Can reproductive rights be 'human' rights? Some thoughts on the inclusion of women's rights in mainstream human rights discourse

Christine Bateup*

Introduction

Due to the efforts of feminist theorisers and campaigners over the past decade, the issue of women's rights has now been firmly established as a primary area of concern in international human rights theory. This work has demonstrated, with little room for doubt, that international human rights law operates as a gendered system.[1] When viewed through the lens of gender, human rights law is revealed to be partial and androcentric (privileging a masculine world view), because the law-making institutions of the international legal order which have created and interpreted human rights standards have been, and continue to be, dominated by men.[2]

* LLB (Hons) (Melb), BA (Melb); Research Assistant, Federal Court of Australia. The opinions expressed herein are those of the author.

1 The first sustained feminist critique of the gendered nature of international law, now regarded as the seminal piece in this area, was Charlesworth H, Chinkin C and Wright S 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 190. Since the publication of this article, there has been an incredible proliferation of articles from a feminist perspective critiquing international law and international human rights. The following is by no means a complete list but is intended to indicate the diverse scope of feminist work in the area of international human rights law: Byrnes A 'Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws, or Meaningful Marginalisation?' (1992) 12 *Australian Yearbook of International Law* 205; Charlesworth H 'The Public/Private Distinction and the Right to Development in International Law' (1992) 12 *Australian Yearbook of International Law* 190; Cook R (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994); Copelon R 'Recognising the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 291; Engle K 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England Law Review* 1509; MacKinnon C 'Rape, Genocide and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5; Peters J and Wolper A (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York, 1995); Wright S 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions' (1992) 12 *Australian Yearbook of International Law* 241.

2 See Charlesworth H 'Human Rights as Men's Rights' in Peters and Wolper (eds) above note 1, p 103; Charlesworth H 'Women's International Human Rights' in Cook (ed) above note 1, p 58.

Feminists have therefore argued that human rights as currently understood are not the universal rights that human rights discourse claims, but are 'men's' rights, in that they have been constructed around masculine characteristics and masculine analytical categories.[3] As a consequence of this, issues that have been perceived as involving women's rights have been marginalised both institutionally and conceptually from the mainstream human rights arena.[4] In turn, this marginalisation continues to justify ignoring or minimising women's concerns in mainstream human rights bodies.[5]

In attempting to address the gendered nature of human rights, many feminists have focused upon the issue of how women's rights can be included successfully within the traditional canon of human rights. This approach has been increasingly utilised in relation to a number of women's human rights concerns, including the issues of violence against women[6] and reproductive rights.[7] The essential aim of such moves is to promote an integrated approach that contests the existing epistemological frameworks of international human rights law and reinterprets and recharacterises 'traditional' human rights to include women.[8] This approach is based on the assumption that if the gendered characteristics of human rights are successfully challenged and the traditional androcentric scope of rights broadened, then human rights will have truly 'universal' application.

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3 On what it means to say that the law, in general, is gendered, see Davies M 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Naffine N and Owens R (eds) *Sexing the Subject of Law* (LBC Information Services, North Ryde, 1997) pp 28-30.

4 This marginalisation has meant that violations of women's human rights are generally considered in the international legal system under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by the specialised Committee on the Elimination of Discrimination against Women. See Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 19 ILM 33 (entered into force 3 September 1981). The Committee is established under arts 17-21.

5 See, for example, Charlesworth H, Chinkin C and Wright S, above note 1 at 632; Reanda L 'Human Rights and Women's Rights: The United Nations Approach' (1981) 3 *Human Rights Quarterly* 11.

6 See, for example, Copelon, above note 1; Etienne M 'Addressing Gender-Based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 139; MacKinnon, above note 1.

7 See below, notes 34-78 and accompanying text.

8 See, for example, Charlesworth H 'Alienating Oscar? Feminist Analysis of International Law' in Dorinda Dallmeyer (ed) *Reconceiving Reality: Women and International Law* (American Society of International Law, Washington, 1993) pp 7-8; Mertus J and Goldberg P 'A Perspective on Women and International Human Rights After the Vienna Declaration: the Inside/Outside Construct' (1994) 26 *New York University Journal of International Law and Politics* 201 at 230-3.

Although this approach has had immense rhetorical value in gaining recognition of women's rights as human rights in the international arena, it is still difficult to see any actual improvement in the lives of the world's women.[9] It is, in fact, arguable that in some areas, such as reproductive control, the situation of women has actually declined since women's rights have begun to be more widely asserted.[10] Thus, it does not appear that feminist campaigning has yet changed the way in which mainstream 'male' rights are interpreted. This could, of course, simply be a result of the time it will take for feminist ideas to be readily accepted within the mainstream. However, in this article, I wish to raise some new, tentative concerns about why a recharacterisation of the traditional canon of human rights to include women and their concerns effectively may be more difficult than has so far been suggested.

Feminist theorists who argue that international human rights are gendered and can be recharacterised to include women implicitly accept that the subject of human rights law can be either male or female, despite the fact that human rights have traditionally developed according to masculine characteristics. In this article, I will argue that the feminist project needs to take a further step and actually interrogate the construction of the *subject* in international law. Human rights are not only gendered; they are also sexed, as the subject of international human rights law has been constructed with a male body. In the process, I hope that this analysis will demonstrate why a simple recharacterisation of rights is not enough in itself to include women.

I will begin by focusing on the issue of reproductive rights and examining feminist attempts to recharacterise mainstream human rights in order to have reproductive rights accepted as human rights. This will demonstrate the real practical difficulties involved in a recharacterisation of 'men's' rights. Next, I will attempt to show that such practical difficulties are inevitable, as theoretically the subject of human rights law is male. This will involve engaging in the process of 'sexing the subject of law'[11] and demonstrate how the mind/body dichotomy has come to be incorporated in

9 For example, women's rights were specifically recognised for the first time by the United Nations (UN) at its World Conference on Human Rights in Vienna in June 1993. See Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc A/CONF.157/24 (1993), § 18, which specifically recognises 'the human rights of women' as an 'inalienable, integral and indivisible part of universal human rights'.

10 Wright S 'Human Rights and Women's Rights: an Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women' in Mahoney K and Mahoney P (eds) *Human Rights in the Twenty-First Century* (M Nijhoff, Boston, 1993) p 76.

11 See Naffine N and Owens R 'Sexing Law' in Naffine and Owens (eds) above note 3, p 3.

human rights law. Finally, I will propose some preliminary implications of the sexing project for the future recognition of women's rights and some issues that will need to be examined further if women are to be recognised as complete subjects in human rights law in the future.

Reproductive rights as human rights?

Although the denial of reproductive rights to women may not appear at first to have the dramatic or urgent quality of some human rights violations, such as genocide or the torture of political prisoners, it is the cause of millions of deaths as well as serious illness and disability in women every year. More than 585,000 women, or one every minute, die each year from pregnancy-related causes, with about 200,000 of these maternal deaths resulting from the failure or lack of information concerning contraception.[12] The majority of these deaths occur in developing countries, where maternal mortality is 13 times higher than in industrialised countries.[13] At least 7 million women suffer serious health problems and as many as 50 million women suffer some health problems after childbirth.[14] In many developing countries, over one quarter of all deaths of women of reproductive age are pregnancy-related.[15] Over 350 million women do not have access to safe and effective contraception.[16] As a result, of the nearly 175 million pregnancies each year, as many as half are unwanted or ill timed.[17] This, in turn, leads to some 20 million unsafe abortions just in the developing countries, or one unsafe abortion for every seven births, leading to no less than 70,000 women's deaths and long term ill health for at least 1 million others.[18]

However, despite these statistics, the issue of reproductive self-determination and the concept of reproductive rights to protect it are relatively new subjects in international human rights law. In fact, the call for the explicit recognition of women's reproductive rights as human rights only emerged as a high priority in the

12 United Nations Population Fund, *The State of World Population 1999: 6 Billion A Time for Choices* (1999) ch 3, citing World Health Organisation and United Nations Children's Fund *Revised 1990 Estimates of Maternal Mortality* (1996) UN Doc.WHO/FRH/MSM/96.11 and UN Doc.UNICEF/PLN/96.1.

13 Above note 12.

14 Above note 12 citing World Health Organisation *Global and Regional Estimates of Incidence of Mortality Due to Unsafe Abortion with a Listing of Available Country Data* (1998) UN Doc.WHO/RHT/MSM/97.16.

15 Above note 12.

16 Above note 12.

17 Above note 12.

18 Above note 12.

international human rights arena in recent years as a result of the 1993 World Conference on Human Rights in Vienna,[19] the 1994 Conference on Population and Development (ICPD) in Cairo,[20] and the Fourth World Conference on Women (FWCW) in Beijing in 1995.[21] This focus has been further demonstrated by the recent 'Cairo+5' update on the progress made in the five years since the ICPD in Cairo.[22]

The ICPD and the FWCW emphasised reproductive health as the key concept underlying reproductive rights.[23] Reproductive health was defined in the *ICPD Programme of Action* as 'a state of complete physical, mental and social self-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes'.[24] Within this definition, three general objectives are recognised: meeting the need for family planning; reducing maternal mortality; and preventing and treating reproductive tract infections and sexually transmitted diseases, including HIV/AIDS.[25]

The focus on reproductive health as the primary reproductive rights issue emerged as part of the fundamental reappraisal of health as a human rights issue since the mid-1980s, largely as a response to the emergence of the HIV/AIDS health crisis.[26]

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19 See *Vienna Declaration and Programme of Action*, above note 9.

20 See ICPD Secretariat *ICPD Programme of Action* UN Doc A/CONF.171/13 (1994).

21 See *Beijing Declaration and Platform for Action* UN Doc A/CONF.177/20 (1995).

22 Report of the Secretary General *Twenty-first special session of the General Assembly for an overall review and appraisal of the implementation of the Programme of Action of the International Conference on Population and Development* UN Doc.A/54/442 (1999).

23 See *ICPD Programme of Action*, above note 20 Ch VII ('Reproductive Rights and Reproductive Health'); *Beijing Platform for Action*, above note 21 §§ 89-111 ('Women and Health').

24 *ICPD Programme of Action*, above note 20 § 7.2.

25 Report of the Secretary General *Proposals for Key Actions for the further implementation of the Programme of Action of the International Conference on Population and Development* UN Doc.E/CN.9/1999/PC/4 at § 59 (1999).

26 Hendriks A 'The Right to Health: Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: the Economic Covenant and the Women's Convention' (1995) 44 *American University Law Review* 1123, 1124. In September 1994, the first international conference on health and human rights was organised by the Francois-Xavier Bafnaud Center for Health and Human Rights in Cambridge, Massachusetts: see Hendriks at 1125. Also, the first journal on health and human rights was launched in 1995: *Health and Human Rights*. HIV/AIDS remains the biggest public health problem in the world today, particularly in sub-Saharan Africa, where 20.8 million people are infected: see United Nations Population Fund, above note 12.

As a consequence, much of the writing that has emerged on women's reproductive rights has focused on the issue of reproductive health to the exclusion of other reproductive issues.[27] Nevertheless, it is clear that the underlying concern of the focus on reproductive health is to empower women to *control* their own fertility and sexuality with maximum choice and minimum health problems with the assistance of adequate and comprehensive reproductive information and services.[28] Women themselves, it is argued, should be able to make their own decisions concerning their bodies and should be able to decide for themselves whether or not to bear children. Understood in this way, the concept of reproductive rights can be seen to include much more than simply the right to reproductive health. I therefore prefer to focus on the wider right to reproductive self-determination, or the right to reproductive freedom, as the most fundamental right encompassed by the phrase 'reproductive rights'. This right to reproductive self-determination includes rights relating to reproductive health, but also includes additional rights relating to reproductive security and sexuality, reproductive equality, and reproductive decision-making.[29]

In the following section I will examine how feminist theorists, in challenging the gendered nature of the international human rights system, have asserted that the right to reproductive self-determination can be recognised within traditional human rights documents if the appropriate rights are identified and then recharacterised and reinterpreted to include women.[30] The instruments I shall focus on make up the so-called 'International Bill of Rights', being the Universal Declaration on Human Rights

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27 See, for example, Chapman A 'Monitoring Women's Right to Health Under the International Covenant on Economic, Social and Cultural Rights' (1995) 44 *American University Law Review* 1157; Coliver S (ed), *The Right to Know: Human Rights and Access to Reproductive Health Information* (University of Pennsylvania Press, London, 1995); Fathalla M 'The Impact of Reproductive Subordination on Women's Health: Family Planning Services' (1995) 44 *American University Law Review* 1179; Gilbert L 'Rights, Refugee Women and Reproductive Health' (1995) 44 *American University Law Review* 1213; Hendriks, above note 26.

28 See, for example, Cook R, 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University Law Review* 975 at 976; Plata M I 'Reproductive Rights as Human Rights: The Colombian Case' in Cook R (ed) above note 1, p 515.

29 Cook R *Women's Health and Human Rights* (World Health Organization, Geneva, 1994) p 19-43; Cook R 'International Protection of Women's Reproductive Rights' (1992) 24 *New York University Journal of International Law and Politics* 645; Cook R 'Human Rights and Reproductive Self-Determination' above note 28.

30 This is not just something advocated by feminist theorists. Paragraph 7.3 of the *ICPD Programme of Action* states that 'reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents'.

(UDHR),[31] the International Covenant on Civil and Political Rights (ICCPR),[32] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[33] In the process, I shall attempt to demonstrate the immense difficulties involved in such a task. In the subsequent section, I will then examine these difficulties in more detail and suggest that they highlight fundamental inadequacies in current feminist analyses.

Recognition of reproductive rights within the International Bill of Rights

The task of identifying the rights within traditional human rights instruments that could be used to justify women's rights to reproductive self-determination is not clear cut, as women's reproductive interests often cross the boundaries that separate one legally defined right from another. Reproductive rights must therefore be seen as an aggregate of various human rights that are found in these international human rights instruments.

As previously stated, the rights that would be relevant to the recognition of the right to reproductive self-determination within the traditional canon of human rights relate to reproductive security and sexuality, reproductive health, reproductive equality, and reproductive decision-making.[34] As the process of canvassing all the related rights would be lengthy, I shall instead examine the rights relating to one of these areas, namely reproductive security and sexuality, to demonstrate how the traditional construction of these rights obscures the harms suffered by women and the complexities involved in attempting to recharacterise these rights to include women.[35] This will also demonstrate the kind of process that the other rights that constitute women's right to reproductive self-determination would need to undergo.

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31 Universal Declaration on Human Rights, GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948).

32 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976).

33 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, 6 ILM 369 (entered into force 3 January 1976).

34 My analysis here is largely based on the work of Rebecca Cook, one of the leading feminist legal advocates for reproductive rights: see Cook R 'International Protection of Women's Reproductive Rights' above note 29; Cook R 'Human Rights and Reproductive Self-Determination' above note 28.

35 This has also been examined in a different context by Hilary Charlesworth: see Charlesworth H 'Taking the Gender of Rights Seriously' in Galligan B and Sampford C (eds) *Rethinking Human Rights* (Federation Press, Leichhardt, 1997) Ch 3.

Rights relating to reproductive security and sexuality

The right to reproductive security and sexuality can be understood as depending on respect for the right to life, the right to liberty and security of the person, the right to freedom from torture and ill-treatment, the right to marry and found a family, and the right to enjoyment of private and family life. In order to guarantee a woman's control over her body, and thus her control over issues such as contraception, abortion and the spacing of children, it is probable that these rights would need to be asserted in combination.[36]

(a) Right to life

The most obvious human right violated by avoidable maternal death is a woman's right to life. This right is integral to treaties that protect civil rights, and is found in art 6(1) of the ICCPR, reflecting art 3 of the UDHR.[37] This right, however, has been traditionally interpreted to mean the right not to be deprived arbitrarily of one's life, in the immediate context of the obligation of states to ensure that courts observe due process of law before capital punishment is imposed.[38] The right has therefore been traditionally concerned with the arbitrary deprivation of life in the public sphere through public action, in which it is principally men who are harmed.[39] Cook has argued that the right is understood in this way because men consider state execution more immediate to them than death caused by pregnancy or labour.[40] This interpretation also ignores the historical circumstances of women, in that capital punishment cannot usually be applied to pregnant women.[41]

These concerns starkly highlight the public/private dichotomy that exists in international human rights law, and international law in general. Critique of the public/private distinction has been central to feminist work on the gendered nature of human rights.[42] In essence, this critique asserts that the human rights framework

36 Cook R 'International Protection of Women's Reproductive Rights' above note 29 at 653.

37 Also see, for example, European Convention for the Protection of Human Rights and Fundamental Freedoms, 26 November 1987, 27 ILM 1152, art 2; American Convention on Human Rights, 22 November 1969, 9 ILM 673, art 4; African Charter on Human and Peoples' Rights, 27 June 1981, 21 ILM 58, art 4.

38 See Sieghart P *The International Law of Human Rights* (Clarendon Press, Oxford, 1983) pp 128-34.

39 See Charlesworth H, above note 35, p 41.

40 Cook 'International Protection of Women's Reproductive Rights' above note 29 at 689.

41 Above note 40.

42 See, for example, Charlesworth H 'The Public/Private Distinction' above note 1; Charlesworth H 'Worlds Apart: Public/Private Distinctions in International Law' in Thornton M (ed) *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) 243; Charlesworth H, Chinkin C and Wright S, above note 1; Romany C 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook R (ed) above note 1, p 85.

construes the civil and political rights of individuals as belonging to public life, while neglecting to prevent the infringement of those rights in the private sphere of familial relationships. This dichotomy is a gendered one, as the public realm protected by human rights law of the workplace, the law, economics, politics and civil society, where political power and authority is exercised, is regarded as the natural province of men. On the other hand, the private world of the home, the family and children, which has not traditionally been protected by international human rights law, is regarded as the natural province of women. Issues concerning reproduction are thus designated as 'private', or matters of nature, and outside the regulatory regime of international human rights law.

Challenging this dichotomy would require a fundamental reconsideration of the scope of application of international law. Despite the magnitude of this task, it is implicit in the argument of many feminist theorists that the public/private distinction can simply be 'collapsed' if human rights are recharacterised to incorporate the private sphere and thus include women.[43] Hope for such a broader interpretation in relation to reproductive self-determination and the right to life has been identified in comments of the UN Human Rights Committee.[44] In 1989, this committee stated that 'the right to life has too often been narrowly interpreted. The expression "right to life" cannot be properly understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.'[45] The committee also expressed the view that it was desirable for state parties to the ICCPR to take 'all possible measures' to reduce infant mortality and to increase life expectancy.[46] It has been argued that a compatible and complementary goal to this is the reduction of maternal mortality.[47]

43 Contrast with Engle K 'After the Collapse of the Public/Private Distinction: Strategising Women's Rights' in Dallmeyer D (ed) above note 8, p 143, who argues that the retention of the 'private' might be liberating for women.

44 See Coliver S 'The Right to Information Necessary to Reproductive Health and Choice Under International Law' in Coliver (ed) above note 27, pp 38, 49-50; Cook 'International Protection of Women's Reproductive Rights' above note 29, at 689-90; Cook 'Human Rights and Reproductive Self-Determination' above note 28 at 993.

45 Human Rights Committee, General Comment 6 on art 6, UN GAOR Hum Rts Comm, § 5, UN Doc CCPR/C/21/Rev.1 (1989).

46 Above note 45.

47 Cook 'International Protection of Women's Reproductive Rights' above note 29 at 689-90. Cook *Women's Health*, above note 29, p 24.

Cook argues that if the right to life were interpreted more broadly in this manner, with the influence of feminist methodologies,[48] the right could be used to assert the need for comprehensive reproductive health care services, including contraceptive services and requested terminations for life-endangering pregnancies.[49] The lives protected by these measures would also include those of dependent young children, whose own survival is often prejudiced by the deaths of their mothers.[50] Prenatal care and information about the risks of pregnancy would also reduce maternal mortality and could be included under the right to life as well.[51]

(b) Right to liberty and security of the person

The right to liberty and security of the person is found in art 9(1) of the ICCPR, which is based on art 3 of the UDHR. It has been argued that this right could serve the state's negative interest of non-interference in an individual's pursuit of means to limit, or to promote, fertility.[52] On this interpretation, the right could be used to recognise a woman's right to reproductive choice as an essential element of her personal integrity and liberty. The right could then protect women from government population control programs which compel sterilisation and abortion, and from situations where states force women to conceive against their will. The violation of liberty and security could also be said to occur where a state denies women access to means of fertility control and leaves them to risk unwanted and unintended pregnancies.[53]

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48 See Cook 'Human Rights and Reproductive Self-Determination' above note 28 at 994.

49 In terms of the assertion of the right to life as supporting women's reproductive rights, a question may be raised concerning whether a pregnant woman's right to life is limited by a right to life of the foetus. However, it is not generally accepted that the international human rights conventions apply before the birth of a human being. For example, art 6(1) ICCPR refers to the right belonging to every 'human being'. (Compare this with art 4(1) American Convention, which protects life 'from the moment of conception'. However, even this right has been held to be inapplicable to abortion.) Thus, this argument should not operate to restrict a woman's assertion of the right to life supporting her claim to reproductive self-determination. (But note *Patton v UK*, App No 8416/78, 3 Eur HR Rep 408 (1981), an abortion case where the woman's right to life was balanced against that of the foetus.)

50 Cook 'Human Rights and Reproductive Self-Determination', above note 28 at 994.

51 Coliver, above note 44, p 50.

52 This right, protected in art 7 of the Canadian Charter of Rights and Freedoms, was held to be violated by the restrictive criminal abortion law of the Supreme Court of Canada: see *Morgentaler* (1988) 44 DLR (4th) 385, cited in Cook 'International Protection of Women's Reproductive Rights' above note 29 at 183 and 696.

53 Cook 'International Protection of Women's Reproductive Rights' above note 29 at 696.

However, for the right to liberty and security to be understood in this way, a radical reinterpretation of the right would be needed. As with the right to life, this right is essentially male-oriented, in that it primarily applies to liberty and security in the public sphere, referring specifically to the right to be free from arbitrary arrest or detention and due process undertaken by a court of law.[54] The problems associated with challenging the public/private distinction would therefore also apply if this human right were recharacterised to include women.[55]

(c) Right to freedom from torture and ill-treatment

The right to freedom from torture or cruel, inhuman or degrading treatment is found in art 7 of the ICCPR, reflecting art 5 of the UDHR. It has been argued that this right could be utilised by women in the context of the provision of medical interventions and the denial of desired medical care, making particular reference to the sentence in art 7 of the ICCPR which provides that '[i]n particular no one shall be subjected without his free consent to medical or scientific experimentation'. This understanding would be significant to women's reproductive health care as it furnishes grounds to oppose the cruelty and inhumanity of compelling a woman to continue a pregnancy which endangers her life or health, as well as grounds to oppose the maltreatment of children in such practices as female genital mutilation.[56]

However, this understanding would require a considerable amplification of current interpretations of the right. Again, as a paradigm civil right, it has traditionally been applied to state actions against men which take place in the public realm, and again, this interpretation would need to be challenged for women's reproductive rights to be successfully asserted.[57]

It has also been argued on the basis of feminist critiques of the public/private distinction in international law that the right to freedom from torture can be applied in the context of gender-based violence against women which violates women's sexual and reproductive integrity.[58] Private conduct does not directly incur the

54 See ICCPR art 9.

55 See above notes 42-3 and accompanying text.

56 Cook 'International Protection of Women's Reproductive Rights', above note 29 at 699.

57 Charlesworth H 'Women's International Human Rights', above note 2 at 72. Also see above notes 42-3 and accompanying text.

58 See, for example, Copelon R 'Intimate Terror: Understanding Domestic Violence as Torture' in Cook (ed) above note 1, p 116; Etienne, above note 6 at 156-9; MacKinnon, above note 1.

responsibility of states under international law, and feminists have argued as part of their critique of the public/private dichotomy that this serves to obscure and legitimate men's domination of women in the private sphere, with the result that notions of imputability and state responsibility at international law need to be rethought.[59] As states have been held responsible for violations of human rights that individuals suffer at the hands of other individuals where the states have failed to take appropriate preventative action, including punitive measures against such violations,[60] such a shift may be possible. However, if this were to extend to the recognition of a woman's right to reproductive self-determination, it would involve the same problems in challenging the public/private distinction as I have previously discussed.[61]

(d) Right to marry and found a family

The right to marry and found a family is found in slightly different forms in art 23 of the ICCPR and art 10 of the ICESCR, based on art 16 of the UDHR. All recognise the family as the 'natural and fundamental group unit of society'.[62] Article 23(2) of the ICCPR also states that '[t]he right of men and women of marriageable age to found a family shall be recognised', while art 10(2) of the ICESCR states that '[s]pecial protection should be accorded mothers during a reasonable period before and after childbirth'.

The recognition of the right to found a family was originally a reaction against the Nazi policies in the mid-20th century that prohibited marriage across racial and other lines.[63] Given this background, the right has not yet been applied to promote the reproductive freedom of women in family matters. However, there are signs that such an application would be possible. For example, the UN Human Rights Committee has stated, in relation to art 23 of the ICCPR:

> [t]he right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.[64]

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59 Above. Also see Charlesworth H, Chinkin C and Wright S, above note 1 at 628-30; Romany, above note 42.

60 See, for example, *Velasquez Rodriguez v Honduras* 28 ILM 244 (1989).

61 See above notes 42-3 and accompanying text.

62 UDHR art 16(3); ICCPR art 23(1); ICESCR art 10(1).

63 See generally Eriksson M, *The Right to Marry and Found a Family: A World-Wide Human Right* (Iustus Förlag, Uppsala Sweden, 1990).

64 Human Rights Committee, General Comment on art 23, UN GAOR Hum Rts Comm, UN Doc CCPR/C/21/Rev.1/Add.2 (1990).

Cook argues that in terms of supporting a woman's right to reproductive security, the right to found a family implicates rights at opposing ends of the fertility scale, from untimely fertility to infertility.[65] She argues that the right to found a family is inadequately observed if it amounts to no more than the right to conceive, gestate and deliver a child, but should also be interpreted as involving the right of a woman to positively plan, time and space the births of children to maximise their health and her own.[66] In addition, this right can be seen to complement a woman's right to life or right to survive pregnancy by being interpreted to incorporate the right to maximise the survival prospects of a conceived or existing child through birth spacing by contraception or abortion.[67]

It might be thought that this right, especially as manifested in the ICESCR, transcends the dichotomy between public and private by recognising the 'family'. However, the public/private dichotomy is still present, as the 'family' as a social unit is recognised, but the power relationships present within the family structure, under which women are routinely subordinated, remain unchallenged.[68] In addition, the recognition of the right to found a family was predictably based on a connection between family and marriage. Therefore, the construction of women as married mothers in the private sphere is a constant, unarticulated theme underlying this right.[69] In this way, as Wright has argued, the primacy accorded to protection of the family in human rights law, which is reflected in this right, actually operates to the detriment of women's reproductive rights by reinforcing the concept that the position of women is a private one.[70] It also allows attempts to protect women to be considered 'interference' within the protected private realm of the family.

The right that special protection be accorded to mothers during a reasonable period before and after childbirth in art 10(2) of the ICESCR is also problematic,

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65 Cook 'International Protection of Women's Reproductive Rights', above note 29 at 700.

66 Above. Also see Convention on the Elimination of all Forms of Discrimination Against Women, above note 4, art 16(1)(e), which expands on this by requiring all states to ensure that women enjoy 'rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'.

67 Cook 'International Protection of Women's Reproductive Rights', above note 29 at 701-2.

68 See, for example, Charlesworth 'Human Rights as Men's Rights' above note 2, p 108; Charlesworth 'Women's International Human Rights' above note 2, p 74-5.

69 Whitty N 'The Mind, the Body and Reproductive Health Information' (1996) 18 *Human Rights Quarterly* 224 at 227.

70 Wright, above note 1 at 261-3.

as it evokes an image of women as lacking control and needing protection. This paternalistic construction detracts from the essential claim involved in asserting reproductive rights that women themselves should have control over their own bodies and fertility. As a result of these problems, the successful reinterpretation of this right to support women's reproductive self-determination would be extremely complex.

(e) Right to enjoyment of private and family life

The right to enjoyment of private and family life is found in art 17 of the ICCPR, reflecting art 12 of the UDHR. Although at first glance it appears to be similar to the right to found a family, the right instead implicates more the right to liberty and security of the person, discussed above. Thus, it is again arguable that the right is essentially male-oriented, as it was designed to protect men in the private sphere from arbitrary interference by government, and involves similar problems in relation to the public/private distinction as have been discussed previously.[71]

However, although the core of this right is the right to be free from arbitrary government interference, international authorities have recognised that governments may also in certain circumstances have positive obligations to ensure the respect of private life.[72] If successfully asserted in the context of reproductive rights, this would mean that women would have the right to make informed decisions about whether and at what age to have sexual relations, and whether to use contraception and in what form, which would require the positive obligation of the government to refrain from coercion, undue inducement, and interference with access to information and services.[73]

Some feminist theorists have, however, questioned the appropriateness of utilising the right to privacy to support women's right to reproductive self-determination.[74]

71 See above notes 42-3 and accompanying text.

72 See Coliver above note 44, p 53. For instance, the European Court of Human Rights has noted in relation to the right to respect for one's private and family life in art 8 of the European Convention that 'although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State's margin of appreciation': *Rees v United Kingdom* European Court of Human Rights, 17 October 1986, Series A no. 106, § 35.

73 Above note 54.

74 Compare with Engle above note 43, who argues that the 'private' could have liberating potential for women in the area of abortion, as the language of privacy could be the most appropriate way to theorise women's sexuality in legal terms.

This is particularly the case in relation to abortion, where the right to privacy has also frequently been asserted to justify women's right of access to abortion.[75] It has been argued that by basing a woman's right to abortion upon the right to privacy and the notion of the private sphere, it is possible to avoid any duty to ensure that women can, as a practical matter, have access to abortion services.[76] For this reason, in the United States abortions need not be funded by Medicaid programs,[77] and before they were reversed by government policy, regulations preventing publicly funded clinics from advising patients about abortion were upheld as valid restrictions on a woman's 'right' to abortion.[78] This further problem means that the right to privacy may be the least appropriate right of all those examined on which to base an argument for a woman's right to reproductive freedom.

Practical and theoretical problems with the recognition of reproductive rights within mainstream international human rights law

As the preceding analysis has demonstrated, in order for the traditional canon of human rights to be relevant to women and protect their reproductive self-determination, the rights examined would need to be profoundly recharacterised. I have argued that this process would be a difficult one involving a number of complicating factors. It must also be remembered that in asserting these rights in combination, the difficulties involved with the assertion of one right would be compounded by the difficulties involved in asserting the other rights. There are also other practical problems with the successful assertion of reproductive rights, such as problems involving competing rights claims which often occur when women argue that their reproductive rights have been violated.[79]

The main issue I have endeavoured to highlight is that the primary focus of many feminists in arguing for this recharacterisation of rights to address their gendered nature is to challenge the public/private dichotomy. The critique of this dichotomy

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75 See, for example, Michel A 'Abortion and International Law: The Status and Possible Extension of Women's Right to Privacy' (1981-2) 20 *Journal of Family Law* 241.

76 Graycar R and Morgan J *The Hidden Gender of Law* (Federation Press, Leichhardt, 1991) p 210.

77 See *Harris* 448 US 297.

78 *Webster* 492 US 490. Also see Walker K 'An Exploration of Art 2(7) of the UN Charter as an Embodiment of the Public/Private Distinction in International Law' (1994) 26 *New York University Journal of International Law and Politics* 173 at 186-95.

79 See, for example, Walker, above note 78 at 194-5. Walker notes one stark example of this where religious freedom is invoked by Catholic States such as Ireland to deny a woman's right to abortion, an argument that has not been challenged at international law.

is their primary theoretical tool, and it is implicit in their analyses that reproductive rights will be successfully asserted by women when this dichotomy is dismantled. The striking fact is, however, that as yet, there has been no real change in how the traditional canon of human rights is interpreted at the international level as a result of the feminist critique of the public/private distinction. Not only does this suggest that the actual recharacterisation of human rights to include women is far from won, but I would argue that it also suggests that the feminist critique of the public/private dichotomy may be inadequate as the principal theoretical device to explain the exclusion of women from human rights law.

These arguments about the reinterpretation of rights appear to assume implicitly that the subject of human rights law can be either a man or a woman, despite the fact that it is only men who have traditionally been regarded as subjects. Feminists must also interrogate this assumption to determine whether women can be actual subjects before international human rights law, before asking whether the abstract rights themselves can be reinterpreted. In the following section, I will make some preliminary suggestions concerning this process. In particular, I will interrogate the subject of international human rights law by 'sexing its subject'.[80] This will involve an analysis of how the mind/body dichotomy has been incorporated into human rights discourse and will reveal that not only are human rights gendered; they are also sexed. The result of this is that the subject of international human rights law is not an abstract individual as is commonly asserted, but has been constructed as a man, and therefore with a male body. I will then examine the implications of this for the recognition of women's reproductive rights within mainstream human rights discourse.

Sexing the subject of human rights law

The project of sexing the subject of law and examining the place of the body within law has recently become a fashionable activity, especially within feminist jurisprudence, as it offers a new method of examining problems related to women and the law and fruitful avenues for future change.[81] Law in general has always presupposed and constituted a subject, yet missing from legal theory has been a critical evaluation of this subject, especially its sexing.[82] Although this project has not

80 See Naffine and Owens, above note 11, p 6.

81 See Naffine and Owens (eds) above note 3; Cheah P, Fraser D and Grbich J (eds) *Thinking Through the Body of the Law* (Allen and Unwin, St Leonards, 1996).

82 Above note 81 p 7.

yet been undertaken in relation to human rights, it is a particularly fertile area for studying the subject of law, as it is the one area of international law that explicitly poses the individual as the subject, or bearer, of rights.[83]

In order to sex the subject of human rights, or unmask the sex of its subject, I will be asking two interrelated questions.[84] The first is 'What is the place of the body in humans rights discourse?' The second question is then, of course, 'What is its sex?'

Place of the body in human rights discourse

In order to understand the place of the body within human rights discourse, it is necessary to examine the traditional foundations from which this discourse emerged. The UDHR, as the foundation instrument of current human rights, does not refer to any underlying philosophy of human rights, nor do the ICCPR or the ICESCR. However, it is generally accepted that current understanding of human rights and the modern capacity for individuals to assert rights are historically and culturally specific concepts that first emerged in the 17th and 18th centuries as part of the broad Enlightenment political discourse of liberalism espoused by such writers as John Locke and John Stuart Mill.[85]

The influence of liberalism has led to a distinct understanding of the mind and the body within modern human rights discourse. One of the central tenets of liberalism is that humans are naturally free, equal, autonomous, and rational beings.[86] All of these characteristics emphasise the primary ability to *reason* that is fundamental to the concept of the individual.[87] Kant, for example, was convinced that what

83 There has been a small amount of feminist work on the state and embodiment: See Knop K 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293; Charlesworth H 'The Sex of the State in International Law' in Naffine and Owens (eds) above note 3, p 251.

84 Following the approach used by Ngaire Naffine, Michael Detmold and Rosemary Owens: see Naffine N 'The Body Bag' in Naffine and Owens (eds) above note 3, p 79; Detmold M 'The Common Law as Embodiment' in Naffine and Owens (eds) above note 3, p 95; Owens R 'Working in the Sex Market' in Naffine and Owens (eds) above note 3, p 119. See also Naffine N and Owens R above note 11, p 12.

85 See generally Kingdom E 'Body Politics and Rights' in Bridgeman J and Millns S (eds) *Law and Body Politics: Regulating the Female Body* (Dartmouth, Brookfield US, 1995) p 4-5; Peterson V S 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15 *Alternatives* 303.

86 See, for example, Locke J *The Second Treatise of Government* (first published 1690) in Laslett P (ed) *Two Treatises on Government* (Cambridge University Press, Cambridge, 1992) §§ 4-6 pp 269-70.

87 See Dworkin R 'Liberalism' in S Hampshire (ed), *Public and Private Morality* (Cambridge University Press, Cambridge, 1978) p 113.

constituted our essential personhood was our ability to reason. A century later, Mill confirmed that our ability to make free, rational choices on our own behalf conferred on us our essential humanity.[88]

This freedom and power the individual possesses to make rational choices extends to the individual's own body, as the liberal individual is also a propertied subject, with property in his own body.[89] As Locke states, 'every Man has a *Property* on his own Person. This no Body has any Right to but himself.'[90] This focus on reason as constituting the individual's essential personhood, and enabling an individual to have control over his own body, demonstrates the primacy that has been accorded to the mind, over the body, in liberal political theory. Thus, within liberalism, the human individual is conceptualised as a duality of mind and body, invoking the classic conceptual mind/body dichotomy that has been central to Western philosophical thought since Descartes.[91] Within this dichotomy, the body is constructed as negative and inferior to the mind, with the rational mind able to exercise control over the irrational body.

Within human rights discourse, the extensive influence of liberalism has resulted in a similar understanding of the individual. The individual subject of human rights law is also a creature of reason, with the freedom and power to make his own rational choices regarding life. The rights of the subject derive from this freedom and autonomy, and can be utilised to prevent the state from encroaching upon the area of rational individual action.[92] The fundamental concept of human dignity as underlying the notion of human rights further reinforces the primacy given to the ability of individuals to make rational choices concerning their own lives.[93]

More importantly for my analysis, the mind/body dichotomy has also been incorporated in human rights discourse in a particular way. By focusing on the protection of the individual's ability to make rational choices, human rights gives priority to the protection of the mind over the body. It can be argued that similarly to other areas of law examined in light of the mind/body dichotomy, human rights are concerned principally with the protection of the contents of minds, and only

88 See Kant I *The Metaphysics of Morals* (Cambridge University Press, Cambridge, 1991); Mill J S *On Liberty* (J M Dent and Sons, London, 1910), both cited in Naffine, above note 84.

89 The use of the pronoun 'his' is deliberate.

90 Locke, above note 86, § 27 p 287.

91 See, for example, Kingdom, above note 85, pp 4-5; Naffine, above note 84, pp 80-1.

92 See, for example, Peterson, above note 85 at 310.

93 UN Charter, Preamble; UDHR, Preamble.

secondarily with the actions of bodies.[94] Thus the essence of the person, and the guarantee of its protection, is associated with the mind, abstracted from the body. The supremacy of the mind and the primary focus within human rights discourse on its protection does not mean, however, that the body is completely absent from human rights. In fact, in response to my argument, it could be asserted that one of the aims of human rights is to protect the moral *and physical* integrity of the person. Based on such an argument, the right to be free from torture or cruel, inhuman or degrading treatment could be seen as an example of the protection human rights law accords the body, preserving the inviolability of the individual's body.[95]

However, I would argue that protections accorded to the body in human rights law, such as the prohibition against torture, still implicitly accept the mind/body dichotomy. The reason for this concerns the reception of the liberal idea that the individual owns the property in their own body. As a result of this, the rational, autonomous subject is seen to be the only individual who should be able to control his body. When the body is controlled by another, such as through torture, the individual's mind and capacity for rational choice concerning his own body is overcome, violating his fundamental human dignity. On this basis, it can be argued that the focus of human rights violations such as torture is actually on the psychological trauma suffered through the body as a result of the overbearing of the mind, challenging the autonomy of the individual.

In the following section, I will turn to analyse the body of the individual in human rights law in more detail, in order to show that when the maligned body is present, it is in fact a male body.

Sex of the body in human rights discourse

Much of the recent theoretical and philosophical interest in the mind/body dichotomy has been generated by feminists attempting to understand the ways in which women have been marginalised and subordinated in society.[96] In this work, it has been argued that the relationship between 'man' and 'woman' is homologous with that of 'mind' and 'body'. Men are most commonly characterised as creatures of reason and the mind, while women are associated with 'irrational' corporeality. As a

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94 Naffine and Owens, above note 11, p 12.

95 UDHR Art 5; ICCPR Art 7. Also see above fn 56-61 and accompanying text.

96 See, for example, Butler J, *Bodies that Matter* (Routledge, New York 1993). For a brief summary of feminist encounters with the mind/body dichotomy, see Cranny-Francis A, *The Body in the Text* (Melbourne University Press, Carlton South Victoria, 1995).

result, it is argued that the mind/body dichotomy has operated conterminously with the subordination of women.

The association of woman with body has a long and prominent history in Western thought. In fact, the origin of the idea of woman as body can be traced back to Aristotle's theories of generation and sex distinction.[97] However, the association of woman with body was most strongly asserted between the 17th and 19th centuries in Europe with the rise of scientific discourse, mirroring the rise of current understandings of human rights.[98] This discourse produced the 'knowledge' that women were governed by their reproductive capacities, with their menstrual periodicity signalling an unstable, and irrational, bodily economy. In addition, reproduction itself was categorised as an irrational activity, requiring neither creativity nor reason on the part of women.[99] Irrational women thus came to be associated with the unruly body, while men as rational autonomous creatures came to be associated with the mind.[100]

Given this analysis of the construction of woman as body, it may appear contradictory to suggest that the body within human rights discourse is male. However, in relation to legal discourse, and for our purposes human rights discourse, the result of the construction of woman as body was that men as mind, with the fundamental characteristic of reason, were constituted as legal subjects. Women on the other hand, essentialised as unruly body, were confined away from the law in the private realm of the family where they could be controlled and regulated by the reasoned mind of man and denied subjecthood before the law. As woman as body is confined to the private sphere, when the body is present in the public domain, it is then implicitly a male body both materially and practically.[101] Although theoretically abstract from his body, the invisibility of the female body

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97 See Lange L 'Woman is not a Rational Animal: On Aristotle's Biology of Reproduction', in Harding S and Hintikka M (eds) *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Kluwer Boston, Dordrecht Holland, 1983) p 1.

98 See generally Russett C *Sexual Science: The Victorian Construction of Womanhood* (Harvard University Press, Cambridge Massachusetts 1989); Tuana N *The Less Noble Sex: Scientific, Religious, and Philosophical Conceptions of Woman's Nature* (Indiana University Press, Bloomington), Ch 5, 'The Hysteria of Women' pp 93-107.

99 Olsen F 'Do (Only) Women Have Bodies?' in Cheah P, Fraser D and Grbich J (eds), above note 81 pp 209 and 214.

100 This construction of woman as body has been accepted in relation to many domestic laws governing reproduction: see Martin S 'A Woman Centered Approach to Laws on Human Reproduction', in Mahoney K and Mahoney P (eds), above note 10, p 905.

101 Cranny-Francis, above note 96, p 23.

means that the male body is sustained as paradigm.[102] Thus, the subject of law in the public domain does not have an androgynous body, as is commonly assumed, but possesses a male body to complement his male mind. The subject of human rights law, when its sex is unmasked, is male.

This analysis demonstrates that feminists who argue for the recharacterisation of human rights to include women's reproductive rights, by failing to examine the way in which the mind/body dichotomy is incorporated within the law, miss the crucial point that the subject of human rights law is male. Arguably, it is this male subject that must be challenged if women's claims to rights are to be included within the mainstream of international human rights law. This analysis also shows how the mind/body dichotomy actually precedes and lays the foundations for the public/private dichotomy, as it is woman as body who has been relegated to the private sphere. What does this then mean in practice for the recognition of reproductive rights as human rights?

Implications of the sexing project for the recognition of reproductive rights as human rights

The practical result of the sexing of the subject of human rights as male is that the particularity of women's bodies has not been attended to within human rights law. If women want to be recognised as subjects, they must forsake their bodily specificity and align themselves with the universal male body for recognition.[103] This explains why women are protected by human rights law when the injuries they suffer are analogous to those suffered on a male body, such as genocide, or detention without trial. However, as soon as the harm suffered involves women's bodies in particular, such as in the case of reproductive rights violations, the harm cannot be analogised to that suffered by a male body and women are left effectively unprotected by the law. This also explains the historical absence of reproduction as a central concern within human rights discourse. As it is not an issue affecting the male body, it has not been seen as an important issue warranting protection.

The argument for the recharacterisation of rights to include women arguably reinforces the mind/body dichotomy through failing to consider it specifically. As stated previously, the underlying concern of feminist assertions of reproductive rights for women is that women should be able to control their own bodies. This

102 Lacey N, 'On the Subject of "Sexing" the Subject', in Naffine and Owens (eds), above note 3, pp 65 and 73.

103 Beveridge F and Mullally S, 'International Human Rights and Body Politics' in Bridgeman J and Millns S, above note 85, pp 240 and 244.

focus on control is a clear attempt to counter the construction of women as body, or as irrational and incapable of making prudent decisions concerning their bodies. Arguing that reproduction does require rational decision-making of which women are capable thus challenges the male view of reproduction as a natural process.[104] However, as I have examined, the notion of being able to control one's own reproduction, and thus one's own body, is formulated from within a discourse that fails to acknowledge the mind/body dichotomy.[105] The fight for reproductive rights on the basis of control thus involves the use of a double-edged sword.[106] Rather than challenging the mind/body dichotomy, one remains dependent upon it, for by arguing for a shift in control, the belief in body as object is reaffirmed.[107] In addition, the focus upon control does not question the sex of the subject, but assumes that if women act like men and assert control over their bodies as men have done for so long, they can be subjects. However, the subject has a male body, and there is no way this argument can be successful, in subsuming women's body within that of man, without doing some violence to women's image.[108]

In practice, however, where it would lead us to challenge the current construction of the mind/body dichotomy is unclear. I am not arguing that it should be reversed, given that women have been associated with the body for too long, and to reverse the dichotomy may simply serve to reinforce this construction.[109] The answer, therefore, must lie in displacing the mind/body dichotomy completely. This is a grand statement, and indeed may be impossible in a practical sense given the entrenched nature of the dichotomy in Western thought. However, it is also a necessity if women are to be included as full subjects within international human rights law. In theoretical terms, displacing the dichotomy may involve an alternative understanding that the bodily self is an integral part of the mental self, operating not in opposition or duality but in harmony.[110] This could be referred to

104 Olsen, above note 99, p 214.

105 Hadd W 'A Womb with a View: Women as Mothers and the Discourse of the Body' (1991) 36 *Berkeley Journal of Sociology* 165 at 165.

106 Kingdom, above note 85, p 6.

107 Hadd, above note 105 at 166-7.

108 Thornton M 'Historicising Citizenship: Remembering Broken Promises' (1996) 20 *Melbourne University Law Review* 1072 at 1074.

109 Contrast with Smart C *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications, London, 1995), who appears to argue that the association of woman with body need not necessarily be negative. She states that '[i]t is this reduction of woman to sex/body that is a source of anger, not because women want to be appreciated for their minds or be disembodied, but because of the meanings currently attributed to embodiment' p 222.

110 Hadd, above note 105 at 167-73.

by a concept such as 'embodied subjectivity',[111] or 'the embodiment of mind',[112] allowing the mind to have a presence but only in and through the body. In practical terms, this would mean that arguments for reproductive rights would need to be reframed to link the mind and the body. For example, it could be argued that women should have a right to abortion, not because women have the right to control their own bodies, but because they have a right to choose what experiences they will or will not live through their bodies.[113] This recognises that a decision whether to abort or bear a child involves not just the physical, but also the emotional and mental state of a woman.

The recognition that we are embodied beings could also offer some fruitful prospects for human rights theory more generally. The fact that we are embodied beings should serve to remind us that we exist originally with others, and that human autonomy may be secondary to this.[114] Such an analysis could therefore offer future directions for the full recognition of such rights as collective or group rights within human rights discourse as well as women's rights.

Final reflections: the utility of the sexing project for human rights

For human rights to be truly universal, and thus universally respected, women's rights must be included within the mainstream as legitimate human rights concerns. What I have shown in this article, however, is that it is misguided to think of the process of inclusion as a straightforward, linear one. Interrogating the subject of human rights law, and demonstrating how it is sexed, shows that it may not be as easy to include women as subjects of human rights on their own sexually specific terms as many feminists have suggested.

However, in raising these concerns, I do not wish to suggest that women can never be subjects in their own rights; indeed, this is exactly what feminists have been fighting for. Rather, I would suggest that the mind/body dichotomy in human rights law, and law more generally, must be challenged if women can ever be included as complete subjects. Whether this is practically possible and where it would in fact lead us remains unclear; I have only offered some tentative and preliminary suggestions on future directions. It must also be remembered that the dismantling of

111 See, for example, Lacey, above note 102.

112 See, for example, Detmold, above note 84.

113 Hadd, above note 105 at 167.

114 Cheah P, Fraser D and Grbich J 'Introduction: The Body of Law' in Cheah P, Fraser D and Grbich J (eds), above note 81 at xi, xvi.

the mind/body dichotomy will be no easy matter, as it is such an entrenched concept within the Western understanding of human rights and Western thought more generally. Despite these difficulties, however, it is clear that further consideration must be given to these ideas if women's human rights are really to be understood as 'human rights' in the future. ●