

GENDER AND HUMAN RIGHTS

Some Thoughts and Cautionary Notes

“(...) That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man - when I could get it - and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman? (...)”

SOJOURNER TRUTH, former slave, at the Women's Convention in Akron, Ohio, 1851

<http://womenshistory.about.com/library/bio/bltruth.htm>

“Women are second-class citizens throughout the world. For all the differences among Nations, there are striking commonalities as well. Much of this is a product of Law. Exclusion from political participation; inequality in the ownership of land and in rights of inheritance; restrictions on contraception and abortion – all these and many more, are legal controls”

Cass Sunstein, ‘Gender, Caste and Law’
in Nussbaum and Glover, eds: *Women, Culture and Development*, 1995: 359

The history of Human Rights embodies a non linear, fragmentary inclusion of large groups of people that were excluded from various Declarations or social and political practices. A major and obvious such group is formed by the people we describe as *women*. The United Nations have pursued in various ways a deliberate policy of *advancing the status of women*. From the beginnings of the Organization, it became clear to some that human rights have a *gender dimension*. The more obvious side is women's subordination or, as more commonly put, *discrimination against women*.

The UN Charter 1945 and later, to this day, all major International HR documents promised gender equality, or at least non discrimination. Yet, the UN itself fails to fulfil the obligation to have a fair percentage of women in its top posts, and the first time that a woman opened the debates in the GA happened in the current year of 2011 (President of Brazil, Dilma Rousseff).

Vienna, 1993 is a date to remember: *Women's rights are human rights*. Apparently, this was a not so obvious truism that needed to be said.

But "Gender Issues" is of course a broader concept that reflects the progressive awareness of the fact that both men and women can be limited or victimized by the imposition of gender roles, be it by law or by custom. Child soldiers (and soldiers in general) are predominantly male, and one of the more obvious associations with masculinity is the triad violence/weapons/war. While female genital mutilation has been condemned by all sorts of HR texts, documents and in all sorts of international *fora*, male children circumcision is also being questioned on the grounds of a right to body integrity. Some male athletes were dismayed when they found that the Olympic authorities barred them from competing as synchronized swimmers, considered too 'feminine' a modality. Parental leave has been extended to fathers in many countries and child custody is being fought for by fathers who demand that their parental role be considered as seriously as mothers' role traditionally has been, etc. Sexual orientation or preference has come to the fore as a HR issue in recent years, with courts and laws changing dramatically in some countries (from decriminalization of same sex activities to the possibility of formal marriage¹). So has the supposed immutability of sexual or gender identity, with more and more countries allowing a legal change of sex and the UN or the ECtHR stating sexual identity as a right and including the possibility of change as protected.

Nonetheless, it is fair to accept that the issue of *gender* in human rights instruments and discourse arose from the awareness of the absence or limited protection of *women*. This is also true about *Gender Studies* in general. Masculinities studies followed on Women Studies. The research on the social, economic, political, legal situation of women as a *lower caste* (Cass Sunstein) entailed the investigation of the social construction of *gender relations*. And the social system of gender relations is most deeply marked by an imbalance of power in various spheres of life that, on the whole, predominantly favours men against women. *Some men against some women, of course*. The gender system is not isolated from class, race or any other basis or 'pretext' of domination. Imbalance of power, domination, and discrimination are functions of many variables, intertwined and mutually influential. The official EU policy on non discrimination has notably been insisting on the need to consider *multiple discrimination* a

¹ In 2010, Portugal altered its Civil Code to include same sex marriage. The law had recognized "de facto unions" between two people of same or different sex since 2001. The Constitution included "sexual orientation" as an explicit forbidden ground of discrimination in 2005 – and the lawyers have ever since been discussing its implications. Adoption or artificial insemination are still legally forbidden to same sex couples.

major fundamental rights problem. Things become even more complicated when it comes to *intersectional discrimination* (eg, discrimination against 'black women', or 'immigrant women', or 'Muslim men', or any such combination of factors).

It is important to note that the various social and legal changes that have taken place in recent years have not in general challenged the identification-by-gender (as opposed to what happened with race, most notoriously) or its dual nature. Even if biologists (Fausto-Sterling) or writers (Virginia Woolf) have considered that two sexes are too few for human variation and richness, for common sense as well for the hegemony in scientific and other discourses (legal, most obviously!) two is the only possible number. Now, the history of law and custom suggest that the deviation of the supposedly natural behaviour in gender terms has always been more or less severely repressed, which questions any simple belief in the sheer basis on nature – and finally the inevitability of categorization by gender and its stern dual persistence.

In fact, people do not 'belong' to a gender. They live in a *gender relations system* which associates imbalances of power with natural sex differences. The Law has been a major actor, together with religion, custom, science in the building of a hierarchy, an *imbalanced difference*, between men and women – just as it did (and still does, for sure) in many places and centuries with race or religion.

Gender is not only about individual identity or what a society teaches us a man or woman, boy or girl should be like or how they should behave. Gender is also a way of structuring relations of power - whether that is within families, where the man is often considered the head of the household, or in societies at large, where men tend to be the ones in whose hands political, economic, and religious and other forms of cultural power are concentrated.

EQUALITY, DISCRIMINATION AND RIGHTS

Societies all over the world are marked by imbalanced gender relations. The phenomenon takes quite different shapes and sizes. Anthropology has noticed both its variation and its ubiquity.

In "modern", developed countries, the hegemonic legal and political way of dealing with the perceived imbalance of "Gender" is the framework of an inseparable pair: *Equality* and *Discrimination*. This presupposes that people are naturally men (male) and women (female), that somehow an imbalance has been established between these categories and that Law – and to some extent Politics, including legislation – has to be called upon to correct the asymmetries.

For historical and political reasons, this path has been particularly resorted to in the context of the labour market. The original art. 119 of the Treaty of Rome 1950 (European Economic Community, later European Union) – drafted for fighting unfair competition based on cheap female labour – partly dictated a sharp concentration of EEC policies and directives on (paid) work, employment, salaries and similar issues.

This traditional way of dealing with inequality forgets, among other things:

1. That Law was to a large extent complicit in creating the very inequality that it is supposed to fight;
2. That the very concepts of men and women are historically – and also legally – created by a plurality of discourses, and are normatively endowed with expectations and presuppositions that must be deconstructed;
3. That the philosophical tradition (of Aristotelian origin) that correlates equality and difference does not question the *perception of difference* (who says what is different and why, and on whose authority) and mixes difference with submission;
4. It also fails to see that the problem is not difference, but subordination, domination, exclusion; to put it another way: *hierarchical difference*;
5. Nor does it question the assumption that its reasoning tends to equate male=norm and female=deviance;
6. It tends to consider all men and all women as two homogeneous groups, therefore assuming an essence (*‘Das ewig Weiblich’*) in their nature and features, which is empirically and historically untenable;
7. The concentration on paid work is short sighted and inefficient.

DIFFERENCE, LIKE BEAUTY, IS IN THE EYE OF THE BEHOLDER

What one sees, the beholder’s vision, is shaped by power relations, stereotypes, hegemonic discourse, and common sense. Prejudice and habits, traditions, and personal or common held beliefs – prejudicial conceptions, preconceptions – determine what he/she is able to see and how to interpret it, to give meaning to it.

Discursive power, like all power, is unevenly distributed and complex. The power to determine, to define, to label, to establish difference (the existence and meaning thereof) belongs to few. So does the power to be heard and to establish patterns or rules.

So, treating the “similar” alike and the “dissimilar” (different) unlike (Aristotle) begs the question of what is similar or dissimilar, of who says so and based on what.

It is at best a self-fulfilling prophecy. The same remain the same, the different remain different. At worst, it will create, justify or reaffirm/reinforce power hierarchies that can be extremely harmful to the ones at the bottom, the so called “different”: Jews. Women. Blacks. Gays and Lesbians. Foreigners. The old, the poor, the immigrants, the sick, THE OTHER.

SEX, GENDER. GENDER, SEXUAL ORIENTATION

Sex and gender are supposed to differ: sex is seen as a biological given, gender as a social (cultural) construct. Both tend to be understood as binary categories, leaving intersex or ambiguous gender in a non-normal

category, a pathological deviation from normal healthy people, even if legally permitted (transsexual or transgender legal change). Somehow this vision is transposed to sexual orientation, which tends to be an either-or category, notwithstanding the 'obvious' empirical and conceptual shortcomings. Both gender and sexual (orientation) identities can be construed as a positive reaction to discrimination ('gay pride', 'in a different voice'... just like 'black is beautiful'), but they always reduce a person to one dimension, which is problematic and simplistic. A major site of raising-by-gender is, of course, the family.

FAMILY, FAMILIES: NESTING GENDER RELATIONS

Family and domestication of women

One of the main difficulties in thinking about "the family" is the variation of family forms (historical, cultural and geographical). Contemporary public discourse in industrialized countries tends to refer to an ideal type based on Mother-Father-Child(ren). But society does not conform easily to rigid schemes of life and historically all sorts of *private life* arrangements have of course existed, on the boundaries of legal provisions. Our very focus on the "nuclear family" is based on a relatively recent phenomenon, connected with industrialization and urbanization that lead to a fast erosion of the so-called "extended family".

Families have been sites of (production), reproduction, care and socialization. But often also of domination and abuse². Gender roles are first and foremost learned in the family. Law has traditionally submitted the wife (and children) to the husband's (father) authority and generally done so in an imperative way.

Napoleon's Civil Code (*Code Civil*, 1804) has framed a model that has left deep traces in many Roman Law countries. The Victorian Anglo-American model is not so different as far as patriarchy is concerned (Blackstone, *Commentaries on the Laws of England*).

John Stuart Mill and Harriet Taylor signed a legally non binding agreement rejecting the legal framework for marriage in 1851...³ - an example of the

² Violence in the family: idealized family becomes more problematic as an image with the uncovering of prevalence of domestic violence.

³ John Stuart MILL, 1851, *Statement on Marriage*: "Being about, if I am so happy as to obtain her consent, to enter into the marriage relation with the only woman I have ever known, with whom I would have entered into that state; and the whole character of the marriage relation as constituted by law being such as both she and I entirely and conscientiously disapprove, for this among other reasons, that it confers upon one of the parties to the contract, legal power and control over the person, property, and freedom of action of the other party, independent of her own wishes and will; I, having no means of legally divesting myself of these odious powers (as I most assuredly would do if an engagement to that effect could be made legally binding on me), feel it my duty to put on record a formal protest against the existing law of marriage, in so far as conferring such powers; and a solemn promise never in any case or under any circumstances to use them. And in the event of marriage between Mrs. Taylor and me I declare it to be my will and intention, and the condition of the engagement between us, that she retains in all respects whatever the same absolute freedom of action, and freedom of disposal of herself and of all that does or may at any time belong to her, as if no such marriage had

impossibility of alternative *contracts*. Living together without being married could, on the other hand, be socially untenable.

One of the remarkable features of CEDAW (1979) is its insistence on the need to change gendered roles in the family as a prerequisite for attaining equality between men and women.

In the XX century, many countries changed their Family Codes (or Laws) towards a more egalitarian system (men-women; children born in-out of wedlock) but tradition, beliefs and social customs still retain an unequal division of work and even of sexual codes of conduct. Some national courts decisions may help to sustain such customs and codes.

“COMPULSORY HETEROSEXUALITY” (A. RICH) AND GENDER STRUCTURE

A woman “alone”, a “single parent” (in most cases a woman) may be a difficult life to live, in terms of social acceptance, even today⁴.

Women of the working classes always had to work hard inside and outside their home, but for middle-class women outside paid work became something of liberation, because of the economic independence that it made possible. But it also brought on an increased difficulty: to make family and work “compatible”.

Some countries have recently changed their laws in order to include “alternative” forms of private life arrangements, most obviously same sex marriage. Either naming and treating it as such, or creating a different legal category, various systems accept the possibility of a couple formed by two people of the same sex. But in most countries the ideal of equality stops at the gates of parenting, in particular of adoption.

Gender relations are also marked by these limited openings.

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taken place, and I absolutely disclaim and repudiate all pretension to have acquired any *rights* whatever by virtue of such marriage.”

http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=255&chapter=21660&layout=html&Itemid=27 acc. 31.8.2009

⁴ Women’s dependence on marriage can be seen on literary works of fiction, like those of Jane Austen (1775-1817); women depended on marriage for survival... [Charlotte Lucas (*Pride and Prejudice*, 1813): “I am 27 years old...”]. Or Thackeray’s (1811-1863) *Vanity Fair* (1847-1848).

Not a thing of the past, either; contemporary popular fiction (2000s): novels by Sophie Kinsella *Shopaholic* series or Helen Fielding: *Diary of Bridget Jones*. Women need men (husbands) for status, money and romance.