strategy for creating the very social progress that cannot be achieved within the framework of cultural authoritarianism.

The unqualified importance attached to group rights and cultural identity is sometimes a reflection of romanticized notions of the Asian or African 'communal' unit of society. Developing countries have for decades faced the stresses of colonialism as well as the pressures of rapid urbanization, migration and the new market-oriented economic order. It is becoming increasingly difficult to find strong, creative, indigenous traditions in these countries which reflect the harmonious social relations associated with community and group cohesiveness. What is more apparent is the breakdown of traditional social obligations and support systems. The vacuum created often has not been filled by a new and humane value system. Customs which may have evolved and changed to take account of new needs now remain static and are interpreted in a context where gross distortions of original traditions exist. Perpetuation of those cultural traditions and practices are thus a source of oppression rather than a creative force for social and family stability.

Instances of such distortions have been documented in empirical research on traditional practices in Asia and Africa⁶¹. The concept of 'wife inheritance' or 'dowry' in African and Asian societies, for instance, was based on principles of family support and caring for children and women, now absent in many of the modern manifestations of these customary traditions. Even the distortions that have surfaced in the interpretation of women's rights in Islamic communities are an eloquent example of the breakdown of a living tradition. Women's groups in Pakistan and Bangladesh have demonstrated how the separate property rights of women, and their rights in respect of the marriage portion (*mahr*), have been undermined and replaced with a non-Islamic concept of dowry. Modern legislation on sexual offences has been criticized as a distortion of the legal values in Islam. Studying the Koranic and other sources of Islamic law, women's groups have found a value base that is supportive of a woman's right to equality and justice. Concepts such as the mother's preferential right to the custody of children of tender years, women's property rights, constraints on a man's right to unilateral repudiation or pronouncement of *talak*, and a woman's legal capacity to obtain a divorce for proof of the husband's matrimonial fault have been cited as providing a value base that can be developed in order to eradicate social and legal inequities. Islamic law was unique among early legal systems in recognizing a preferential right to custody for

the mother of a child in the early years on the grounds of the child's nurturing needs and maternal bonding. Early jurists also modified the law on hire to make it possible to hire a wet nurse, ensuring an alternative source of nurturing for a child. These aspects of Islamic law are in striking contrast to the early English common law, which recognized such sweeping paternal authority that a father could claim possession of a child at the breast. Paralegals working with communities to help them use customary law in dispute settlements are sometimes conscious of the need to differentiate those indigenous systems that violate established human rights norms from those that promote human rights.

It is important to recognize that recorded customary laws may, in fact, not reflect the community traditions of a people. They may be the product of misinterpretation or the imposition of a judicial or policy maker's perception of what constitutes customary law. This reality is evident from the historical experience on the application of customary laws in India and Sri Lanka. In India, the Hindu law was applied by British courts to some Muslim communities, leading to a demand in 1937 that this be replaced with the Family law based on the Shariah (traditional Islamic law). Similarly, in Sri Lanka, a Dutch Governor decided to send for a Code of Family law used by Dutch occupied territories in Batavia as the Muslims in Sri Lanka had no recorded laws. This Code was resurrected by the British administration in 1806 and put before a small selected group of Muslim elders in one city who accepted it without debate as an authentic record of the laws of the Muslim population on the island. It was then applied as an authentic source of indigenous law until the early part of this century, when it was gradually replaced by principles derived from the Shariah. Muslim women in Sri Lanka and authorities on Islamic law have pointed out that the rights of Muslim women in Sri Lanka have been undermined by customary practices on dowry and matrimonial property, revealing developments similar to those that have taken place in Bangladesh and Pakistan over a period of time. The customary laws regulating some other communities in Sri Lanka have also incorporated elements of English or Roman-Dutch law through a process of legislative and judicial interpretation. Thus, it may be seen that customary and religious laws held as time-honoured and sacrosanct norms in a community may in fact not have evolved out of a people's history.

If cultural rights are to have real meaning in any community, there must be an effort to evaluate established norms and achieve a balance between an individual's duties and obligations to the group and the individual's right to personal autonomy. There can be no compromise on the value placed on the worth of the individual in the community. Creative

indigenous laws achieved that balance, as demonstrated in periods of the history of countries representing the zenith of their civilizations. A historical analysis of developments in the area of the family illustrates that legal norms are not static, but rather reflect changing cultural patterns. Scholars have argued that in early and medieval times in Europe, there was no concept of childhood. In contrast to Roman-Dutch law, English common law was indifferent to the situation of the child. Practices such as female circumcision, now associated with the cultural traditions of developing countries, were not unknown in England between the 15th and 18th centuries, while child marriages and the option of puberty or the right to repudiate such marriages were familiar to English law in the early part of this century⁶². Changes that took place over time altered these practices and established new trends. It is by means of a similar process of change that early positive features of indigenous religions and customary law in the developing countries of Asia and Africa have been undermined in the colonial and post-independence period, with resulting prejudicial effects on women and children.

The Convention on Women's Rights encourages States Parties to move into the 'sensitive' area of cultural rights by at least developing a civil code on family relations in line with the value system of the Convention. A civil code constitutes a uniformly applicable statute in a country which can be used by all citizens to determine family relations. Countries with plural family laws based on different personal laws applicable on the grounds of ethnicity or religion invariably have a nucleus of uniformly applicable civil law in areas such as marriage and inheritance, with the aim of regulating the conduct of all citizens. Penal laws and constitutions invariably confer uniform rights and responsibilities, reflecting a common code of legal values that governs all citizens, irrespective of their own wishes. Civil codes, by contrast, put forward uniform norms, while recognizing that citizens may choose which laws should govern their actions and so seek relief under those laws. This is illustrated in the law on wills and family support in India and Sri Lanka. The law on family support in these countries is derived from legislation that applies uniformly to all communities, and people may, if they wish, seek legal relief under these laws.

Recent judicial developments in both of these countries indicate how women's rights are undermined when women and children are denied the right to claim legal relief on the basis of these civil laws. Legislation introduced recently in India following the Shah Bano case prevents a Muslim woman from seeking maintenance under a family support statute which applies throughout India. Application of Islamic law principles in recent court decisions in Sri Lanka in regard to maintenance of male legitimate children prevents these

children claiming support from their father on the same legal basis as children of other communities because the application of a statute on maintenance to Muslims has been questioned in the courts. The recognition of a man's unilateral right to convert to Islam and therefore practise polygamy in Sri Lanka has created a situation where a man can deny maintenance obligations in respect of a woman and children imposed under this statute on family support, which is broader in scope on the argument than is the personal Islamic law that now determines his obligations⁶³. The choice concept recognizes that individuals may opt out of their indigenous laws by governing their relations according to a uniformly applicable national statute. The application of the statute is not compulsory, but based on choice. Judicial decisions that foster pluralism tend to undermine a citizen's capacity to exercise that choice.

The Convention on Women's Rights links with national constitutions that guarantee non-discrimination. It encourages the development of 'model' or uniform codes in important areas affecting the rights of women and children as a first step towards building a consensus on basic legal values within the community. The codes can be based on norms, in line with international human rights commitments, and citizens may choose to govern their family relations according to them. An element of choice may not be recognized, on the other hand, when custom and social practice violate basic norms accepted within the country. For instance, legislation criminalizing deaths associated with dowry and *Sathi pooja*, the self-immolation of widows, has been enacted in India. Legislation on dowry-related violence and cruelty to women has been enacted in Bangladesh. These laws represent a nucleus of uniform anti-discriminatory legislation in line with the Conventions and other international standards⁶⁴.

The Convention on Women's Rights also encourages the kind of developments seen in Islamic countries where efforts have been made to ascertain the original sources of Islamic law and the areas of compatibility with the concepts reflected in international human rights law and constitutions. Judicial activism in the courts in interpreting constitutional and legal remedies is also stimulated when the Convention takes a positive stand against customary practices that violate the basic norms. The Convention can be used within countries to help bring about changes in judicial decision-making which is in conflict with the value system of the Convention.

The provisions on cultural rights in the Convention on the Rights of the Child must not be used to undermine the value ethos created in this regard by the Convention on

Women's Rights. A conflict can be avoided if there is an effort to obtain complementarity by means of strategies that can be used to give effect to the Convention on Women's Rights. Encouraging the review and analysis of indigenous or customary law as well as the development of uniform codes represents a creative way of ensuring that cultural rights are not used to work against the achievement of children's rights in general or to perpetuate gender-discriminatory law and practices.

It would appear that the 'best interests' concept in Article 3 of the Convention on the Rights of the Child can be used to encourage States Parties to develop uniform codes and to review personal laws in the light of the basic child rights articulated in this instrument. We have already observed the manner in which this concept has been used in national legal systems to confer parental rights on women. Article 3 is so basic that it is not one which a State Party can exclude by entering a reservation. The Convention on the Rights of the Child clearly states that a "reservation incompatible with the object and purpose of the present Convention shall not be permitted"⁶⁵. Article 3 of the Convention can therefore be used creatively to develop a common approach to the issue of cultural rights and reform under these two Conventions.

V. ENFORCEMENT

The provisions on implementation in the two Conventions are very similar. Both Conventions have adopted a strategy of rights and contemplate a system of monitoring and redress of violations through pressure on States Parties to initiate change. In accepting a system of monitoring by Committees constituted under the treaty rather than by a complaints procedure, they conform to the accepted legal traditions in human rights law. An individual cannot, in general, lodge a complaint against a State Party for violation of a right protected by an international treaty. Most countries also require incorporation of treaty obligations in domestic law if they are to give legal rights and relief to citizens under national law.

The existence of a complaints procedure for citizens in the European Convention for Protection of Human Rights and Fundamental Freedoms has been helpful in motivating government actions and has also contributed to creating judicial sensitivity to the norms of this Convention within Europe. By contrast, the monitoring mechanisms established by the Convention on Women's Rights have not been effective in generating interest within States.

Reporting processes do not appear to have been taken seriously, and there has been inadequate awareness of the Convention at the national level. In one instance, the evaluation of a country report by the Committee met with a strong adverse reaction from the country and even prompted the summoning of a special meeting to comment on the monitoring committee's report⁶⁶. A comparison of the monitoring and implementation procedures in the two Conventions indicates that the provisions in the Convention on the Rights of the Child have greater potential for ensuring that States Parties meet their obligations and that countries and their people progress towards achieving the international standards set by the Convention.

Both Conventions have created monitoring committees which must meet annually, and which have the right to obtain reports at regular intervals from States Parties. The procedures incorporated into the Convention on the Rights of the Child are stronger as they provide for both the dissemination of information on the Convention and the public circulation of reports by States Parties at the national level. This encourages a more participatory process in regard to national reporting and legitimizes generating a public debate within the country on a State Party's performance on the Convention. The Committee on the Rights of the Child considers reports and can also make suggestions and recommendations to the States Parties. These recommended actions and suggestions will be reported to the United Nations General Assembly together with the comments of any of the States Parties concerned. A similar power to address a State Party directly is absent in the Convention on Women's Rights⁶⁷. This empowering provision of the Convention on the Rights of the Child to make recommendations to States Parties, address them directly and report their response is an important asset in stimulating implementation at the national level. It can help to create a non-adversarial yet dynamic approach to implementation through dialogue, and can also prevent the kind of situation faced by the Committee on the Elimination of Discrimination against Women when a negative reaction to the Committee's report creates tension between a State Party, a group of countries and the Committee. Nevertheless, the possibility of evaluating performance in strong and critical terms does give this Committee the power to insist that a State Party take its reporting obligations seriously.

Both Conventions suffer from the limitation of having to rely on the official report of a State Party, though, as we shall observe, the specialized agencies can be consulted. Neither Convention empowers its Committee to obtain reports from local or international non-governmental organizations. Other human rights committees, however, have developed a

practice of obtaining such reports informally, and a similar development will be a creative contribution to effective implementation of these Conventions. There are, in fact, provisions in the Convention on the Rights of the Child that encourage the Committee to obtain reports from non-governmental organizations. Apart from the provisions relating to a State Party's obligation to disseminate information on the Convention and its own report within the country, the Committee has been authorized to consult and refer country reports to "other competent bodies" for expert advice. They may develop rules of procedure to enable the formal participation of these organizations – an initiative that is not authorized under the Convention on Women's Rights, which refers only to the specialized agencies⁶⁸. These provisions encourage and legitimize the involvement of non-governmental organizations in the monitoring process and also in using this procedure to promote action. The failure to obtain alternative reports from non-governmental organizations and to involve them in the reporting process on the Convention on Women's Rights has proved to be a disadvantage. A lack of awareness of the Convention among women's groups working with commitment on women's issues within countries has prevented it being used as a lobbying tool. Legislators, lawyers, judges and other professionals are not familiar with it, nor has it attracted the serious attention of women's groups in developing countries who have made an important contribution in working for the realization of women's rights.

Recent developments in South Asia in the area of social action litigation indicate how legal procedures and court actions have been used by members of the public and voluntary organizations to obtain individual relief, assert group interests, and lobby for law reform. The concept of *locus standi* has been modified dramatically to permit concerned members of the public or non-governmental organizations to bring violations of fundamental rights guaranteed by national constitutions before the Superior Courts. The courts themselves have become directly involved in ensuring enforcement of their orders in these applications so that governmental authorities have to initiate action to give relief. Journalists, academics and non-governmental organizations have sometimes been able to invoke the power of judicial review by simply writing a letter to the courts, so as to challenge administrative action that constitutes an infringement of fundamental rights. There have been many cases where these court applications have been used on behalf of women and children. Cases on bonded child and women workers, children in prison and in State institutions have been brought before the courts and intervention has been obtained on behalf of the affected groups. Since the courts intervene to promote social action, this type of litigation has been described as

something more than public interest litigation. These efforts have also helped to stimulate local Bar Associations to provide free legal aid. Such innovative initiatives are intended to provide and simplify access to legal relief for those who are unable to utilize legal proceedings on their own for economic or other reasons. There are also instances in which court decisions in India have drawn attention to inadequacies in enforcement of equal remuneration legislation and gender discrimination in divorce laws, and have directed the legislature to initiate law reforms within a specified time. The legislature has responded positively, taking steps to introduce changes in the statute law. This interaction between the legislature and the judiciary is one that is especially relevant in achieving women's and children's rights. It should be strengthened, not undermined by arguments that this interaction is unjustified judicial intervention in the area of public policy⁶⁹.

The Conventions on women's rights and on child rights can strengthen judicial activism and become an important tool for activists and groups involved in using legal processes. They provide a link to strengthen fundamental rights guaranteed by national constitutions and give legitimacy for involvement in attaining those rights. The articles in the Convention on the Rights of the Child on monitoring particularly support and legitimize judicial activism as well as public concern for realizing rights. They thus afford a prospect for strengthening women's rights and human rights in general through a new concept of monitoring enforcement of legal standards. Ratifying countries will find it difficult to view the involvement of the public as interfering and disruptive when the Convention on the Rights of the Child specifically contemplates such involvement.

The Convention on Women's Rights gives specialized agencies the right to be represented at the consideration of the implementation of provisions of the Convention that are relevant to them. They may also be involved in the reporting process⁷⁰. The Convention on the Rights of the Child has similar provisions on representation and involvement of the specialized agencies in the reporting processes. In addition, it identifies the United Nations Children's Fund (UNICEF) as an agency that will perform a special role in regard to this aspect of the work of the Committee. It also recognizes an important role for UNICEF and the specialized agencies in providing States Parties (who so request) with technical advice and assistance to implement the Convention⁷¹. This provides special legitimacy to their efforts at developing a partnership among international agencies in realizing children's rights, and recognizes the importance of their active involvement in promoting children's rights at the national level. The obligation of States Parties in the Convention on the Rights of the

Child to implement their commitments in regard to child survival and development, through the realization of economic, social and cultural rights, is described in terms of an obligation to undertake appropriate measures to fulfill them "to the maximum extent of their available resources"⁷². This cannot, however, justify poor performance, since States are also entitled to ask for technical advice and assistance from UNICEF and other agencies in implementing the Convention. The Committee on the Rights of the Child has in its initial meetings already proposed the creation of a 'technical advisory group' comprising members of these agencies to assist in its work.

Several articles in the Convention on the Rights of the Child introduce a new dimension to the concept of enforcement of international standards not found in the Convention on Women's Rights by placing an obligation on States Parties to "promote and encourage international co-operation" to ensure the progressive realization of the rights guaranteed by the Convention⁷³. This introduces a concept of shared responsibility for providing development assistance. It encourages the creation of an environment in which the achievement of social and economic rights is supported by a coordinated international effort. If this aspect of the Convention is approached with some degree of commitment, it will inevitably have a positive effect on women's rights, since programmes for children can be developed with sensitivity to the intersecting needs of women and children. Creative developments in this regard may eventually contribute to an international recognition of the value of social and economic rights as important human rights, in the same way that civil and political rights are.

Traditional legal systems in many countries of South Asia and in African societies incorporated strong concepts of family support and communal access to resources. These norms were undermined by colonial legislation on land use and family support. Laws in the post-independence period continue to reflect a 'poor law' approach to poverty, perceiving it as an offence, as vagrancy or neglect to fulfill family responsibility. Indeed, 19th-century colonial vagrancy statutes continue to be used even today against the urban poor, who may be placed in State institutions for 'rehabilitation'. Post-independence constitutions in developing countries also place social and economic rights outside the area of fundamental rights, though directive principles of State policy which cannot be enforced through litigation indicate that governments must introduce poverty alleviation programmes and other social and economic measures to improve the quality of life of citizens. If the Convention on the Rights of the Child can create an environment in which certain basic social and economic

needs are seen as the rights of people rather than benefits handed to them, this development may help to promote responsible government and thus really influence the achievement of the basic rights guaranteed in national constitutions and in these international treaties.

A recent evaluation of the work of the Committee on the Elimination of Discrimination against Women⁷⁴ has argued that specialized agencies and other United Nations organizations have not had an adequate input in relation to the reporting process. Other work and available data also point to the fact that the past decade has witnessed much rhetoric on women's rights which, however, has not been matched by the global performance over this period or even by the performances of those countries that have ratified the Convention. The stronger provisions of the Convention on the Rights of the Child on both monitoring and implementation may help to prevent a repetition of this situation. The involvement of the organizations with status to assist in reporting under each Convention is crucial to implementation at the national level. This involvement is also important for strengthening the apparent compatibility between these two major Conventions, prioritizing women's and children's problems in national policies in efforts aimed at eventually realizing the similar goals that they articulate. Though both Conventions envisage a commitment of national resources, the later Convention on the Rights of the Child contemplates a stronger networking among nations, the United Nations Children's Fund and the specialized agencies in a global effort on behalf of children. Yet the commonality of values and goals in the two Conventions suggests that committing resources in initiatives aimed at realizing children's rights need not prejudice the priority that must also be given to achieving the rights of women. The challenge is to develop programmes that link the common areas of interest so that the failures of the past decade in regard to women's rights will be replaced by changes during this decade that will bring equity for both women and children.

The United Nations Decade for Women was an important era, which ushered in a significant focus on women's issues. Nevertheless, there has been an unwillingness to link the human rights dimension with women's rights or to recognize the complementarity between women's issues and children's concerns which the Convention on Women's Rights articulates. An outcome of this has been the neglect of concern with gender discrimination as it affects girl children. It has also sometimes led to an underestimation of the value of women's legitimate role in the family and the household. The relationship between women's work and child care responsibilities has to some extent been seen as a burden. Indeed, women in development programmes have given priority to removing women from their

domestic situations into the workplace. The 'private' and 'domestic' sphere of women's lives has too often been regarded only as a trap which stereotypes women in their roles as wives and mothers. These roles themselves have been viewed as constraints preventing women from realizing their potential in the wider community. The inability to participate outside the family has been perceived as the reason for discrimination and denial of equal opportunity. Yet research during this past decade has revealed that the 'seclusion' of women in the private domestic sphere is something of a myth in most societies as women have been involved in both child care and in an active working life. It has become apparent that the denial of equity and equal opportunity also proceeds from a failure to recognize women's contribution in both spheres. Statistics on social indicators in South Asia where female literacy is high, and on the feminization of poverty in developed countries, indicate that a model of development and gender equality which disregards the link between women and children cannot improve social indicators for either group or bring about equitable treatment within society. Both of these Conventions envisage societies in which women's role in the family is strengthened; this will replace rhetoric on both the importance of the family and the oppression within it by concrete initiatives that will help to build caring human relationships based on the values of fairness and human dignity.

VI. CONCLUSIONS

The Convention on the Rights of the Child introduces the concept of a coalition or networking for implementation: a new concept that can stimulate links between women's rights and children's issues. It should also stimulate concerted efforts, particularly in developing countries, on problems such as discrimination against girl children, their use in child labour, early marriage and denial of educational opportunities. Committed efforts to deal with these problems specific to girl children can help to focus attention on the wider dimension of gender discrimination and therefore impact on women's issues within countries. It is the failure to attack gender discrimination at its roots – the value system for girl children – that produces the anomalies we see, particularly in developing countries where policies intended to ameliorate the situation for women instead perpetuate existing prejudices and fail to have positive effects on girl children.

We have observed the failure of women's health policies to have an impact on the problem of female infanticide, and the misuse of abortion laws that authorize medical termination of pregnancy to abort female fetuses. Income-generation projects for women in Asia and Africa may have promoted economic self-reliance, but they have not generated changes in child marriage and other harmful social practices such as genital mutilation in Africa or dowry violence in South Asia. The absorption of young girls into employment in the investment promotion zones in South Asia has had no impact on the sexual and other exploitation that these young workers face in the workplace due to gender discrimination. The girls themselves have the same aspirations that society has for them, even accumulating their savings to provide the dowry that is demanded for them on marriage. Increasing economic opportunities and promoting financial independence for women or developing women's health programmes can therefore have little effect unless they are combined with programmes and policies on gender discrimination and girl children.

The importance of building and developing common strategies for women and children has already emerged. The Committee on the Status of Women has supported a proposal of UNICEF's Executive Board to focus on issues concerning girl children by reference to standards set in both Conventions⁷⁵. The Committee has also called for a closer link between the monitoring committees set up under these two Conventions. Women's movements in various countries have protested against child pornography and child trafficking, and have lobbied actively for law reform and social policies for child victims of exploitation. Particular problems such as cultural practices that adversely affect the health of women and children have been identified as important areas for common action. These can be developed further in the process of implementing the Convention on the Rights of the Child. Besides, both Conventions provide a linkage to national constitutions that recognize the right to freedom from discrimination. Women's groups can make use of this link to strengthen advocacy efforts and to develop awareness in regard to both women's and children's rights.

Even if the provisions of these Conventions are not immediately incorporated into national law, they can be used by concerned persons and organizations to sensitize the judiciary and other professionals as well as communities on the importance of making a reality of constitutional and international standards. Recognition of an identity of interests between two groups closely linked by mutual need and by maternal-child bonding can help to overcome the constraints of socio-economic and legal policies as well as cultural traditions.

It can also help women themselves become articulate advocates for child rights. Advocacy can be used creatively to assist with the international monitoring process under both Conventions, which is ultimately crucial for implementation and enforcement. Effective monitoring of national performance by both Committees must eventually stimulate political will at the national level and some commitment to realizing the rights of both women and children.

In industrialized countries, where equal opportunities for girls and boys is no longer a controversial issue, the link between child rights and women's rights may be seen as a regression to an era when these two groups were linked by common disabilities in patriarchal societies. Yet the experience of the past decade has shown that the destinies of women and children are connected and that a woman's capacity to realize her full potential as she grows to adulthood may be prejudiced by a lack of support in her nurturing and care-giving roles. Issues of sexual exploitation are also a common area of concern for women's and child rights activities in these countries. In developing countries, however, the enormous breakthrough required for the recognition of gender equality in terms of access to opportunity will not come about unless there is a committed effort to address the issue of discrimination against girl children. This must be combined with action on women's issues. Constitutions provide for affirmative action on behalf of women and children, but very little has been done to initiate policy interventions that address the special needs of girl children. Yet, only when attitudes change, inequities are removed and increased opportunities are made available to girl children – the women of tomorrow – will it become unnecessary to perceive women as a 'disadvantaged' sector of an adult population.

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