SELF-DETERMINATION FOR WOMEN

by

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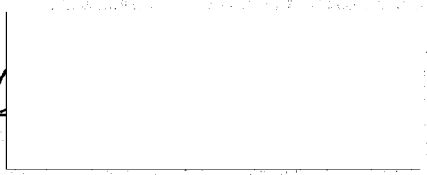
(Signature) 

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ABSTRACT

The Eighth Amendment to the Irish Constitution elevated the right to life of the foetus to the status of a constitutional right. The implications of this development for Irish women are used in this thesis as a starting point to illustrate the need for a right to self-determination for women as a social group. As a country with a democratic government, and a codified bill of rights, Ireland is squarely within the liberal legal tradition of rights. This background, together with the absolute prohibition on abortion, and the powerful position of the Catholic Church as a reservoir of conservative beliefs, makes Ireland a particularly strong example to illustrate the need for a right to self-determination for women.

A constitutional right to self-determination for women as a social group would aim to return to women the power to define and create the institutions and structures of society under which they live, at both the public level of government and the private level of family and the day to day lives of women. This thesis attempts both to delineate the theoretical outlines of this right and suggest how such a right can be used to engage with law to advance the position of women.

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CHAPTER ONE

THE PROBLEM DEFINED; THE ABORTION INFORMATION CAMPAIGN IN IRELAND

A. Introduction.

The Eighth Amendment to the Irish Constitution gave constitutional protection to the right to life of the foetus. In this thesis, the background to this amendment and the subsequent litigation to enforce it are taken as a starting point to illustrate the need for a right to self-determination for women as a social group. As a country with a democratic legal form of government, and a codified bill of rights, Ireland is squarely within the liberal legal tradition of rights. This, together with the absolute prohibition on abortion, and the powerful position of the Catholic Church as a reservoir of conservative beliefs, makes Ireland a particularly strong example to illustrate the need for a new type of right. This thesis is an attempt both to delineate the theoretical outlines of this right and suggest some practical applications to the Irish experience with the provision of abortion.[1]

Why is a new type of right necessary? The answer to this question lies in the increasing disillusionment of both feminists and social activists with rights and their capacity to effect social change. One of the most stringent critiques of rights comes from critical legal theorists, influenced by Marxist criticism of law, literary theories of language and deconstruction. They argue that rights are essentially indeterminate, are in theory capable of a myriad of different interpretations, but are in practice interpreted to

1 References to Ireland in this thesis, unless otherwise stated, refer to the Republic of Ireland which was created in 1921 from 26 of the 32 counties of the island of Ireland which was formerly a British colony.

advance the interests of the ruling classes. Any advances gained by engaging in rights struggles are at best co-optive or illusory. The use of rights as a method of achieving social change is therefore completely rejected.[2]

Feminists disillusioned by the capacity of rights to secure gains for women have also been critical of rights.[3] While some feminists have adopted the approach of critical legal theorists and rejected engagement with rights, Judy Fudge being the best example, others have not abandoned rights, but attempted instead to reformulate rights concepts or institutions deciding rights claims. While accepting the C.L.S. critique, the latter have recognized that experiences with rights depend on the perspective of the viewer and for those historically excluded and deemed other, the acquisition of rights can be very important, marking a symbolic shift from victim to self-determining actor. These writers point out that rights have advantages other than short-term litigational success and that the symbolic value of the acquisition of rights must not be underestimated.[4] As Scheingold writes,

> "the mobilizing capacity of rights may be more significant than whether litigation provides a secure mechanism of achieving and enforcing social change."[5]

A second reason why feminists and minority critiques of rights do not abandon the use of rights completely is because of the importance of law as a source of power and a site

2 See Amy Bartholomew and Alan Hunt, "What's Wrong With Rights." (1990) 9 *Law and Inequality* 1; Judy Fudge, "The Public\Private Distinction: the Possibilities of and the Limits to the use of Charter Litigation to Further Feminist Struggles." (1987) 25 *Osgoode Hall Law Journal* 485.

3 G. Brodsky and S. Day. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back.* (Ottawa: Canadian Council on the Status of Women 1987)

4 Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights." (1987) 22 *Harvard Civil Rights Civil Liberties Law Review.* 403; Elizabeth Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement." (1988) 61 *N.Y.U. Law Rev.* 589; Carol Smart "The Problem of Rights" in *Feminism and the Power of Law.* (London: Routledge 1989).

5 Quoted in Bartholomew and Hunt, *supra*, note 2, at 53.

of struggle. Law is used not only to advance reforms, but to reinforce reactionary values. Since legal rights are the instruments used within that discourse, feminists may have little choice but to engage with rights. To quote Bartholomew and Hunt again

> "Most social and political movements that have arisen since the late 18th century have articulated their goals as rights claims ... and have emphasized either (a) law reform strategies designed to transform rights claims into legally recognized and potentially enforceable rights claims or (b) `litigation strategies' employing court action, either defensively or aggressively as a means of advancing rights claims"[6]

As the Irish experience with abortion information illustrates, feminists may not have much option but to engage with law. Abandoning rights in the face of these challenges becomes completely unrealistic. In addition it ignores the measure of success which the use of rights does actually have.

This thesis is based on the assumption therefore that rights are important, and that the better approach is to recognize existing defects and try to reconceptualise rights. This is not to say that individual rights are not important in certain circumstances. What will be argued here is that a shift to group rights rather than individual rights for women will have a significant impact on the effectiveness of rights. There is no claim that all women's problems can be solved by a recourse to rights litigation, nor that the reconceptualisation of rights can solve all problems with rights. Neither is there any claim that the conclusions in this thesis are valid for other cultures or systems apart for western liberal democracies. Given these limitations however, my contention is that modifying the existing structure of rights to create a right to self-determination for women as a social group will overcome many of the limitations inherent in the structure of liberal legal rights, enable a broader view of the position of women in society to be taken, and thus enable rights to be used more effectively to change life for women.

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6 *Ibid.* at 56.

In this chapter the background to the eighth amendment to the Irish Constitution protecting the right to life of the unborn, and the litigation which attempts to enforce this right, will be used to illustrate the defects of existing conceptualizations of rights. The following themes will be drawn out and developed.

Firstly, the invisibility of women during the amendment campaign and in the High Court and Supreme Court judgments despite the fundamental nature of the right to reproductive control for women will be examined.

Throughout the whole series of events which obviously effects the whole position and future of Irish women, their interests and views are not discussed. The amendment campaign became a questioning of the relationship between Church and State, the power of the Catholic Church vis-a-vis the Protestant Church and the influence of the Amendment on the future unification of Ireland. There is little consciousness of women as a group of people with needs and interests.

This continued throughout the litigation on information about abortion. At no point is it apparent that the perspectives of the women who must live with the day to day consequences of the rulings, are taken into account. The framing of the issues as abstract and competing individual rights is put forward as a cause of this invisibility. It will also be argued that even when an attempt is made to consider women's needs and interests, the structure of individual rights prevents this being done in a manner which represents women's actual experiences.

Secondly, it is argued that defining the issues as a contest between two holders of individual rights, the foetus and the mother, fails to represent the reality of the power

struggle taking place in Ireland. This conflict is more clearly seen as one between two groups, that is feminists and reactionary forces centered around the Catholic Church. It is also clear that the Catholic Church, which comprises both the clergy and the laity, operates as a cohesive and unified node of power in Irish Society. Its ideology is incorporated into law through a combination of explicit rights and the interpretation of natural and constitutional rights by a judiciary which has largely internalized Catholic values as natural. On the other hand women are a powerless group, suffering from low status, often poor, and often divided from one another. It is these groups, the patriarchal Church and women themselves, who have been struggling redefine women, either as equal to a foetus, or as people with a capacity to make their own decisions, to be self-determining. In order to redefine ourselves both within and outside the law, women also need to have a group right to self-determination.

B. The Theoretical Background to Constitutional Rights.

The amendment and subsequent litigation involved two uses of rights, to use Bartholomew and Hunts formulation, the transformation of a claim to a right to life for the foetus into a constitutionally recognized right, and once that was achieved, litigation to enforce the right. The pro-life amendment campaign led to the adoption of Article 40.3.3. into the Irish Constitution, which provides that

> "The State acknowledges the right to life of the unborn and with due regard to the equal right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws, to defend and vindicate that right"[7]

7 The Irish Constitution, Bunreacht na hEireann, was adopted by the Irish people in 1937. It is similar in style to the Canadian Charter and the U.S. Constitution in that it sets out the powers of the executive, judiciary and the legislature, and has a comprehensive bill of rights interpreted by the judiciary. Special procedures are required for its amendment, namely that a proposal for amendment be passed by both

This right was not always given constitutional or even legal protection in Ireland. At common law, procuring an abortion before the foetus quickened was no: a criminal offence; after quickening it was simply a misdemeanor. Lord Ellenborough's Act of 1803 made the procuration of the abortion of a quick foetus a capital offence. The legislation which made abortion at any time a felony, was the Offences against the Person Act 1861 (U.K.), which was also applicable to Ireland as a part of the United Kingdom at that time. It remained on the Irish statute books following independence in 1921.

The combined effect of sections 58 and 59 of this Act make not only the woman herself, but anyone who attempts to help her 'procure a miscarriage' subject to considerable penalties.[8] Although this legislation was a completely unqualified prohibition on abortion, by the 1980's Irish pro-life interests sought stronger measures. Watching developments in other countries, these groups feared either the repeal of the 1861 Act, or a liberal interpretation of the constitution which would allow abortion in certain circumstances. Developments in the U.S. and Irish Supreme Courts were seen

houses of the Oireachtas (Parliament) and submitted by referendum to the decision of the people

8 Section 58 provides that "Everywoman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with the intent to procure the miscarriage of any woman whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or any other means whatsoever with the like intent shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be kept in penal servitude for life."
Section 59 of the Act provides that "Whosoever shall unlawfully supply or procure any poison or any other noxious thing or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or not be with child shall be guilty of a misdemeanor.

as evidence of a swing in this direction.[9] Securing constitutional recognition of the right to life of the foetus was seen as a way of preventing this development.

Irish feminists had been discussing abortion since Irish Women United came together in 1975, although it was still a divisive issue at that time. A Woman's Right to Choose Group was formed in 1979, and set up the Irish Pregnancy Counselling Center in 1980, which included an abortion referral service. To counter the rights claim made by pro-life forces, this group also began to assert a rights claim, that of the woman's right to choose.[10]

There were two groups therefor seeking to redefine the role of women in Irish society, both articulating their demands in terms of rights. In order to understand the signifigance and implications of these demands, the theoretical basis of rights must be understood. Rights claims draw on the classical liberal vision of rights rooted in the liberal democratic theories of Hobbes, Locke and Hume. With the decline of theories of legitimation based on divine obligation, these general theories of social and political life sought to provide a new justification for the problem of political obligation and the power of law.[11] The social contract was one solution to this problem. It was arrived at by reducing society into what were perceived to be its constituent elements, self-moving, self-directing individuals who ceded some power to the state in return for a

9 Roe v. Wade 410 U.S. 113 (1973) and Griswold v. Connecticut 381 U.S. 479 were widely known in Ireland at this time. Mc Gee v. Attorney General [1974] I.R. 284 had used the protection of the personal rights of the citizen in Article 40.3.3 to imply a right to marital privacy and from there the right of mamed couples to use contraceptives, the importation of which had previously been illegal.

10 The Woman's Right to Choose group had their first public meeting in 1981. For a more detailed discussion of the work of feminists in Ireland see Ailbhe Smyth (ed) "Feminism In Ireland" special issue of (1988) *Women's Studies International Forum.* 351: Mary Daly, *Women and Poverty.* (1989: Attic Press) at Chapter 7.

11 For a critique of the social contract theories see C. B. McPherson, *The Political Theory of Possessive Individualism.* (Oxford, Clarendon Press 1962) and Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory.* (Wiley & Sons: 1979).

measure of stability, and in return assumed legal and political obligations to themselves. To make sense of the social contract however, one must, as McPherson points out

> "be able to postulate that the individuals of whom society is composed see themselves, or are capable of seeing themselves as equal in some respect more fundamental than all the respects in which they are unequal ... because so long as everyone was subject to the determination of a competitive market, there was a sufficient basis for rational obligation of all men to a political authority which could maintain and enforce the only possibly orderly human relations, namely market relations."[12]

Without this equality individuals would not cede power to the state but would seek to assume power themselves. While the egalitarian nature of society was an advance on divinely ordained hierarchies of subordination, it lead to a view that the only threat to the individuals freedom and equality was not other equal individuals but the excessive power of the state. Legal rights were necessary therefore to protect the individual and were used to erect a metaphorical `fence' or zone of privacy around the individual, within which the state had no power.

The theory of self-assumed obligation necessitated however a view of the individual as an abstract separate entity, apart from other individuals and social relationships, that is pre-existing obligations, which might compromise his freedom. Pateman discusses the implications of this view,

> "If the individual is seen in the abstract, in complete isolation from other beings, then all `his' judgments and actions are based solely on his own subjective viewpoint--what other viewpoint is there for such a creature? That is to say, the individual's reasoning will be entirely self-interested; he will act if, and only if, he judges it to be for the benefit of himself and his property."[13]

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12 *Ibid*, at Chapter 2.
13 *Ibid*, at 25.

The view of the individual as abstract also facilitates a decision making process where facts are abstracted from background, context and sociology, and broader goals and values become invisible as litigants are assumed to act solely for their own private and self-interested ends.[14] The conclusion can also be drawn therefore that rights, as the property of the individual, will also be used only for the benefit of the individual.

In **liberal** democracies therefore, where law is legitimated by the social contract, legal discourse has a world view based on these theories, and sees the world as divided into two spheres, public and private, with the individual sovereign within the private **sphere.** The **courts are** then seen as neutral arbitors protecting the pre-existing rights of the individual from intrusion by the state, and restoring the status quo ante when these rights are interfered with. Walsh J. summarizes this view perfectly in S.P.U.C. v. Coogan,

> "The Constitution commits to the judicial organ of government the ultimate guardianship of the Constitution and of the vindication of the rights which are either guaranteed by it or conferred by it"[15]

Also apparent in the judgment of Hamilton P., is the conception that rights are inherent in the individual and that the court is merely protecting any interference with them:

> "the court is under a duty to act so as not to permit any body of citizens to deprive another of his constitutional rights, to see that such rights are protected and to regard as unlawful any infringement or attempted infringement of such constitutional right."[16]

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14 For a discussion of the effects of liberal legalism on litigation see Owen Fiss, "The Social and Political Foundations of Adjudication." (1982) 6 *Law and Human Behaviour* 121.

15 The Society for the Protection of Unborn Children (Ireland) Limited v. Coogan and Others [1989] I.R. 734 at 743.

16 Attorney General (S.P.U.C.) v. Open Door Counselling Ltd & Dublin Well Woman Center Ltd. [1988] I.R. 593, at 617.

It is clear therefore that Irish constitutional rights are part of this theoretical system. The effects of this structure on the issues to be decided will be examined in the next section.

C. Theme 1: The Invisibility of Women

The effects of the conception of rights within legal liberalism is apparent from a consideration of the amendment campaign. One of the most significant points to note was the small part played by any discussion of the consequences of the amendment for women and women's health. Some women did attempt to point out that the amendment had dangerous implications for pregnant women and that the range of treatment available to the sick pregnant mother might be restricted, because certain treatments were potentially life threatening to the foetus.[17] Others argued that the amendment was not a response to the problem of abortion in Ireland. Senator Robinson in particular pointed out that

> "Not all abortions are as a result of unwanted pregnancies. Many women who have abortions would clearly like to keep their child but are the victims of circumstance. Circumstance can mean our still cruel attitude to unmarried mothers, or, let's face it, simple economic pressures. Couched in brutal terms, if the State wishes to take a pro-life attitude, it must ensure that parents, either single or married, are not penalized economically for having children"[18]

Nevertheless the main arguments were elsewhere. Objections to the amendment centered around its potential divisiveness. It was argued that an amendment clearly

17 Professor O'Dwyer of the Royal College of Surgeons for example, quoted in Tom Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983.* (Brandsma Books :1990) at 322.

18 Senator Mary Robinson writing in the Kilkenny Standard May 15 1982, as quoted in Hesketh, supra note 17, at 71. Mary Robinson was elected President of Ireland in October 1990.

endorsing Catholic values and morality would alienate non-Catholics in both Southern and Northern Ireland, and have an adverse effect on the future re-unification of the country. It was also argued that the wording of the amendment was uncertain and open to different interpretations in legal and medical circles. Lastly the campaign and referendum were criticized as a waste of public funds in a time of severe economic recession.[19]

There was more than one factor which contributed to the invisibility of women's needs in the debate surrounding the amendment. Certainly the conservatism of even the more liberal members of Irish society prevented a real discussion of the rights of women. The Women's Right to Choose Campaign, organized to oppose the amendment, might have been expected to develop strong arguments in favour of right to reproductive freedom, but was forced by lack of funding and organizational support to appeal to the more liberal members of Irish society. A strong articulation of women's rights to abortion would have resulted in the loss of the support of these still conservative groups. Recasting the objections to the amendment as stemming from its legal and medical uncertainty, its futility in solving the `problem' of abortion, its divisive nature or waste of public money, rather than the detrimental effect it would have on the role of women in Irish society, meant that one could be both anti-amendment and anti-abortion, and the support of the above groups could be retained.

Nevertheless the abstract and individual nature of the rights claim asserted by the pro-life activists contributed substantially to the invisibility of women. By allowing the foetus to be viewed as an entity separate from the mothers' womb in which it is living, and possessing a right to life independent of the mother, the woman in whose body the

19 For a comprehensive analysis of the referendum see Hesketh, *ibid.*

foetus is, falls out of the picture. If the foetus is independent of the mother, then her rights do not need to be considered.

Even if feminists had asserted the right to choose of the mother it is unlikely that the courts would have characterised the issues differently. The rights of both woman and foetus would not have escaped the structures imposed by the classical definitions of rights, which characacterizes woman and foetus as separate autonomous entities, having no connection with each other apart from the desire to interfere with the others' life or decisisonal autonomy. If the woman's right to choose had been asserted, the classical sturcture would continue to see woman and foetus as competing claimants, with both viewed as acting from self-interest, rather than seeing the issue as a decision by the woman as to what is best for her and the foetus, in the light of the difficult social and economic circumstances of child rearing. This is the situation which arose in the subsequent litigation.

In both S.P.U.C. v Wellwoman and S.P.U.C. v. Coogan and Grogan,[20] the characterization of the dispute as a contest between foetal and others rights is very clear. The similarities between both actions, in terms of the issues involved, the declarations and injunctions sought and the characterization of the issues by the judiciary merit their discussion together. In both cases the defendants sought to provide information to women about abortion services available in Britain, and the plaintiff Society for the Protection of Unborn Children sought a declaration that this was unconstitutional and an injunction restraining the provision of the information.[21] Both cases also sought to ascertain whether any right existed in Irish constitutional law or at a European level which qualifies the right to life of the unborn, and saw this question

20 *Supra,* notes 15 and 16.
21 This society along with other pro-life groups was instrumental in agitating and organizing support for the amendment.

as the central issue to be decided. Both cases worked their way through the Irish courts before being taken to the European Court of Human Rights and the Court of Justice of the European Communities respectively.

The first of these cases was against the clinics. S.P.U.C. alleged that the women's groups in Dublin operating pregnancy counselling services, including referrals to British abortion clinics, violated the right to life of the unborn as guaranteed by Article 40.3.3. In response to this the defendants raised the constitutional rights to privacy and freedom of expression, and the rights to freedom of communication and freedom of access to information granted by the Treaty of Rome.[22] Hamilton P. in the High Court, granting the declaration and injunction sought by the plaintiffs, saw the issue in terms of competing rights. In order to decide which one was more deserving of protection, he relied on the fundamental nature of the right to life of the unborn and found that

> "the qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn."[23]

A similar process takes place in the Supreme Court where the decision of Hamilton P. was affirmed by Finlay C.J. writing for the majority, with whom Walsh, Henchy, Griffin and Hederman J.J. agreed. Finlay C.J. first asks whether the defendants were assisting in the destruction of the right to life of the unborn, and finding this to be the case seeks to ascertain whether there is any right which qualifies this right, holding that

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22 The Treaty of Rome is the foundational document of the European Communities It lays down certain fundamental pre-requisites for membership of the E.C., including the free flow of goods, capital and persons between member states. Ireland is a member of the E.C.. since 1973.

23 Wellwoman, *supra*, note 16, at 617.

> "no right could possibly arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."[24]

Similarly in S.P.U.C v. Grogan[25] the rights asserted are not of the pregnant woman but of the foetus and of the students' unions. The Grogan and Coogan *cases* concerned the request for an injunction by S.P.U.C to restrain the publication of information on abortion services in the students' welfare guides. Carroll J. at the High Court initially found that S.P.U.C., as a private body, did not have the necessary locus standii to bring a constitutional action. This decision was reversed by the Supreme Court on appeal, Finlay C.J. Walsh, Griffin, Hederman J.J. holding that right to life of the unborn was of such fundamental importance that any citizen with a bona fide concern and interest could act to protect that right.[26] McCarthy J dissented, expressing a concern which echoed that of Carroll J. in the High Court, at the attempts of S.P.U.C. to police the constitution and the Supreme Court judgment.

When the case returned to the High Court, the defendant unions raised the rights under Articles 59 and 60 of the Treaty of Rome to receive information about services available in other member states of the European Communities, and argued that they had a right to publish and distribute information as a corollary to Articles 59 and 60, and that these rights qualified the Article 40.3.3 of the Irish Constitution.[27] This argument was accepted by Carroll J. in the High Court, who refused to grant the injunction and determined that a decision of the Court of Justice of the European

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24 *Ibid.* at 625.
25 [1989] I.R. 753
26 *Supra* note 15, at 747
27 Article 59 provides that: "restrictions on the freedom to provide services within the community shall be progressively abolished" Article 60; "Services shall be considered to be services ... where they are normally provided for remuneration in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

Communities on the right to give such information was necessary to allow judgment in this matter to be given.[28]

On appeal to the Supreme Court it was held that the injunction should be granted. In coming to a decision the Supreme Court again framed the issues in terms of competing rights of two sovereign autonomous individuals, with the plaintiff seeking to protect the right to life of the unborn and the defendants asserting that rights arising from European Community law qualified the right to life of the foetus.

Characterizing the issues as competing rights claims is squarely within the classic liberal legal structure of rights where the courts are neutral arbitors weighing each claim in order to decide which is the more meritorious. In order to come to the conclusion that the right to life of the unborn is that which needs the courts protection, Hamilton P. emphasizes throughout his judgment the fundamental nature of this right, the historical protection accorded the right in both British and Irish common law and subsequent legislation, and the ontological basis of the right in the very nature of human identity, defining the right as having a moral claim pre-existing law and the constitution. Defining the right of the foetus in these terms has the effect of imposing a moral imperative on the courts to ensure its protection. The moral claims which legitimate the rights to privacy, freedom of expression, freedom of communication and access to information are not discussed in the judgment, nor is any evidence advanced of their protection by the courts in the past.

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28 Under Article 177 fo the Treaty of Rome, courts of member states of the European Communities may make a reference to the Court of Justice of the European Communities to interpret Community Law. This mechanism is in place to ensure harmonisation of E.C. law in all member states.

When this conceptual grid is mapped onto the issues underlying Wellwoman, abortion becomes "an interference with and a destruction of the right to life of an unborn infant in the mothers womb."[29] The foetus is created as a sovereign individual with a pre-existing right to life which the courts endeavor to ensure is protected and vindicated. The connection of the foetus with the mother in the womb is made invisible by reifying the rights of the foetus. The defendants are then defined as individuals seeking to interfere with another individuals constitutional rights. The connection of the clinics with pregnant women is made invisible. The defendant clinics are seen merely as providing illegal medical services to female clients, rather than members of the group women who also suffer the consequences of the Wellwoman decision.

Thus the pregnant woman has no place in the rights contest, and her needs and interests are not relevant for the determination of the issues before the courts. This abstraction makes intelligible the otherwise puzzling statement of Finlay C.J. that the equal right to life of the mother is not applicable in this case because the defendants did not claim that the service they were providing "was in any way confined to, or especially directed towards the equal right to life of the mother."[30]

Not only does the framing of the issues in this form make a discussion of the women at the center of this dispute seem irrelevant, such a characterization is also alien to the experiences of women who become pregnant and must make a decision whether or not to continue that pregnancy. The translation of the decision to be made into the competing rights of liberal legalism fails to represent the contextual and relational nature of the decision to have an abortion. A comparison between descriptions of

29 *Supra*, note 16, at 597.
30 *Supra*, note 16, at 617.

women in the current litigation and in feminist scholarship in this area, illustrates this clearly.

In her study of the moral development of women, Carol Gilligan found that women constructed moral problems as conflicting responsibilities rather than competing rights and that moral understanding is based not on the primacy and universality of individual rights but instead on a sense of responsibility.[31] This form of decision making continued when women were making a decision about abortion.[32] As Hester Lessard points out

> "if one listens to women's voices, one finds that women's decisions about reproductive control are not only decisions about pregnancy but are also decisions about relationships with a child, the other parent, and with one's community. They do not reflect the assumed bifurcation of interests, woman versus foetus, of constitutional rights discourse. Rather women appear to be engaged in a discourse about accommodating a wide range of interests, including their own and that of a potential child, to the particular circumstances of their lives in a way that acknowledges the singular and radical dependency of fetal life on their bodies as well as the socially mandated dependency of children on mothering by women."[33]

Such a relationship between woman and potential child is in complete contrast to the characterization of the issues in the S.P.U.C. cases in terms of abstract competing rights. This can be seen in the judgment of Finlay C.J.

> "I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in a balance against the granting of such protection would be another competing constitutional right ... in the instant case ... there can be no question of a possible or

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31 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development.* (Cambridge: Harvard University Press, 1982) at 19-20.
32 *Ibid.* at Chapter 4, "Crisis and Transition."
33 Hester Lessard, "Relationship, Particularity and Change: Reflections on *R v. Morgentaler* and Feminist Approaches to Liberty" (1991) 36 *McGill Law Journal* 263 at 290.

> putative right which might exist in European law as a corollary to a right to travel so as to avail of services, counterbalancing as a matter of convenience the necessity for an interlocutory injunction."[34]

Women are seen as a threat to the foetus instead of people trying to make the best decision for themselves and the foetus. This is most clearly apparent in the decision of Walsh J. in Coogan where he observes that

> "In cases which call for the vindication of Article 40.3.3 it could often be said that the parent or parents and indeed the relatives or other members of the family of the unborn life, who should normally be expected to vindicate that right, are the ones who are pursuing the goal of the destruction of the right."[35]

Viewing women as self-interested allows Walsh J. also to imply that women might have abortions to defeat a potential child's succession rights saying that "in many cases the failure of a live birth can be of material benefit to third parties"[36]

The adversarial nature of rights is a central attribute of the liberal rights structure, and an integral part of the rights structure at present. The question which needs to be asked however is whether this attribute is a function of individual rights solely, or of both individual and group rights. In other words, by putting forward a theory of group rights, can abstraction and competition be left behind?

My contention is that these defects can in many respects be overcome. A group right is of necessity more contextual and less autonomous than an individual right, because its very existence acknowledges that the individual has links and connection with a group. It is also less easy, particularly if the group is heterogeneous, to abstract the group

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34 *Supra*, note 25, at 765.
35 *Ibid*, at 744.
36 *Ibid*, at 747.

from society, because its members are member of other gr ups also and widely dispersed throughout society.

The problem of competition is more complex however. According rights to groups still leaves potential for conflict between groups or groups and individuals. There is a difference however between a rights structure which sees rights as the property of competing self-interested claimants, and a view of rights claimants as essentially co-operating. The problems of conflicts of this kind will be worked out in more detail in Chapter 4, but it is clear that the solution must lie in some form of negotiation, compromise and co-operation.

Group rights cannot however be seen as a complete solution to the problems of abstraction and competition, but the alternative, individual rights, are so burdened with the ontological baggage of the liberal conception of rights, and its attendant ideologies of the negative state, separation of public and private, individual and community, and the view of rights as only protecting what already exists, that a reformulation in contextual terms is almost impossible.

While it can be said therefore that the abstract adversarial nature of rights is potentially separable from group rights but perhaps not necessarily so, the same is not true of individual rights. The work of Hester Lessard illustrates this difficulty. She is redefining liberty in terms of a concrete contextualised other and applying this redefinition to reproductive self-determination. Despite a claim that the individualist stance is preserved, Lessard shifts into an endorsement of group and communitarian values without explicitly acknowledging the transition or allowing the discussion to modify her theory of liberty or her view of the rights claimant as individual, albeit a

contextualised individual.[37] While she argues that "section 7 of the Charter, as well as the collectivist themes of Canadian Constitutional discourse generally, can be claimed by women and expanded on"[38] to achieve full liberty and participation in society for women and emphasizes the importance of collectivist dimensions to a dispute, her theory of rights purports to maintain an individualist stance. It is my contention that Lessard's attempt to overcome the limits of the existing rights structure and secure reproductive self-determination for women, lead her away from individual rights to a recasting of her theory in terms of group rights. This shift in emphasis is not acknowledged by Lessard however.

What are the implications of a group right in this context? Would a group right to self-determination for women have led to a different outcome in the cases discussed above? Certainly the separation of the clinics and the unions from pregnant women would not be possible as they would be seen to be part of the context in which Irish women are situated. With a purely individual right this separation would remain possible. A right to self-determination for women as a social group would necessitate questioning the effect of the restriction of information on the position of women in Irish society. It would require a broad examination of the consequences of the decision in order to determine whether the courts, by their actions, guaranteed and respected this right. A purely individual right might only respect the individual woman's decisional autonomy in this particular instance, leaving the wider questions unasked.

The group right to self-determination has broader implications which will be worked out in detail in Chapter 5. but must at a minimum amount to allowing women a facility to shape the structures of society in which they live. An individual right could only

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37 See Lessard, *supra*, note 33, at 306.
38 *Ibid*, at 306.

respect the decisional autonomy of a woman in the private sphere. The limitations of this protection are apparent from recent U.S. experience, where the Federal Government will not provide public funding for what they deem a `private decision'. As Olsen points out "Abortion becomes a private right that women enjoy if they are privileged enough to have private access to it."[39] The implications of ensuring complete reproductive self-determination are enormous, and would require nor only that decisions about bearing children be free from economic or social constraints, but that caring for children be respected and supportedby society even if work and home have to be reorganized to take the competing commitments of women into account.

While this may seem utopian, it is nevertheless the logical working out of a group right to self-determination for women The making of such claims is itself empowering, even if the reality of what can be achieved falls far short of the desired outcome.

D. Theme 2: The Real Issue as a Struggle Between Groups

It is clear from an examination of the issues in Ireland that the amendment and subsequent litigation are more readily seen as a struggle between two groups, women and Catholic interests, to define the role of women, rather than a competition of individual rights. In this section I will illustrate this, show how both groups appear in law, and examine the process whereby Catholic values are incorporated into law through the doctrine of natural rights.

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39 The limits of this approach are examined in detail by Frances Olsen in "Unravelling Compromise" (1989) 103 *Harvard Law Review* 105.

That the Catholic church, comprising both the clergy and the laity, operates as a powerful restraint on the freedom and choice of Irish women is apparent from a consideration of the conduct of the amendment. During the campaign, P.L.A.C. enjoyed the full support of the Catholic Church. It toured around Ireland giving public talks, and was allowed to speak in Catholic schools, important in a country where almost all schools are run by Catholic religious orders. They also had the strong support of Church laity including expert doctors and gynecologists, and towards the end of the campaign Catholic clergy even advised their congregations at Masses to vote in favour of the amendment. As Hesketh points out, although there were no organizational ties between the Pro-life Amendment Campaign and the Church,

> "the P.L.A.C. view and the Catholic view on abortion were identical. On all questions raised by the abortion issue, P.L.A.C. spokespersons, from the earliest stages in the debate, articulated a Catholic stance,... and accepted the humanity of the foetus from the moment of conception; offered both biological and theological arguments in favour of the view that life began from fertilization and argued that abortion was wrong in every case"[40]

The subsequent litigation was initiated by S.P.U.C., one of the pro-life groups which was involved with the P.L.A.C. The objective of the litigation was to enforce the restriction on abortion by drawing on the amendment and the Catholic values which are both written explicitly into the Irish Constitution and implied through the doctrine of natural rights. The Preamble to the Constitution, for example, begins with a dedication to the Most Holy Trinity and acknowledges the obligation of the "people of Eire" to "our Divine Lord Jesus Christ". The special position of the Catholic Church in Ireland was expressly recognized by Article 44, which was deleted in 1972. The cumulative effect of these provisions is apparent in Norris v. The Attorney General[41], where the constitutionality of legislation making male homosexuality a criminal offence was

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40 Hesketh, supra, note 17, at 50.
41 [1984] I.R. 36.

upheld by the Supreme Court. The view of O'Higgins C.J., quoted with approval in Wellwoman, that the Irish people when enacting the constitution

> "were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."[42]

lead to a finding that this constitution could not therefore be used to "render inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful"[43]

It is also through the concept of natural rights that Catholic ideology is legitimated by the constitution and given the power of law. This process can be seen at work in the Hamilton judgment where the natural right to life is used to legitimate the moral claim of the foetus to life. He stresses the fundamental nature of this right, and that it "springs primarily from the natural right of every individual to life"[44] In Irish Constitutional jurisprudence natural rights are even more fundamental than constitutional rights, as they stem from the very nature of human identity. As such they pre-exist law and the constitution. This view is apparent in the judgment of Walsh J. in McGee,

> "Articles 41, 42 and 43 (protecting fundamental rights) emphatically reject the theory that there are no rights without laws, no rights contrary to the law, and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the constitution confirms their existence and gives them protection."[45]

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42 *Ibid*, at 64
43 *Ibid*,
44 *Supra*, note 16, at 398.
45 *Supra*, note 16. For a discussion of the difference between natural and constitutional rights in a different context see J.P. Casey, "Constitutional Law: Natural and Constitutional Justice." 1979-80 *D.U.L.J.* 95.

The concept of natural rights draws on the Christian theological doctrines of natural law developed by St. Augustine and St. Thomas Aquinas. According to this doctrine natural law was the law which God laid down for humans, and could not therefore be changed by positive law. According to Quinn the Irish Constitution incorporates this theocratic view of natural law, using papal encyclicals to flesh out natural rights concepts.[46]

The work of neo-marxists on common sense reveals another implication of the use of `natural rights'.[47] The beliefs that are accepted without question as normal, natural and every day are usually included in that body of knowledge labelled common sense. This knowledge is also however a reservoir of the dominant beliefs and prejudices of a particular society. In the Irish case, it will seem natural to a judiciary educated in Catholic schools, and living in a conservative society, that women's primary duties are in the home, and that the foetus has a right to life. Thus the hegemonic values of Irish Society are incorporated into law through the doctrine of constitutional rights. By formulating rights in these terms, the judiciary is free to imply almost any right into the constitution as a natural right.

It is apparent therefore that the values of one powerful group, Catholics, influence constitutional rights. By contrast, the values of women have no place in this discourse. In fact women are represented in the Constitution as a powerless group, confined to traditional roles in the family and as mothers. The fundamental unit of society is proclaimed to be the family based on marriage, divorce is prohibited, and woman's

46 G. Quinn, "The Nature and Significance of Critical Legal Studies" 1989 *Irish Law Times* 282 at 284, discussing the application of critical legal studies to the Irish Constitution.

47 See Stuart Hall, D Held, G McLennan, (eds) *State and Society in Contemporary Britain: A Critical Introduction.* (1984 New York: Polity Press)

work in the home is seen as her primary duty.[48] The effect of the amendment was to reinforce the vision of women in law and in the Constitution, as beings whose primary value was in child-bearing. By making the right to life of the foetus of equal status to that of the pregnant woman, woman's value was further undermined. As Ursula Barry writes

> "In our struggle for equal rights, we little thought that we would be constitutionally redefined as equal to that which is not yet born. This must be the most radical redefinition or woman that we can imagine. We are equated to something not human, only potentially so."[49]

The only rights which are granted are described by Walsh J.

> "the right to protect the life of her unborn child and the right to protect her own bodily integrity against any effort to compel her by law or persuasion to submit herself to an abortion. Such rights also carry obligations, the foremost of which is not to endanger or to submit to or bring about the destruction of that unborn life."[50]

If these are our only rights then there is no way in which the increasing supervision of women's pregnancy can be prevented. The door is open to allowing restrictions of women's lives and choices in many different ways if the ostensible object is to protect the foetus. Although there is no evidence that this has happened in Ireland, women in other countries have not been so fortunate.[51]

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48 Article 41.2.2, for example, provides that "the State shall endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

49 Ursula Barry, "Women in Ireland" in Ailbhe Smyth, (ed) *supra*, note 10, at 319.

50 *Supra*, note 15, at 767.

51 Olsen for example *supra*, note 39, at 132, describes how women in the U.S. have been denied access to drug rehabilitation programs and then prosecuted for the effects of drugs on their newborn children, and how doctors have imposed particular obstetrical treatments upon women against the women's wishes and judgment.

The argument could be made that there are many women in Ireland who are Catholics, and who have internalised and accppted the values of the Catholic Church. While their voices must be listened too feminists cannot simply accept their experiences uncritically, but must instead reserve the right to evaluate the effect of their opinions and beliefs on the status of women as a whole. Without this critical facility there would be no platform or position from which to call for change.

Although the judgment of Walsh J. is notable in that it is the only one to include any discussion of the position of pregnant women or the consequences for women of an unplanned pregnancy, it fails to understand the real situation. Women are seen as victims, subject to pressures which they cannot withstand, and still subject to parental control rather than as competent adults capable of making their own decisions.

> "there is no doubt that, particularly in the case of an unmarried pregnant woman, intense pressures of a social kind may be brought to bear upon her to submit to an abortion, even from her peers or her parents" [52]

There is no understanding of what is really going on in women's lives, nor of the constraints which lead women to choose abortion, the economic pressures that force women to choose between poverty and abortion, the cultural pressures such as the shame and disgrace a single mother is made to feel in a small community, or of the lack of daycare and inflexible work practices which make children an impossible burden.[53]

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52 *Supra,* note 15, at 767.

53 For an analysis of the poverty of women in Ireland see Daly, *supra* note 10. In Chapter One she points out that although there are no exact statistics available for single parents in Ireland, one adult households headed by women, are the most likely of all households to be poor in Ireland, as elsewhere.

In these circumstances the protection of the equal right to life of the mother in Article 40.3.3 seems a mockery and leads one woman to write "In this country the unborn seem to have more rights than the women and children struggling to live today" [54]

To summarize, it is clear that there are two groups seeking to define the role of women in Irish Society. One group, the Catholic Church is in a powerful position in law because its values are explicitly and implicitly protected in the Constitution. The second group women, have not had their values and experiences taken into account because of their powerless position. The constitution embodies a view of women which is stereotypical and opressive. In order to redress this power imbalance, a group right for women is necessary.

E. European Litigation.

The trends and themes which have been observed in national litigation are also apparent to a certain extent in the litigation at the European level. The final decisions in Grogan and Wellwoman have not yet come down, but there is still a lot to be said about how the issues were framed.

S.P.U.C. v. Grogan remained most firmly within the definitional confines created at national level. The defendant unions asserted that there was a legal right for the national of one member state to travel to another member state to receive a medical service lawfully provided there, and that as a corollary there was a legal right to

54 Noreen Byrne, "The Feminisation of Poverty" in Ailbhe Smithe (ed), *supra*, note 10, 367 at 368.

information about that foreign medical service, and to publish and distribute that information.[55]

As against these individual rights, S.P.U.C. and Ireland asserted once more the right to life of the unborn and that the activities of the defendant represented "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society in Ireland."[56]

The argument made earlier that the structure of individual rights contributes to the invisibility of women and fails to acknowledge the actual exercise by groups of power in law, also holds true here. Although the defendants did introduce a medical report showing that the only effect of the Hamilton decision was to delay Irish women getting to Britain to have abortions, with the resulting health problems of later abortions, there was no discussion of the broader long-term effects on women of the lack of reproductive self-determination on Ireland.[57]

The Advocate General of the Court of Justice, Walter van Gerven, did not in fact decide which right was more fundamental, or whether restrictions on one right are justified by the aim of protecting another right. While he agreed that community citizens in general had a right to receive information about services in other member states, and that abortion was such a service, he found that the restrictions on these individual rights in order to secure the individual right to life, were matters of Irish

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55 S.P.U.C. v. Grogan: Observations of the defendants to the Court of Justice of The European Communities at 4 and 5.

56 Observations of Ireland paragraph 4.10.

57 "The effect of the injunction has been to significantly increase the risk to life and health of pregnant women resident in Ireland who now tend to obtain abortions later in the pregnancy and with out the benefit of either pre-abortion or post abortion counselling." Observations of the Defendants at paragraph 6.

public policy and as such would not be interfered with by the European Court of Justice.[58]

To argue that abortion is a matter of public policy is in complete contrast with Canadian and U.S. jurisprudence which sees abortion as within the decisional sphere of the woman.[59] This recategorisation supports the criticism that the public/private split in classical liberal legalism is "an ideological construct that can be flipped almost without limit to suit predetermined outcomes."[60] This is only possible with an individual rights claim however, as asserting the rights of women as a social group deconstructs the liberal legal view of society as a society composed of individuals (in the private sphere) and the state (in the public sphere). Society is recreated as composed of interlocking and relational groups possessing varying degrees of power. With this view of society the public/private divide is meaningless.

The use of community rights as a resource was also limited by the nature of the European Community whose primary objective is the harmonization of the market economies of its member countries. The observation of the Commission that "whatever its merits, the objective of preventing abortion belongs to the moral sphere in relation to which member state remain free to pursue their own policies" underlines this point.[61]

Certainly the European Court of Human Rights is not subject to similar constraints. This court operates within a different legal framework than the Court of Justice of the European Communities. It has a much wider application and serves the 23 members of

58 See reports of this decision in The Irish Times, June 12 1991. The position of the advocate general is to prepare an impartial and independent opinion to assist the Court of Justice in arriving at its opinion. While the decision of the Advocate General is not binding on the Court, it is usually followed.
59 See Olsen *supra* note 39, and Lessard *supra* note 33 for a discussion of the position in the U.S and Canada respectively.
60 G. Quinn, *supra* note 37, at 284.
61 Observation of the Commission at p 16.

the Council of Europe to ensure that the European Convention on Human Rights is not violated. By contrast the Court of Justice of the European Communities serves the European Communities only and examines whether there has been a breach of the Treaty of Rome. Ireland is a member of both the Economic Community and the Council of Europe.

Following their failure at national level, Open Door Counselling and the Well Woman Center decided to complain to the European Court of Human Rights that their rights were being violated by the abortion information ban. They maintaned that there is unjustifiable interference with their right to impart specific information, as guaranteed by Article 10 of the convention, that their right to privacy under Article 8 is also being violated, and that the Supreme Court of Ireland judgment discriminates against women contrary to Article 14 since it is only women who are directly affected by denial of assistance and information.[62]

This is the only litigation which has placed women at the center, and the only place in which the equality rights of women are argued. These complaints have been so far been declared admissible by the Commission and await determination by the European Court of Human Rights.[63]

The European Convention on Human Rights also has liberal legal foundations however, and the critiques made above of liberal legal rights are also applicable here. That it has influenced the construction of the questions to be decided is apparent from the

62 Decision of the Commission on Human Rights relating to the Admissibility of Application no. 14234/88 Open Door Counselling v. Ireland and Application no. 14235/88 Dublin Well Woman Center & Others v. Ireland, 15 May 1990.

63 The commission makes a preliminary examination of a case to determine whether the complaint raises issues of law and fact under the convention. One of the purposes of this screening is to ensure that the Court does not waste time on complaints which are frivolous or have no merit.

arguments made by the clinics that the Supreme Court judgment has violated the right to privacy of Irish women. Arguing a right to privacy does not however overcome the many criticisms levelled against individual rights in the earlier part of this chapter. While this court might grant a declaration that women's decisional autonomy had been violated, without the broader reorganization of society which a group right to self-determination could potentially achieve, this right would have little impact on the lives of women.

F. Conclusion.

Statistics show that Irish women are still travelling to Britain at the rate of about 4,000 a year, over a thousand in the first quarter of 1991, and these numbers only count those giving an address in Ireland. Many prefer to keep their nationality hidden for various reasons. Clearly Irish women are rejecting the hegemonic values of Irish society. This chapter has shown how the existing structure of rights has prevented Irish women from using law to do this. The only effects of the use of individual rights to defend women's' interests are that the student unions are being pursued in the Irish Courts for £30,000 ($60,000) in legal costs, and the Open Door counselling center has closed its doors. Clearly a change is necessary.

The contention here is that by asserting a right to self-determination for women as a social group, the defects inherent in the existing rights structure can be overcome, and a more successful litigation strategy can be pursued. Subsequent chapters are devoted to examining this approach in more detail.

CHAPTER TWO

GROUP RIGHTS: ADVANTAGES AND POSSIBILITIES FOR WOMEN

A. Introduction.

In the previous chapter, the inadequacy of individual rights to secure reproductive self-determination for women has been highlighted and the possibility of group rights put forward as a solution. This is not to reject individual rights completely, it is simply to show that where the objective is the accommodation of group needs and interests and the removal of societal constraints on the freedom of groups, then group rights are preferable. This chapter will discuss the four main advantages of articulating demands in a group form.

B. What is a Group Right ?

Throughout this thesis, I argue that a group right to self-determination is more effective in achieving a broad restructuring of women's lives than an individual right. But what is meant by a group right? How is a group right different from an individual right?

This question has been answered by a number of theorists. At the most basic level the distinguishing feature of a group right is that it applies to a group and not an individual and that it is therefore capable of being claimed and exercised by a group. Any attempt to go beyond this level of generality and define the specific characteristics of group rights, as has been done for individual rights in Chapter One, is more problematic. Not

only are group rights underdeveloped in legal discourse,[1] there is also the difficulty that the act of defining the characteristics of a group right to a large extent creates it. It then has the necessary characteristics to achieve the desired objective in a particular situation. Thus if the abstract nature of individual rights is a substantial barrier to the objective of achieving self-determination for women, then group rights are defined as not abstract. However, the fact that group rights are underdeveloped in rights discourse, leaves more space for the development and creation of their characteristics in a way which is favourable to women.

The emphasis here will therefore be to explain what is meant by a group right only to distinguish it from an individual rights and clarify what it means in this thesis. Chapter Four will examine specific group rights in more detail as they have developed in concrete legal systems.

There are certain broad definitions of group rights which can be identified. Fournier[2] describes the following classifications:

1. A right gains its collective characteristic when it is awarded to a specific group defined by its characteristics. This right either protects the group from specific discrimination or provides the group with special treatment. Fournier gives as an example "the right conferred on members of a minority to communicate with the

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1 This is due to the primacy of the individual in the liberal legal system as discussed in Chapter one, and the desire by governments and international organizations dealing with groups and minorities to assimilate different groups into the dominant populations in order to ensure the cohesion and stability of states. Giving rights to groups threatened this objective. For a thorough discussion of the rights of groups see Warrick McKean, *Equality and Discrimination under International Law.* (1984 : Clarendon Press)

2 Francine Fournier, "Collective rights in the Area of Equality Rights; The Canadian Scene." 1987 *Cambridge Lectures* 229, at 233.

Administration in their language" [3]. Another example would be section 35 of the Cnaadian Charter which recognizes and affirms treaty and aboriginal rights of Indian, Iniut and Metis People.

2. A right is collective because of its necessary collective utilization, and "can be exercised only if a number of persons consent to use together, with the same orientation, the right that belongs to each of them."[4] An example here would be the Genocide Convention[5] or the right to self-determination, which can be claimed by many different groups with different characteristics.

Duclos adds the following to the above definitions of group rights;

3. Interpretative provisions protective of groups, that colour the way in which a particular constiiution or convention is read. For example s.27 of The Canadian Charter requires that the Charter be interpreted consistently with "the preservation and enhancment of the multicultural heritage of Canada."

In addition there are rights which are granted to aggregates, that is collections of people who do not identify as a group and are not bound by ties of culture, language and so on, but are acting together on a short term basis, for a particular purpose. An example of a right granted to aggregates would be freedom of association. Duclos calls these "individual rights with a group protection component", because they are "rights which can only be effectively exercised in the context of a group and so may imply protection for the group." [6] For example the right to engage in industrial action can be used to protect an individual from criminal or tortious liability, but is only meaningful where

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3 Pierre Carrignan, as qouted in Fournier, *ibid.*
4 Jean Rivero, as qouted in Fournier, *ibid.*
5 Convention on the Pevention and Punishment of the Crime of Genocide. 1948, 78 U.N.Treaty Series 277
6 Nitya Duclos, "Lessons of Difference: Feminist theory on Cultural Diversity." (1990) 38 *Buffalo Law Review* 325 at 347.

there is an industrial dispute involving large numbers of workers, and may provide protection for the trade union.

Another distinguishing feature of group rights is the claimant. The claimant of a group right will usually be the group, or if it is an individual, then the individual will be representing the group. It is often however difficult to find a specific victim of the violation of a group right. With women for example, the lack of a right to self-determination may result in lower numbers of women in well paying jobs, but can one specific woman be pointed to to as a victim? To properly implement group rights some provision would have to be made to allow class actions. In addition the claiming of a group right by an individual substantially alters its nature. If for example the right proposed in this thesis, self-determination for women as a social group, were claimed by an individual woman, it is my contention that it would no longer imply a demand to change the systemic constraints which oppress women, but would instead only guarantee private autonomy for a woman.

Other definitions of group rights have emphasized their purpose, either to protect the interests and needs of groups,[7] or to express the value of grouphood, communality, as a right.[8] These descriptions of group rights, while useful to describe the concept of group rights once defined, do not actually explain why group rights are different from individual rights. Viewing group rights as rights which are collectively utilized seems to be the most sucessful.

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7 Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination.* (Greenwood Press:1985) at Chapter 4.

8 Ronald Garet, "Communality and Existence: The Rights of Groups." (1983) 56 *Southern California Law Review.* 1001

C. The Advantages of Group Rights.

There are four broad reasons why group rights are preferable to individual rights where the objective is to make the legal system more responsive to the needs of groups and more willing to assist in restructuring society.

1. Nondominant groups have values, priorities and ways of living which are often different from and incompatible with the values of the dominant group, that are not recognized by the legal system, and which the groups themselves nevertheless see as important and worth preservation. Group rights can be a mechanism by which these values are respected and recognized.

2. A group perspective examining the social realities of groups, makes pervasive and systemic systems of inequality visible.[9]

3. Group\collective action is more powerful than isolated individual stands, and is necessary to resist the aggregation of power in other centers.

4. Group rights tap into existing ethical support for minority rights at national and international level, or existing governmental blueprints for access to social rewards.

However a choice of group rights merely because they are a more efficient method of acquiring additional amounts of a limited set of resources for the particular group in question, here women, leads to a criticism that possessive individualism is being replaced by a theory of possessive groupism.

Certainly competition with the dominant group, which benefits from the oppression of other groups, is inevitable, as oppressor and oppressed will have interests which are

9 This is the point made by Colleen Sheppard "The "I" in the "It": Reflections on a Feminist Approach to Constitutional Theory" in Richard F. Devlin (ed) *Perspectives on Canadian Legal Theory*. (Edmond Montgomery: Toronto 1991)

fundamentally opposed. Competition between oppressed groups is more problematic however. If feminism is more than a self-interested struggle to `get what's going' for women, then this sort of competition is to be rejected, and replaced with a sensitivity to the effects on other subordinate groups of the success of women in gaining power.

In addition methods for dealing with conflict, when it does arise, could be devised. An emphasis on negotiation and dialogue for example could provide a solution. In other cases the cause of the dispute is elsewhere. In A.G.v. Lavell it could be argued that limited band resources, rather than a desire to violate equality rights, was the motivation behind denying Indian women who married outside the band their Indian status.[10] In cases such as this, identifying the cause of a dispute could be the first step to its solution.

For those conflicts which are not amenable to a negotiated solution, there has to be a realization that some stance or position must be taken. Often both positions cannot be accommodated. In Ireland, for example, there is no negotiated solution which allows both rights to abortion, and no rights to abortion. At this point feminists must make a value judgement about what is better or worse for women, and aim to have that judgement given the force of law. To lose a capacity for criticism can lead to an endless relativism where there is no right or wrong, good or bad, only different experiences, and then no platform from which to call for change.[11] Even the experiences and standpoints of right wing women will often require a critical evaluation. As Ramazanoglu points out,

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10 [1974] S.C.R. 1349.
11 Alan Hunt, "The Big Fear: Law Confronts Postmodernism." (1990) 35 *McGill Law Journal* 508

> "Feminism loses its political force if it is dissipated into an uncritical acceptance of women's experiences"[12]

The challenge is to retain a sensitivity to other oppressed groups while securing changes which will benefit women.

1. Group Values.

Groups exist. People see themselves as members of groups, identify with group values. and express their social identities through the group. Often a group has a different way of looking at things, a different world view which is incompatible with the views and values of a dominant group. As Turpel points out writing about aboriginal peoples in Canada

> "The collective or communal basis of aboriginal life, does not really, to my knowledge, have a parallel to individual rights ... to try to explain to an Elder that under Canadian Law there are carefully worked out doctrines pertaining to who has proprietary interests in every centimeter of the territory, sky, ocean, ideas, and various other relationships would provoke disbelief and profound skepticism"[13]

Women can also claim to be a group with different values and perspectives. This is one of the central projects of cultural feminists who identify and celebrate women's differences from men, for example that "women value intimacy, develop a capacity for nurturance and an ethic of care for the other with which we are connected." [14] This ethic of care has been used by Colleen Sheppard to expand and develop the concept of

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12 Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression.* (1989: Routledge) at 180.
13 M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences." in Richard Devlin (ed) *supra*, note 9, at 518.
14 Robin West in "Jurisprudence and Gender" (1989) 55 *University of Chicago Law Review* 551

equality.[15] However celebrating women's values in this way has been criticized as "institutionalizing women's biology and social role"[16].

Whether women have different values because of a different philosophical natures, or have different views because of a history of exclusion and domination, the result is the same. Women can presently be said to have different values, particularly as regards experiences of pregnancy and childbirth, and that these values are not recognized in law. Or as has been pointed out in Chapter 1, the way in which women can make decisions, in a relational and contextual manner, rather than by weighing competing rights is not recognized in the existing legal structure.

Although this may appear self-evident, it is not adequately recognized in the existing rights systems. While there are slots or forms to fit other interests into, there are none for group values, that is the positive values or attributes which a particular group has, the different world view, or other way of being which is not the dominant one. The present structure of the legal system, by not seeing groups, cannot take the positive values of groups into account.

Other writers, such as Garet argue that there is also a value attached to the very experience of being a group. His work on group-rights begins with the existence of groups.[17] He starts by recognizing that groups exist as parts of society,

> "Individual and society are not the only faces of value: the "individual value" (whether one regards it as liberty, rationality, dignity, autonomy or personhood) and the "social value" are not

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15 Colleen Sheppard "The Ethic of Care", paper delivered at U.B.C. in March 1990.

16 Hester Lessard, "Relationship, Particularity and Change: Reflections on R v. Morgentaler and Feminist Approaches to Liberty." (1991) 36 *McGill Law Journal* 263 at 274.

17 Ronald Garet, *supra*, note 8.

> the only structures of existence. Groupness ... is just as much a structure of existence as are personhood and sociality"[18]

They have an intrinsic value which he calls communality, and a fundamental right to respect for that communality. His is an existential theory of rights, drawing on the philosophy of Jean Paul Sartre, where something has a right to exist simply because it exists. Therefore because groups and a group value exist their right to existence should be protected. He then looks at the U.S. constitution and sees that this value is not recognized there. The only values that are recognized are those of individuals and of the state. This is essentially the same point that critics of liberal legalism make.

In order to illustrate the defects of a purely individual approach, Garet analyses the U.S. case Regents of the University of California v. Bakke.[19] He shows how Powell J. relied on an individual value understanding of equal protection to invalidate a school admissions process that enhanced black representation in the student body by reserving seats for minorities.

> "These results are made possible by the fact that neither the individual value (equal respect for persons) nor the social value (rough political equality) authorizes the court to inquire into the intrinsic value of the two groups subjected to the erroneous protection judgments."[20]

This criticism can be equally well applied to the Wellwoman, Coogan and Grogan cases discussed in Chapter One. The court does not inquire into the situation or existence of the two groups at the center of these cases.

Owen Fiss, on the other hand, believes that running under the surface of the dual value schema of individual and social rights is an unrecognized moral appeal which is

18 *Ibid*, at 1015.
19 (1978) 438 U.S. 265
20 *Ibid*, at 1078

unaccounted for. It appears in certain cases where the decision is not explained by referring to personhood or sociality. This leads Fiss to say that the U.S. Constitution does sometimes provide for group rights, not expressly, but by referring to, and protecting experiences that can only be the experiences of groups.[21]

Although the positions of Garet and Fiss are at first glance contradictory,both are in fact looking at group values from different perspectives. While it is true that there is some provision for what are believed to be the values of a particular group, in line with what Fiss maintains, there is no inquiry into what the values the groups themselves really have. In Irish constitutional jurisprudence the implicit moral appeals to group values of the Irish people are to be found, but there is no questioning of what these values really are.

Whether we see value in terms of a vague communality which all groups have [22] or the value systems peculiar to specific groups, according rights to groups would make it possible for these group values to be seen. To leave groups out of constitutional rights is to neglect, marginalize and exclude those experiences which can only be seen and presented as group rights. As Svensson points out

> "The actual and specific claims and interests of those being subjected to proposed rules must be heard, and perhaps more difficult-understood on their own terms in order for a just accommodation to be reached."[23]

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21 Owen Fiss, "Groups and The Equal Protection Clause" (1975) 5 *Philosophy and Public Affairs* 105, at 171.

22 This value is what the communitarians seek to protect. Their insight is that the conception of the individual self fails to capture the reality of human existtence. See Michael Sandel, *Liberalism and the Limits of Justice*, (1982 New York: Cambridge University Press.); Alisdair MacIntyre *After Virtue.* (1981, Notre Dame: University of Notre Dame Press)

23 Frances Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and its impact on American Indian Tribes" (1979) 27 *Political Studies* 421, at 430.

Svennson has American Indian tribes in mind when making this claim, and more particularly the Pueblo Indians. She discusses the imposition of an alien individualism on them, when they did not define themselves in these terms, and points out that this ideology was inconsistent with their world view.

Not to accommodate groups in the democratic political structure is to deny them respect. Deciding what to award rights to; is partly a political decision about what society values. Van Dyke maintains that

> "We pick out certain interests that we consider morally entitled to respect, and we call them rights. We put into the category of human rights those interests that we judge to be of fundamental importance." [24]

To quote again from Turpel

> "Underlying the use of human rights terminology or the frame work of rights claims is a plea for the recognition of a different way of life, a different idea of community, of politics, of spirituality ... Aboriginal rights claims are, in my view, requests for the recognition by the dominant (European) culture of the existence of another, and for the toleration of, and respect for, the practical obstacles that respect brings with it."[25]

Although rights for groups of themselves may not succeed completely in incorporating these interests into law, indeed these are values which by their very nature are incapable of being absorbed into the dominant system, they provide a mechanism by which the process of recognition and respect can be begun. At a practical level, a right to self-determination for Irish Women could allow women to argue that they did not possess the stereotypical values which are ascribed to them, and create a space for women to discuss what their values might be.

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24 Vernon Van Dyke, *supra*, note 7, at 16.
25 *Supra* note 12, at 519

2. Seeing Inequality.

The second reason why group rights should be recognized is that they enable inequality, disadvantage and oppression to be seen. For those who are unequal, this knowledge helps legitimate demands for change. This disadvantage can be both economic, political or suffered in a multitude of different forms, but unless it is looked at from a group perspective it cannot be seen.[26]

If a disadvantaged person making a demand for change simply speaks from an individual basis, they may find it difficult to be believed. It will be easy to find arguments why for example this women is poor, or that women was not promoted, or the next woman was raped. Those in power can say that the woman was lazy, or provocative, or just could not do the job. If the group is looked at however, and we can show that women in Canada and Ireland on average earn less than men,[27] or occupy the lower rungs of the employment ladder, and that a high proportion of women are sexually abused, then it cannot be argued that it is an individual woman's fault or misfortune. It becomes clear that there are entrenched systems and constraints in social structure that create and perpetuate this inequality and disadvantage. The demand for a remedy becomes less easy to ignore.

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26 Sheppard, *supra*, note 9, disagrees with the use of the word `disadvantaged' to describe the position of those suffering from inequality, because it implies that these people are deficient in some permanent way. Words such as oppression or subordination, for Sheppard, communicate more truly that what is really happening is the domination of one group by another.

27 In Canada in 1986 women who worked earned 66% of what men earned. Comparable figures for Ireland are that women in industry earned 60% of the average male weekly wage. For further discussion of poverty in Ireland see Mary Daly, *Women and Poverty*. (1989, Attic Press: Dublin)

The same is true of other groups in society. If it is seen statistically that aboriginal peoples are overrepresented in the prison population, or that racial minorities are not represented in decision making bodies, it leads to the question why? This in turn should lead to a realization that there are structural reasons for this.

This is the point made by Colleen Sheppard. She argues that it is only by examining the social realities of groups that pervasive and systemic patterns of equality can be seen. Sheppard explains that looking at the context leads to a realization that problems of discrimination and inequality have a group character, and emphasizes "the importance of understanding discrimination as a collective harm experienced by individual members of social groups."[28] If the economic and social context is ignored, through the abstraction of the individual from the situation, or the reification of the rights claims, or simply because of the assumption that all rights claimants are equal, this has negative consequences for groups. Apland and Axworthy put this argument clearly

> "When economic discrepancies are ignored ..., in the name of negative liberty or because of the perceived undesirability of positive liberty,(and, hence, the advocacy of noninterference by governments on behalf of those who are economically disadvantaged) individuals are put at a disadvantage in their legal relations with most government and corporate elites because of their generally less favorable economic position."[29]

It becomes clearer and clearer that ideas of equality and justice require a group dimension. In the United States this ecognition leads Fiss to argue that the equal protection clause should be expanded to include a group disadvantaging principle.

> "This principle will frame matters in such a way as to expose the real issues and thus be more likely to lead to the correct decision

28 Sheppard, *supra*, note 9, at 422.
29 Lars Apland and Chris Axworthy, " Canada: A New Perspective on Democratically Controlled Organizations" (1988) 8 *Windsor Yearbook of Access to Justice* 44, at 48.

> - invalidation of those state practices that aggravate the subordinate position of the specially disadvantaged groups."[30]

According to Sheppard this contextual information can be used to solve problems of interpretation of the quality provision in Canadian Jurisprudence.

> "The words of S.15(1) appear to protect some groups that have been privileged historically ... A purposive and contextualised approach brings the rationality of such [a result] into question. It suggests that the scope of S.15 protection should be limited to those whose individual concerns are connected to the disadvantaging of a social group."[31]

In effect this is what the Supreme Court of Canada has done. It has recognized the importance of both context and a group perspective in Action Travaille des Femmes v. C.N.R. and Andrews v. Law Society of British Columbia.[32] In Andrews Madame Justice Wilson stressed that the S.15 equality right should be considered

> "In the context of the place of the group in the entire social, political and legal fabric of our society. While Legislatures must inevitably make distinctions among the governed, such distinctions should not bring about or re-inforce the disadvantage of certain groups."[33]

In R v. Turpin, the test was expanded and required that groups be a discrete and insular minority who had been historically disadvantaged in order to claim the benefit of s. 15.[34]

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30 Fiss, *supra*, note 20, at 171

31 Sheppard *supra*, note 9, at 423

32 (1987) 40 D.L.R. (4th) 193, [1989] 1 S.C.R. 143.

33 *Ibid*

34 [1989] 1 S.C.R. 1296. See also Schachter v. Canada (1990) 66 D.L.R. (4th) 635, where the Unemployment Insurance Act 1971 which did not provide adoptive parents with the same child care benefits as natural parents, was found to be inconsistent with S.15 of the Charter; Christante v. Smith [1990] 4 W.W.R. 744, and Milne v. Alberta [1990] 5 W.W.R. 650, where discrimination against illegitimate children in receiving child support was held to violate S.15; Leroux v. Co-Operators General Insurance Co. Ltd. (1990) 65 D.L.R. (4th) 702, where the exclusion of common law spouses from insurance coverage was held to violate s.15. In these cases those protected by S.15 were found to be minorities who had been historically disadvantaged.

At least some members of the Supreme Court of Canada have recently begun to move beyond the symmetry that Sheppard and Brodsky and Day, have criticized, that is the use of equality provisions to strike down positive benefits for women on the grounds that they do not apply equally to men, by taking account of the context of the issue in each case. In Conway v. Attorney General of Canada[35] for example prison inmates challenged the effects of the federal affirmative action programme which brought female guards into male prisons. They argued that the subjection of male inmates to searches by female guards while female inmates were not subject to search by male guards violated their equality rights under S.15 of the Canadian Charter.

Desjardins J.A. of the Federal Court of Appeal used the goal of allowing women equal access to employment in federal prisons, and a recognition of the context in which the claim was situated to find that the minimal intrusion in the privacy rights of prisoners was more than justified by this goal.

A group perspective is also important when the question of appropriate remedies is considered. If the real issues cannot be seen - how can adequate remedies be granted? Brodsky and Day are aware of this problem; "Individualizing equality problems makes the oppression of women as a group invisible and makes it difficult to see why they should be granted group remedies." They also point out that

> it also makes it difficult for judges to accept that governments may target certain social programs at groups of people based on the characteristic needs of the group as a whole.[36]

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35 (1990) 58 C.C.C. (3d) 424

36 Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back.* (1989, Canadian Advisory Council on the Status of Women)

This is illustrated by the Irish case of Blake and Madigar. v. Attorney General [37] where the 1960 Rent Restrictions Act which fixed amounts of rent payable on certain private dwellings was declared unconstitutional and an unjust attack on the property rights of landlords. The Irish Supreme Court failed to take the social objective of the legislation into account, which was to provide low cost housing for poorer people who might otherwise have difficulty obtaining affordable housing. As McCormack points out, the emphasis on individual property rights of landlords severely restricted the competence of the Oireachtas (Parliament) to legislate in social welfare and resulted in the "beatification of the market economy through the constitution."[38]

3. The Power of Collective Action.

Another advantage of group rights is the added strength which collective action brings, whether this is action to assert a rights claim, or enforce an existing legal or constitutional right.

When trying to shift the entrenchment of a dominant power bloc, people need to band together to become stronger. Nitya Duclos makes this point very arguing that

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37 [1982] I.R. 117 and Re Reference under article 26 of the Constitution of the Housing (Private Rented Dwellings Bill 1981, [1983] I.L.R.M. 246.

38 Gerard McCormack, "Blake Madigan and its Aftermath" 1989 I.R. Jurist 205 at 223. Other uses of the group disadvantage test in Canada have however illustrated that even where there is ostensibly an awareness of groups, this does not solve all problems with rights, as the interpretation of rights will still be influenced by the ideologies within the legal system and the personal prejudices of the interpreter. This is apparent from Gould v. Yukon Order of Pioneers. Yukon Territory Supreme Court, March 1991.In that case Wachowich J. held that a group must be a discrete and insular minority who have been historically disadvantaged, before s.15 is applicable to them, and to find that women were not a minority nor discrete and insular.

> "If only individuals have rights and not groups, power is so dispersed that no significant threat can be posed to the hegemonic control of the dominant group."[39]

The strength of collective action has also been recognized by sociologists studying the mobilization of ethnic groups. Nagel points out that large scale organizations in modern economic and political arenas have a competitive advantage in trying to extract resources from those in power.[40] The formation of these large-scale organizations is therefore a strategic response to the need to confront other, large scale competitors.[41] These writers are thinking specifically of collectives formed to litigate for native claims such as the Native American Rights Fund. Analogies could also be drawn in Canada with LEAF or NAWL.[42] Collectives such as this because of their size, can wield significant power and have enormous influence as pressure groups.

This is illustrated by the effectiveness of P.L.A.C. in the Irish context, where the collective action of conservative forces was successful in having a rights claim adopted as a constitutional right. At a practical level because of their larger size and greater resources, P.L.A.C. were able to engage in a widespread pro-life campaign, backed by nationwide advertising and media coverage. This helped to ensure the passing of the amendment. Women's groups on the other hand because of their small and fragmented nature, only had the financial resources to campaign in the capital city. In subsequent litigation the assertion that the right was backed by a majority of the Irish People was used to give added legitimacy to the right to life of the foetus. This is apparent from the judgment of Hamilton P. in the Wellwoman case where he observed that

39 Nitya Duclos, *supra*, note 6, at 350.
40 Joane Nagel, "The Political Mobilization of Native Americans" (1982) 19 *The Social Science Journal* 36; Joane Nagel and Susan Olzak, "Ethnic Mobilization in New and Old States: An Extension of the Competition Model" (1982) 30 *Social Problems* 128.
41 Nagel and Olzak *ibid.* at 133.
42 Women's Legal Education and Action Fund and National Association of Women and the Law, respectively.

> "As late as 1983, the people enacted the Eight Amendment to the Constitution. Consequently, there can be no doubt that abortion, which is an interference with and destruction of the right to life of the unborn, is contrary to national policy, public morality, contrary to law, both common law and statute law, to the fundamental right of the unborn and contrary to that right to life as acknowledged by the Eight Amendment to the Constitution."[43]

Collective or group action therefore brings added strength when pressing a rights claim or litigating a constitutionally protected right.

4. The Waiting Niche.

The existing support for groups at national and International levels may also be listed as an advantage for articulating claims in the form of group demands and group rights. To the extent that these rights exist therefore, representing oneself as a group taps into these existing systems.

The utility of this identification has been recognized by the gay population in the United States. Epstein summarizes their views when he points out that

> "This `ethnic' self characterization by gays and lesbians has a clear political utility, for it has permitted a form of group organization that is particularly suited to the American experience with its history of civil rights struggles and ethnic based interest group competition."[44]

This is also the point that Nagel makes when she points out that

> "Successful mobilization strategies are those that fit the blueprints for access and influence drawn up by the political center."[45]

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43 A.G. (S.P.U.C.) v. Open Door Counselling and Wellwoman Center. [1988] I.R. 614

44 Brian Epstein, "Gay politics, Ethnic Identity; The Limits of Social Constructionism" (1987) 17 *Socialist Review* 11, at 20.

45 Nagel, supra note 40, at 39.

This reason draws on moral undercurrents running under society's surface. While the Canadian constitution is designed to accommodate groups, and is to that extent removed from the unbridled individualism of the United States, the support for groups is probably more apparent in the United States which has a stronger tradition of group struggle for individual rights.[46] Where there is this support it makes it easier justify measure which assist groups. It means that groups are swimming with the tide.[47]

Quinn points out that a similar communitarian ethic exists in Irish Legal discourse, which is influenced by the theocratic ethic of communitarianism. Although the appeal to community is seen more in terms of an appeal to the national spirit or the national interest appealed to in S.P.U.C. cases, it nevertheless leaves a space to be potentially exploited by groups which is not available in a completely individualistic system, since

> "liberal-democracy favours the autonomy of the individual whereas theocracy leans toward the collective rights/powers of the group"[48]

Thus, the theocratic influence which has in the past placed constraints on Irish women, may in the future be claimed by them in support of their rights as group. It illustrates that concepts of rights and justice are often historcally and culturally situated, and what is of use at one period may be disadvantageous in another. The use of the equality principle by women is yet another example. While initially the principle was useful in

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46 The respect for groups and the community in Canada is discussed by Martha Jackman in "The Protection of Welfare Rights Under the Charter " (1988) 20 *Ottawa Law Review* 257; see also Nitya Duclos, *supra*, note 6.

47 The present claims of Aboriginal Peoples for self-government would be an example of group demands being made in Canada, see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination." (1991) 36 McGill Law Journal 383

48 Gerard Quinn, "The Nature and Significance of Critical Legal Studies." 1989 *Irish Law Times* 282

forcing male enclaves to include women, it is presently used by men to erode the special protection made available to women.

At the International level, recognition that the claims of groups need to be safeguarded with group rights is apparent from both general principles such as the right to self-determination and specific conventions protecting the rights of particular groups. These will be discussed in detail in Chapter 4.

D. Conclusions.

In this chapter it has been argued that there are advantages to representing and articulating claims in the form of group rights rather than individual rights.

It must be emphasized that group rights cannot solve every problem with law. Prejudice still inheres in individuals, and ideologies within the legal system, which combine to tilt the interpretation of rights in ways which favour the interests of the dominant group. Individual rights will still be necessary to effect certain objectives. It is my contnetion however that the advantages outweigh the disadvantages, and that where the primary objective is to transform the social conditions under which women live however, so that self-determination for women becomes possible, group rights are necessary.

CHAPTER THREE

WOMEN AS A GROUP.

A. Introduction.

The central objective in this thesis is to develop a model or theory of rights for women as a social group. One of the fundamental questions to be asked, therefore, is whether women are a social group. To answer this question affirmatively is not to maintain that women are a group and nothing else, simply that women can be represented as a group where this is necessary to avail of the advantages of being a group. As has been discussed in Chapter Two, the advantages of group rights in many systems, and their usefulness as a tool to break out of the impasse of liberal legalism, often make the expression of the needs of women in this form advantageous. This chapter will examine the characteristics of a group in order to determine whether women actually can be represented as such.

B. The Characteristics of Groups

So, what is a group? Are there any definitions, any central characteristics which women must satisfy before being awarded group status? This section will attempt to answer this question through a survey of various group theories.

Definitions, characteristics and central requirements of groups vary according to the discourse in which one is situated, as each discourse seeks to define and create the term. Law, like other discourses, is competing for the construction of the term.[1] It is

1 Alan Hunt in a Guest Lecture given at U.B.C. "Law as a Mode of Regulation" (April 5th 1991) made the point that 'law competes for the construction of objects for regulation' for the important reason that changing a subjectivity changes the materiality

therefore important to ask, who is calling for a definition and why? Legal theories of groups tend to construct a narrow definition of what constitutes a group, as an expansive definition which includes many groups will lead to many demands for rights. There is then the fear that the floodgates will be opened to group demands. It is therefore in the interest of those agreeing to demands to define the group tightly so that very few entities are included.[2]

1 Groups as Relationships

A realization that there are many different definitions of groups also brings an awareness that the concept `group' has considerable flexibility. This is acknowledged in the work of many sociologists when considering the role of groups in the social structure. Their analysis begins with an attempt to define the basic units of society and the bonds which bind them together. In contrast to theories of the social contract which see the individual as the basic unit, many sociologists accord this value to groups.

The acknowledgment that the group is one of the basic units of society is where Bates and Peacock begin in their attempt to conceptualize social structure.[3] They discuss two ways in which the group is represented, as a category in which like things are collected together, or as a relationship. They argue that classification constructs categories by putting together what the sociologist sees as similar objects, and rejecting dissimilar ones. The only decision to make is whether something is like A or not like A , when A is the category. The necessity for relationship is ignored as

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of the struggle. See also the theories of Jacques Derrida on naming in *Memoires for Paul de Man.* (New York, Columbia University Press: 1989)

2 This difficulty is recognized by Darlene Johnston in "Native Rights as Collective Rights: A Question of Group Self-Preservation." (1989) 2 *Canadian Journal of Law and Jurisprudence* 19.

3 F.L. Bates and W.G. Peacock, "Conceptualizing Social Structure: The Misuse of Classification in Structural Modelling" (1989) 54 *American Sociological Review* 565

> "classification does not require connection among members of a category... all that is required is that members of a class be similar to each other with respect to the defining criteria."[4]

Bates and Peacock also argue that this activity creates classes that only exist in the mind of the sociologist, and not in reality. Instead they prefer to describe the basic units of society as interactional networks, looking at social groups such as the family or work where

> "group members interact as occupants of positions and are related to each other by role relationships characterizing these positions."[5]

This second option is preferred because it is perceived by Bates to exist in reality, separately from and outside the mind of the observer\sociologist. The view that there is any objective reality capable of observation is problematic. The idea of groups as self-defined rather than defined by legal or other discourse is useful however, and is an approach which is in tune with the work of feminists who argue that women must be given the power to define and create themselves. [6] It would enable women to be represented as a group without insisting on the uniformity of a classificatory model. Instead women would be seen as a group of people joined by relationships to and with one another. Recognition that there are relationships within the group would also allow the recognition that some of these relationships are hierarchical and exploitative. Given

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4 *Ibid*, at 569.
5 *Ibid*, at 566.
6 One of the central ideas of Postmodernists is that there is no objective reality, but that all `realities' are created by the observer or writer. For a good discussion of this see Jacques Derrida, *Of Grammotology*. (John Hopkins University Press: 1976) This insight has also been adopted by Feminists in showing that there is no objective truth, but that we each create our own truth, and that discourses so far have reflected a male view of reality. See Linda Hutcheon and Nancy Hartsock (eds) *Feminism\Postmodernism*. (Routledge :1989) For feminist work on relationship see Hester Lessard, "Relationship, Particularity and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty." (1991) *McGill Law Journal* 263

that women come from many different backgrounds and perspectives, any theory of the group which recognizes the heterogeneity of the group, is to be preferred.

2. The Importance of Identity.

Another preoccupation of theories seeking to ascertain the nature of the `group' is to define a group in terms of possessors of specific characteristics or central attributes. These characteristics can often be quite minimal. The first theories which will be looked at focus on ethnic groups, but it is clear that they can be applied to, and are seen by the writers themselves as applicable to other types of groups, including women.

The most minimal definition of a group is endorsed by Nielson.[7] In his discussion of ethnic solidarity in modern societies, he accepts the definition of an ethnic group as

> "a population that has a membership that identifies itself, and is identified by others, as constituting a category distinguished from other categories of the same order."[8]

Owen Fiss, in an examination of the limitations of the anti-discrimination principle in United States constitutional jurisprudence, comes up with a similar theory. Fiss uses the concept of identification in order to distinguish a social group from aggregates of individuals who "might just happen to arrive at the same corner of the street at the same time"[9] He points to two characteristics of the group; Firstly, that a group has an

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7 Francois Nielson, "Toward a Theory of Ethnic Solidarity in Modern Societies" (1985) 50 *American Sociological Review* 133.

8 Frederik Barth (ed) *Ethnic Groups and Boundaries.* (Boston: Little, Brown 1969) as quoted in Nielson, *supra*, note 7, at 135.

9 Owen Fiss, "Groups and the Equal Protection Clause." (1975) 5 *Philosophy and Public Affairs* 105

identity and a distinct existence apart from its members, secondly, that its members are interdependent so that

> "the identity and well-being of the members of the group and the identity and well-being of the group itself are linked. (emphasis added)"[10]

This factor of identity is one of the key determinants of a group. The separate identity and the identification of members with that identity can be seen most clearly when examining the working of stereotypes. Certain prejudices grow up about a group, for example that women make bad drivers, or that people are poor because they do not want to work. These stereotypes then affect all members of the group, whether they choose to identify as members of the group or not. As soon as a woman driver or a poor person is discussed, we assume that they cannot drive or that they are lazy.

Of course this is a negative example. Often group members will identify with a group because they are proud of its values, or wish to claim some benefits awarded to it. The point is that members experience their identities, and are accorded a place in society, based on the identity of another entity, the group. They lose out if the group is negatively stereotyped and gain if the group is awarded positive benefits, whether they choose to identify themselves as group members or not. As Lahey argues,

> "Stereotyping and stigmatization of historically disadvantaged groups are legally recognized harms deserving sanction because they shape the social image and reputation of group members, often controlling their opportunities as individuals more powerfully than their individual abilities do."[11]

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10 Fiss, *supra* note 9, at 148

11 Kathleen E. Mahoney. "The Limits of Liberalism" in R.F. Devlin *Canadian Perspectives on Legal Theory* (Montgomery, Canada 1991) 57 at 67.

For better or worse this capacity for identity and identification is present where women are concerned. Arguments made by feminists against pornography acknowledge this implicitly. Catherine McKinnon for example explains how the subordinating of some women by pornography harms all women

> "not as individuals in a one at a time sense, but as members of the group women. Individual harm is caused one woman and not another, essentially as one number rather than another is caused in roulette; but on a group basis, the harm is absolutely selective and systematic. Its causality is essentially collective."[12]

Negative stereotypes, and discriminatory conditions can therefore be seen as constraining all women whether feminist or not, just as a society which adopts positive values towards women, benefits all women. It appears therefore that this factor of identity is one of the crucial features which distinguishes groups from aggregates.

3. The reation of Identity

How and why this identification takes place is another question. Most writers agree that some commonalties are necessary. Svensson and Johnstone are most demanding in terms of prerequisites for groups, but agree that identity and identification are necessary before an entity can call itself a group. For them this identification takes place where there are many bonds or dimensions linking the people who make up the group, so that the members express all their social identities through the group. The archetypal group then becomes one

> "with many interlocking dimensions or facets shared by its members- in an ideal case for example. language, religion, ethnicity, race *and* historical experience.(emphasis in original)"[13]

12 Catherine A. Mc Kinnon, *Toward a Feminist Theory of The State.* (Harvard University Press: 1989), at 208.

13 Frances Svensson, "Liberal Democracy and Group Rights : The Legacy of Individualism and its Impact on American Indian Tribes." (1979) *Political Studies* 421 at 434. See also Johnstone, *supra*, note 30.

This is in conflict with Nielson who sees members as identifying with each other in many ways, whether on the basis of either one or a combination of markers. These bonds racial or cultural, or through language or religion, are bases for identification but not required for it. They facilitate the creation of an identity, as for example modern technology makes communication easier, but the creation of an identity and a solidarity based on that identity are possible with other bonds, dimensions and markers than those traditionally associated with groups. An example could be common interests, needs or goals. Nielson is quite clear that other structural characteristics such as

> "a common language, a propensity to endogamy, a closed network of interactions...facilitate the expression of this solidarity, but are not intrinsic part of it."[14]

Nielson uses the women's movement as an example of another basis for solidarity. He describes how this movement

> "Would be characterized by claims defined on gender and a degree of mobilization of the female population. It is an instance of gender solidarity. The essential elements of other forms of solidarity would still be the formulation of group specific claims and the mobilization of the membership in view of implementing these claims."[15]

This sort of group is rejected by Svensson as hopelessly complicated. Groups organized around only one bond would also be members of other groups

> "so that there would be a crazy quilt of overlapping group and individual statuses and rights claims and no way to mediate them other then by going back to the principle of overriding individual rights."[16]

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14 *Supra*, note 7, at 137
15 *Supra*, note 7, at 137
16 Svensson, *supra*, note 13, at 434.

Such a view can be criticized for failing to acknowledge that even those `real' groups with multiple interlocking dimensions, still have identities which overlap with other groups. Native peoples, for example, the group Svensson has in mind, also overlap with the group women, despite the multiple bonds of common race, culture, language, history and world view, so that claims to aboriginal self government have come into conflict with the equality rights of women.[17] Individuals in society have a large variety of identities available to them, so that no matter how multidimensional a group is, there will always be crosscutting identities.[18]

One of the central insights of the work on ethnic groups is that ethnicity, or the basis on which ethnic groups identify, is politically constructed. Sociologists show that the bases for group solidarity come into being in response to, and are created by, political and economic factors. This is probably also true for women as a group. Feminists point out that gender is politically constructed. Okin for example writes that "the rejection of biological determinism and the corresponding emphasis on gender as a social construction characterize most current feminist scholarship."[19] This means that the roles of men and women, and the characteristics of men and women are created in society rather than necessitated by biology. Rosaldo writes that

> "The fact that women give birth to and nurse children would seem to have no necessary entailments, (but) it appears to provide a focus for the simplest distinction in the adult division of labour in any human group. Women become absorbed primarily in domestic duties because of their role as mothers. Their economic and political activities are constrained by the responsibilities of

17 This was the essence of the conflict in *Lovelace v. Canada* 36 U.N. G.A.O.R. Supp (No,. 40) Annex XVIII, U.N. Doc. A/36/49 (1981) where it was alleged that the statutory provision which discriminated on the basis of sex in relation to band membership, infringed women's equality rights.

18 Nielson, *supra*, note 7, at 137.

19 Susan Moller Okin, *Justice, Gender and the Family.* (1989: Basic Books) at 6. See also Michelle Rosaldo, *Woman Culture and Society.* (1974) Stanford University Press)

> childcare, and the focus of their emotions and attentions is particularistic and confined to women and the home"[20]

A realization that sex roles are created differently in different cultures and societies underlines this point.[21] To the extent that the work of women with childcare, their roles in the family, their traditional exclusion from society mean that they develop different values and natures, the very meaning of what it is to be a woman is socially or politically constructed.

In her work on Native Americans, Nagel illustrates very clearly the political construction of ethnicity.[22] She points out that there was no such concept as `Indian' prior to contact with Europeans. It was merely "a label applied to religiously and culturally varied peoples for the convenience of an outside group."[23] Yet out of that linguistically and culturally diverse convenience category an ethnicity has been created, which is now the basis for identification, or to be more exact, provides several bases for identification. `Indians' in the U.S. have been mobilizing from three separate bases: tribal, when organization and action are by members of one tribe in pursuit of tribal goals; pan-tribal where the organization involves the members of more than one tribe; and pan-Indian where the action is on the basis of Indianess and in pursuit of pan-Indian goals.[24]

The point to be grasped here is that out of a heterogeneous and diverse collection of people, several different types of politically mobilized groups have been created. These groups have created themselves in response to what they see as their needs, and created

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20 Rosaldo, *ibid*, at 24
21 Rosaldo, *ibid*.
22 Joane Nagel, "The Political Mobilization of Native Americans" (1982) 19 *The Social Science Journal* 36 ; Joane Nagel and Susan Olzak, "Ethnic Mobilization in New and Old States: An Extension of the Competition Model." (1982) 30 *Social Problems* 128
23 Jeanne Guillemin *American Indian Resistance and Protest.* as quoted in Nagel *ibid*,at 37.
24 Nagel, *ibid*,_at 28.

not only one, but an array of groups to work from, depending on the particular problem that needs to be solved. This has enormous implications for a theory of women as a group. Women *can* be thought of as groups, or an array of groups in a relationship with one another, or as one large group. Which one comes into operation would depend on the particular problem to be solved and the options open for its solution. Nor is there a necessity for women to have a fixed, uniform or ahistorical set of characteristics in order to be a group, or to mobilize as a group. Instead there is freedom to represent women as a group if it is necessary to do so.

That this is also true of other groups is pointed out by Nagel. To show that ethnic identification is fluid and to a certain extent voluntary, she describes how people often switch ethnic identities, either in the short term by choosing to speak in one language rather than another, or in the long term, by adopting the cultural markers of religion, dress or custom of a more dominant group in a particular society.[25] As Nagel points out, ethnic mobilization is

> "not simply the inevitable result of primordial differences that somehow generate novel or revitalized ethnic identification and organization. Rather. the boundaries around ethnic groups are incipient, problematic and situationally determined."[26]

25 She gives as an example the conversion of non Hausa northern Nigerian urban immigrants to Hausa ethnicity to claim the economic advantages associated with that identity. There are also examples in North America of the adoption by new immigrants of the dress and customs of the dominant Anglo culture.

26 Nagel and Olzak, *supra*, note 22 at 129. Marlee Kline also makes this point about First Nations Culture in Canada. It has not remained fixed and static at some point prior to contact with Europeans, but is constantly recreating and redefining itself in response to modern society; guest lecture given to the graduate class at U.B.C. in March 1991. The changing nature of First Nations culture was also apparent at an exhibition of contemporary Mask-Carving at the Museum of Anthropology, where the artist departed from traditional images to carve a mask of the Exxon Valdez disaster in protest at the destruction of the environment.

Ethnicity is created as a basis on which to mobilize in response to political and economic conditions in society. Which of these identities crystalizes at a particular moment depends on the situational constraints and the strategic utility attached to that identity. While impetus from below determines if mobilization will occur, impetus from above determines the shape mobilization will take.[27] Native Americans, for example, responded to incentive structures determined by Federal Indian Policy. It is clear that groups can create themselves to exploit the advantages of group rights discussed above in Chapter Two, and more particularly the greater strength which acting collectively brings.

The conceptualization of gays as an ethnic group is also illustrative of the capacity of a group identity to be created. Epstein in his work on gay politics and ethnic identity, describes how gays in the 1970's began to conceptualize themselves as a legitimate minority group, and later as an ethnic group [28] The representation of gays as an ethnic group depends on how ethnicity is defined. It can be seen as a fixed inescapable category, or something that can be taken up and put down. According to Epstein it is more true that racial and ethnic categories are fluid and subject to redesignating and re-evaluation, having different meanings in different contexts, than that they are transhistorical and unchanging.[29]

In a discussion which echoes the ideas of Nagel and Olzak, Epstein describes the `new ethnicity' that developed as an escape from traditional idealized views of ethnicity. This `new ethnicity' came to be

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27 Nagel *ibid*, at 39.
28 Brian Epstein, "Gay Politics and the Limits of Social Constructionism." (1987) 17 *Socilaist Review* 11
29 *Ibid*, at 33.

> "a future oriented identity linking an effective bond with an instrumental goal of influencing State policy and securing social rewards on behalf of the group."[30]

C. The Problem of Essentialism

To assert that women are a group is to invite the criticism that this is a form of essentialism, that is, generalizing about all women on the basis of the experiences of a small group of white privileged western women. What has come to be known as essentialism is the notion, as Angela Harris puts it,

> "That a unitary essential woman's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience."[31]

In her powerful critique of essentialism, Spelman shows how attempts to define the essential nature of woman, and woman's experiences, leads to a focus on white women. She shows how feminists have assumed that we have the clearest examples of what women suffer as women when they are not subject to any other forms of oppression. This leads to a thinking where

> "insofar as what Black women suffer resembles what white women middle class women do, we can tell what they suffer as women; insofar as they suffer what Black men do, we can tell what they suffer as Blacks."[32]

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30 *Ibid*, at 37.
31 Angela Harris "Race and Essentialism in Feminist Legal Theory." (1990) 42 *Stanford Law Review* 581, at 585.
32 Elizabeth Spelman, *Inessential Woman* (Beacon Press: Boston 1988) at 166.

She argues that white feminists therefore think, that Black women suffer sexism in the same way as 'we' (white women) do, so to construct theories of sexism all `we' have to do is work from 'our' own experiences. Of course this is not done consciously, but takes place under the surface of feminist thinking. According to critics of essentialism, this method of searching for what is common to all women reduces race, class and sexual orientation to footnotes and exceptions and also excludes the experiences of women who have been reduced to footnotes.[33]

The recognition that all women do not experience sexism in the same way, do not relate to men in the same way, are not oppressed by structures and ideologies in the Same way, is certainly to be welcomed. As Spelman so powerfully puts it

> "It will not do to say that women are oppressed by the image of the `feminine' woman as fair, delicate, and in need of support and protection by men...as Angela Harris reminds us, `the alleged benefits of the ideology of femininity did not accrue' to the Black female slave- she was expected to toil in the fields for just as long and hard as the black male was."[34]

The essentialist view that all women are the same and suffer the same way, leads to a view that all women have the same problems, and require the same solutions to these problems. Feminist objectives are therefore defined in terms of what white well-to-do feminists want, that is employment equity, daycare, abortion and above all the freedom to be the same as white middle class men. It is not that critics of essentialism think these goals unimportant, or that the experiences of white women were invalid, it is just

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33 This is one of the points made by Marlee Kline "Race, Racism and Feminist Legal Theory." (1989) *12 Harvard Women's Law Journal* 115.

34 Spelman, *supra*, note 32, at 122.

that they are not the goals of *all* women. These theories purport to speak for all women, when in fact all voices are not being heard.[35]

The critique by black women of white feminists also turns on itself however. If all woman experience sexism differently, and have different goals and agenda, then how *can* black feminists propose to speak for all black women? In fact how can anyone speak for anyone else at all?

So what is the answer? Are there no commonalties between women at all, nothing to bind women together? What are the consequences for a *theory* of women as a group? If creating any theory excludes some women is it possible to have any theory at all? Perhaps there are no commonalties, and each woman must define her own objectives and find others to support her on a short term basis.?

While women quite clearly are not all the same, but are different from each other by race, class, religion, background, culture and upbringing, age and abilities, there is more than one conclusion to be drawn from this heterogeneity. Although some feminists may empathize with Caroline Ramazanoglu who maintains that

> "As long as women have different class standpoints on .. critical issues, and remain divided by race, culture and sexuality, there can be no agreement on what constitutes liberation."[36]

there is more than one point of view! According to Spelman for example, giving in to this despair may be another form of racism or essentialism.

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35 See Kline, *supra*, note 33, at 143, discussing MacKinnon's work "MacKinnon's focus on the experiences of white women would not be so problematic if she did not present her views as inclusive of the experiences of all women. Yet it is precisely in purporting to speak to the experiences of all women that MacKinnon gains legitimacy for her theory"

36 Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression.* (Routledge:1989) at 179.

> "It amounts to my claiming that if there is any general case to be made, it *can* only be on the basis **of** my case...if **I** get dislodged from center stage, no-one or nothing else is going to replace me."[37]

Other feminists have argued that this view succumbs to the what may be last ditch efforts to challenge the legitimacy of a movement based on the mobilization of women. This insight stems from similar criticism by feminists of postmodernism, whose.

> "recognition of interpretative multiplicity, **of** the indeterminacy and heterogeneity of cultural meaning and meaning production, is viewed as calling for new narrative approaches, aimed at the adequate representation of "difference"[38]

From this perspective the subject centered analysis of feminism is seen as problematic, and rejected as essentialist. This leads Nancy Hartsock to **ask,**

> "Why it is, just at that moment when previously **silenced** populations have begun to **speak** for themselves and **on behalf of** their subjectivities, that the concept of the subject **and the** possibility of discovering/creating a **liberating truth become** suspect?" [39]

Certainly a sensitivity to difference is required and care must be taken not to succumb to oversimplificationand gross generalizations, but this does not mean there is nothing meaningful to **say** about what women have in common. To hold that there are no valid feminist projects other than the analysis of difference, leads, as Bordo points out, "to the coercive mechanical requirement that all enlightened feminist projects attend to ..difference."[40] Delegitimating the feminist project and engaging in endless discussion of the faults and failings of feminist discourse often benefits only those privileged enough to engage in such discussion.

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37 Spelman, *supra*, note 32, at 183

38 Susan Bordo, "Feminism, Postmodernism and Gender-Sceptism." in Linda J. Nicholson (ed), *Feminism/ Postmodernism* (Routledge:1990) 133 at 135.

39 This is the point that Nancy Hartsock makes in "Rethinking Modernism: Minority vs. Majority Theories" (1989) 7 *Cultural Critique* 187.

40 Bordo, *supra*, note 38, at 139

Neither is such a position politically pragmatic. An endless pluralism cannot provide a platform from which to call for change. The experience of Irish feminists illustrates this clearly. While small scale women's groups have sprung up in towns and counties all over Ireland, an effective opposition to right wing movements has not been assembled because of the fragmentation of feminists' efforts. This is acknowledged even by Ramazanoglu.[41] If a political rather than an academic perspective is adopted, it becomes apparent that there are clear political advantages to be gained from representing women as a group. These have been discussed in the previous chapter. The nature of the legal system is such that unified and cohesive arguments are more likely to be successful than those based on a vague pluralism. If the objective is to increase the effectiveness of rights in achieving change for women, then a group perspective is preferable to a focus on difference.

D What kind of a group are women?

The discussion of theories of groups in earlier sections leads to the conclusion that a group is an entity with sufficient commonalties such that its members *can* identify with the group and act together to pursue common goals and interests. It also seems fair to conclude that the origin of these commonalties is irrelevant, and that often they are political constructs. Women therefore can be seen as a group if they satisfy these requirements.

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41 According to Ramazanoglu "feminism loses its political force if it is dissipated into an uncritical acceptance of women's experiences", *supra*, note 36, at 180.

The work of feminists certainly provides a basis for arguing that women have sufficient commonalties to generate a group identity. This section will examine this work and then aim to show that this identity has been created. To assert the similarities of women is not however to deny their differences, it is simply the assumption of a strategic position for the benefit of women in engagement with law.

Although there are many feminists writing about the similarities between women, they can be divided into two broad categories, those who emphasize the common values of women, and those who draw on common experiences of women and the history of oppression. Often these two categories are intertwined, as the values of women are often developed as a result of a domination, but will be discussed separately in the interests of clarity.

1. Common Values

As has been discussed through this thesis, women share many values and interests. Cultural feminists have devoted themselves to identifying and celebrating these values as positive attributes of women. While it is impossible to describe or even list all the work on this area most cultural feminist have theories based either on women's biology or on the different ontological nature of women. Daly and Riche are perhaps the best examples of a feminism based in biology.[42] They believe that female biology leads to

42 Mary Daly, *Gyn/Ecology: The Meta-Ethics of Radical Feminism,* (Boston, Beacon Press: 1978), *Pure Lust: Elemental Feminist Philosophy.* (Boston: Beacon Press 1984); Adrienne Rich, *Of Woman Born* (New York:Norton 1976); see also Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender.* (Berkely:Univ. of California Press 1978); Linda Alcoff, "Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory." (1988) *Signs* 412.

values of nurturing and caring, and a creates a certain distinct female energy. The work of Colleen Sheppard, which applies this value of women to law, has been discussed above.[43] These capacities for nurturing and caring are seen by others as limiting because they were developed because of the subordination of women. As Alcoff maintains

> "to the extent cultural feminism merely valorizes genuinely positive attributes developed under oppression, it cannot map our future long range course."[44]

The attempt here however is not to approve or disapprove of these values, merely to assert that they have contributed to the creation of the identity of women.

Women appeal to one another and empathize with one another on this basis. As Maeve Doggett points out, the belief in women's values as mothers and reproducers of life was a force behind setting up the women's peace camp at Greenham Common in Britain to protest against the siting of Cruise missiles there.[45]

Another basis for the creation of identity is the different ontological nature of women. The work of Robin West exemplifies feminists who share views of a different philosophical nature for women. According to West, women go through a different individuation process than men, and this leads them to be relational rather than autonomous.[46] Whereas women view independence and autonomy as a threat, men, in Wests view, find intimacy and relation threatening. Because it is men who have constructed philosophy and the legal system, this has lead to a structure where

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43 Chapter 2, note 28 and accompanying text.
44 Linda Alcoff, *supra*, note 42 at 414
45 Maeve Doggett, "Greenham Common and Civil Disobedience: Making New Meanings for Women." 1989-90 *Canadian Journal of Women and the Law*. 395
46 Robin West, "Jurisprudence and Gender." (1989) 55 *University of Chicago Law Review* 551.

autonomy is protected and valued. West see this as being in complete contradiction to women's essential nature.

The objective here is not to analyze the wide variety of feminist work which stresses the values which women share, but to affirm that there are some common characteristics which women share. This is not to say that all women share every one of the values asserted, or that all women have these characteristics in the same way, merely to say that a large number of women will share these values and characteristics. If Irish women are looked at for example, it can be said that in contrast with Irish men, they will in general through their work in caring for children and family members, have developed a greater capacity for caring, they may also tend to view themselves as more connected with their families, and place a greater value on intimacy. This statement is especially likely given the fact that most Irish women are full time homeworkers.[47] Since this creates different needs and interests for women, women can empathize with each other, appeal to these commonalties, and identify with one another. The is apparent from the questions asked by Mary Robinson

> "If half the Oireachtas were women, would the priorities remain the same? Most men would probably doubt whether it would make a significant difference, whereas most women would see immediately that there would be a different order of priorities."[48]

Clearly she views Irish women as a group, and one with separate interests and perspectives.

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47 Jenny Beale, *Women in Ireland.* (1986: Dublin)
48 Mary Robinson, "Women and the Law in Ireland" in Ailbhe Smythe (ed) "Feminism in Ireland" special issue of (1988) 11 *Women's Studies International Forum* 351 at 352

2. Common History of Oppression.

Theories based on a shared history of oppression, and a common interest in acting to end this and so pursue social and political self-determination, are created by many feminists. MacKinnon is one of the best examples of this kind of theory. She sees the feminist project as explaining male dominance and has worked out a total dominance theory, based on the oppression of all women, and a theory of patriarchy as a set of mechanisms, ideologies and social structure designed to oppress women.[49]

Certainly Irish women have a history of oppression in common. As has been discussed in Chapter One, the laws which govern women in Ireland and the view of women in the Constitution reinforces a view of women as primarily wives and mothers. Former legal restrictions such as those which prevented married women from working, or obtaining contraceptives, restricted women's freedom to chart the course of their own lives. Women have been given less opportunity to take part in industrial training programmes,[50] have been denied the same unemployment benefits as men, and have had to shoulder the primary burden of child care. Women, especially single parents, are one of the poorest groups in Irish society.[51]

As with common values, a common history of oppression can be said to draw women together and forge an identity of women as a group. This is evident in Ireland from the formation of women's groups devoted to fighting the poverty of women, and the women's groups discussed in the first chapter who set up clinics to provide pregnancy

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49 This theory is at its most developed in Catharine McKinnon, *supra*, note 12, but see also "Reflections On Sex Equality Under the Law" (1991) 100 *Yale Law Journal* 1281

50 Beale, *supra*, note 47.

51 Mary Daly, *Women and Poverty*. (1989, Attic Press: Dublin)

counselling.[52] The creation of the Irish Council For the Status of Women in recent years is also evidence of the existence of an identification of women with one another. Traditionally there were also many other women's groups, such as the Irish Countrywomen's Association, addressing women as a distinct constituency.

Writings of academic feminists also display an intuitive feeling that women are a group. Bacchi for example works on the assumption that women are a group[53], as does MacKinnon. She describes how

> "Composed of all its variabilities, the group women has a collective social history of disempowerment, exploitation, and subordination extending to the present. To speak of social treatment "as a woman" is thus not to evoke any universal essence or homogenous generic or ideal type, but to refer to this diverse reality of social meanings and practices such that to be a woman is not yet the name of a way of being human."[54]

The fact that women have enough commonalties to make it possible for women to identify as a group, does not mean that the group women is homogeneous. Clearly this is not true. There are Irish women who are rich and poor, who are radical feminists and conservatives catholics, who are nationalists and unionists. It is important to realize that alliances may have to be built between women. The contention is that women need to recognize the male dominance of Irish Society, and how this affects their lives. To quote again from Mary Robinson,

> "It is vital that a sufficent number of Irish Women recognise that the domination by men in the power structures of society does matter"55

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52 Smythe, *supra*, note 48.
53 Caroline Bacchi, *Same Difference: Feminism and Sexual Difference* (1991)
54 Catharine McKinnon, *supra*, note 49, at 1299.
55 Robinson, *supra*, note 48, at 352

An awareness of the points of comparison between women is a basis on which to do this. As Okin explains

> "Many injustices are experienced by women *as women*, whatever the differences among them and whatever other injustices they also suffer from. The past and present gendered nature of the family affects virtually all women, whether or not they live or ever lived in traditional families. Recognizing this is not to deny or deemphasise the fact that gender may affect different sub-groups of women to a different extent and in different ways" (emphasis in original) [56]

However, because of the differences between women, a conception of the group as cooperative and relational, is to be preferred. A suitable model could be the relational networks of Bates and Peacock discussed at page 4 above, or the co-operative model of the group, based on trade unionism, which Apland and Axworthy favour.[57] Perhaps viewing the group women as a constituency, or set of constituencies, or even as a political party would be more useful. A right to self-determination for the group women, viewed as a relational co-operative group would allow women the strength and advantages of acting as a group, while allowing the specificities of any particular claim to be taken into account. Mapping this onto the problem outlined in Chapter One, a right to self-determination would require an examination of the position of women in Irish society to ascertain the effect of the S.P.U.C. decision on them. Would preventing women from having abortions advance the self-determination of women in Ireland? What do Irish Women understand by Self-determination? A right for women as a social group would facilitate the asking and answering of these questions.[58]

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56 Okin, *supra* note 19, at 7.

57 Lars Apland and Chris Axworthy, " Canada: A New Perspective on Democratically Controlled Organizations" (1988) 8 *Windsor Yearbook of Access to Justice* 44.

58 Chapter 5 will be devoted to the working out of the right to self-determination for women.

CHAPTER FOUR

MODELS OF GROUP RIGHTS

A. Introduction.

In previous chapters the argument has been made that group rights are preferable to individual rights when using litigation to end the dominance and subordination of women. There are many types of group rights available in different systems. This Chapter seeks to continue to develop this argument by specifying what kind of group rights are most suited to women's needs.

The question of groups who do not share the interests and values of the dominant group is not a new one. In situations of both colonization and conquest, the response was the construction of Indigenous peoples as inferior and uncivilized. Where minority groups were already part of a state, their rights were simply restricted or the group expelled. Examples of oppression, and exclusion are infinite, but specific examples in the legal systems examined in this thesis include the oppression of Catholics by the British in Ireland, of First Nations across Canada, and the exclusion and curtailment of the rights Asian peoples in B.C.[1].

The establishment of humanitarian norms was a process which began with the French and American revolutions, was reinforced by the second World War and culminated in the United Nations Charter and the Universal Declaration of Human Rights. It lead to an acceptance of

1 Irish Catholics were subject to explicit discrimination in the 19th Century under the Penal Laws, which prevented Catholics from owning property, voting or holding public office. Although they were repealed in 1848, discriminatory practices and customs remained. For a good discussion see F.S. Lyons, *Ireland Since the Famine.* (London, Fontana & Collins: 1978) For a discussion of the legal treatment of native peoples in Canada see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination." 36 [1991] *McGill Law Journal* 383, and Neil Nevitte and Allan Kornberg, *Minorities and the Canadian State.* (Mosaic Press, 1985). The racist and exclusionary laws which applied to Asian people in British Columbia are discussed in Dale Gibson, *The Law of the Charter: Equality Rights.* (Toronto, Carswell:1990)

the claims to justice of minority groups needed justice. Group rights were one of the tools used to further this objective. Although there are many specific group rights, it is my contention that there are two general principles underlying them, that is 1. Equality/Nondiscrimination and 2. Self-determination, and that of the two self-determination will most advance the objective set out in this thesis.[2] This conclusion will be arrived at following an examination of the rights for groups in two legal systems, Canada and International Law. These systems are chosen for the following reasons; The structure of the Canadian Legal system, inherited form the English common law and overlaid with a bill of rights, but also possessing a strong communitarian ethic is most similar to the Irish legal system which is being used here as a case study. An examination of International law is also necessary as protection for group rights is highly developed in this system.

This chapter will discuss the advantages and disadvantages of these principles, first at a theoretical level, and then as developed in International Law and the Canadian Charter.

B. The Principle of Equality/Nondiscrimination.

The equality principle and its corollary nom-discrimination has been one of the most important rights in moving away from a view of social order as based on the hierarchy and autocracy towards the realization that subordinates must be treated with justice. At its most basic level, the equality principle demands that likes be treated alike and what is different, differently. This is the classic Aristotelian formulation of the principle. It has now become one of the fundamental norms of national and international law.[3] Although originally the desire to treat

2 Ian Brownlie, "The Rights of Peoples in Modern International Law." in J. Crawford (ed) *The Rights of Peoples.* (Clarendon Press, Oxford:1988) at p 6. agrees with the division of rights of groups into these categories. Of course there are other divisions possible, but for the points to be illustrated in this thesis, an examination of the underlying principles is most convenient.

3 See Dale Gibson. *supra,* note 1; Lynn Smith. "Judicial Interpretation of Equality Rights under the Canadian Charter; Some Clear and Present Dangers" (1988) 23 *U.B.C. Law Review* 65 Taken together, Article 7 of the Universal Declaration of Human Rights, Article 27 of the Covenant of Civil and Political Rights, adopted by Resolution 2200 A (XXI) 16 the December 1966 have been held by Tanaka J. in the South West Africa Cases to create equality as a fundamental norm of International Law.

people equally regardless of their membership of different groups was an advance on the privileged treatment accorded to those born with wealth or power, the equality principle has many defects however which limit its usefulness for groups.

One of the first limitations of the principle is that it tends to individualize the problems and demands of groups. In the liberal system, the model for equality means that people ideally should be abstracted from their particular circumstances in order to be treated equally, meaning the same.[4] When translated into law this necessitates the abstraction of people from their group backgrounds and experiences in order to be treated equally, so that people are treated as individuals rather than members of groups. As Morton explains the nondiscrimination right is essentially a process of treating an individual the same as everyone else *regardless* of minority membership.[5]

The defects of individual rights have been discussed in Chapter One and will not be repeated here, but equality/nondiscrimination has other limitations. Applying the principle to groups and treating all groups the same, means that any differences that do exist have to be ignored. It entails an abstraction of the characteristics of the subordinate group which are like the dominant group, and ignoring the rest. This leads groups to argue that their distinct characteristics and values are destroyed rather than valued and respected, and that attempts are being made to assimilate them into the dominant culture.[6]

If all groups are to be treated equally then the question arises, equal to whom, or what standards? Feminist scholarship and that of members of minorities has revealed that the equality principle has an implied point of reference or standard. All groups are measured against the privileged or dominant group in society. Thus the equality principle reinscribes the

4 Carol Lee Bacchi, *Same Difference: Feminism and Sexual Difference* (1990) at xvii.
5 Morton, *supra,* note 1, at 72.
6 This is the point made by Mary Ellen Turpel, in "Aboriginal Peoples and The Canadian Charter" in R.F. Devlin, *Canadian Perspectives on Legal Theory* (Montgomery Publications, 1991) 503 at 517

dominant group as the norm, whether that group is men, Anglo Europeans, or another comparative group. As Eisenstein remarks, writing about women.

> "As male is the implicit reference for human, maleness will be the measure of equality : Men are the norm, so women are different from men. But for women to be treated as equal, they must be treated as men, like men. because equality is premised on men."[7]

In order to gain access to the social privileges and rewards of the dominant group. those claiming equality must represent themselves as like the majority. In Bacchi's discussion of the early feminist movement, she examines how women advanced claims to rights on the basis that they were the same as men. As MacKinnon points out, faced with a choice of having the same rights as men, or no rights at all, women choose to be the same as men, and distinct characteristics such as pregnancy were down played. [8] It is essentially an assimilationist claim, where the subordinate group claims inclusion on the basis of it's similarity with those who are privileged and powerful. It was a policy which was also applied to Native Peoples in Canada.

Seeing the dominant group as the norm also has the consequence that this group continues to define the conditions and terms of entry into privilege. Eisenstein points out that

> "women are permitted to compete with men under the same rules and within the same institutions, but those institutions were designed in accordance with male values, priorities and characteristics. Requirements and standards are designed with men in mind."[9]

This implies an acceptance of the conditions under which men live and work, and a desire to replicate them or to modify them only slightly, and for women in the workplace it means an acceptance of a structure which presumes the existence of support services in the home to provide, clean clothes, food, a clean place of relaxation, and the care of one's children.[10] A

7 Zillah R. Eisenstein, *The Female Body and the Law.* (1988: University of California Press.)
8 Catherine A. MacKinnon, "Reflections on Sex Equality under Law" 100 (1991) *Yale L.J.* 1281, at 1287.
9 Eisenstein, *supra,* note 7, at 54.
10 Bacchi, introduction, *supra,* note 4.

principle of equality which is based on sameness of treatment and assimilation, assumes that the institutions and structures created by the dominant group will suit all other groups and further their development and advantage. While this is better than no rights at all, in the end it does not satisfy the desires of dominated groups, including women, to have their specific interests and needs catered to in society. MacKinnon's question is particularly appropriate here

> "Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it." [11]

The other option provided by the equality principle is to acknowledge difference, and provide for special treatment to accommodate this difference. This speciality is either permanent, where the permanence of difference is tolerated, or temporary where the difference is eventually to be ended and the group assimilated. The justification stems from the realization that to create de facto equality, some inequality of treatment is necessary. Examples include special provisions to protect particular languages and cultures, or the creation of special regimes to take account of pregnancy and childbirth for women. Affirmative action programs designed to remedy the exclusion of a group from the workforce, or to end poverty are examples of temporary measures. The provision of special treatment does not however challenge the privileged status of the dominant group and dominant group characteristics as the standard and norm. As Thornton writes,

> "Although the special treatment model adopts a qualified substantive, rather than a formalistic, interpretation of equality, the model is still constrained by the liberal legal view that it is equality with men which is the ideal."[12]

In addition, to treat groups differently, or give them special rights, implies that the problem is somehow in the group. As Bacchi explains, there is a stigma attached to the label, as "it

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11 MacKinnon, *supra,* note 8, at 1287.
12 Margaret Thornton, "Feminist Jurisprudence: Illusion or Reality." 3 (1986) *Canadian Journal of Law and Society* 5 at 13.

implies deviance from the norm, and that the problem somehow inheres in the person so labeled."[13] In focussing on the disadvantage and weakness of the group the process by which the group became disadvantaged is obscured. The fundamental question of how difference is constructed and why it is construed as disadvantage, are also left unanswered. Some have argued that the existence of the privileged subject depends on the construction of a devalued other.[14] The experience of First Nations in Canada illustrates how the construction of difference as inferior was the first step in devaluing the other so that their lands and rights could be appropriated by the European majority.15 Special treatment, by focussing on the status of the disadvantaged, obscures the relationship of oppressor/opressed between the two. Minnow recognizes this when she writes that a difference discovered is more aptly a statement of a relationship, rather than the characteristic of a group. [16]

Special treatment also requires justification to a certain extent. Arguments have to be made that the unique position of the group requires an exception to be made from the requirement of formal equality. This view is implicit in Section 15.2 of the Canadian Charter, which provides that

> Subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.....

Provision of special treatment such as affirmative action programs, or the provision of funding for minority language schools often becomes difficult to justify when they are seen as privileged treatment that the majority are not entitled to. Arguments are popularly made that minorities are `having it both ways' by receiving both equal treatment and special treatment.

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13 Bacchi, introduction, *supra*, note 4 Joan Scott, also points out that focussing on difference can underscore the stigma of deviance. See Scott, "Deconstructing Equality versus Difference: or the Uses of Post-Structuralist Theory for Feminism." 14 (1988) *Feminist Studies* 33 at 39.

14 Joan Scott, "Deconstructing Equality versus Difference: or the uses of Post-Structuralist Theory for Feminism." (1988) 14 *Feminist Studies* 33

15 Patrick Macklem, "First Nations Self-Government and the Borders of Canadian Legal Imagination." (1991) 36 McGill Law Journal 393.

16 Martha Minnow, "Foreword: Justice Engendered." 101 (1987) *Harvard Law Review* 10 at 35-36.

The equality principle also tends to view difference as fixed and unchanging, assuming that a particular culture for example, never modifies or develops. Previous Chapters have shown that this is not the case. There is also an assumption that the members of a `different group' are all the same as each other and that the group is homogeneous rather than heterogeneous. All women for example are seen to be different from men in exactly the same way, and are thought to have the same needs and perspectives. The feminist criticism of essentialism discussed in Chapter Three has revealed the defect of this assumption. In order to construct categories of sameness and difference such generalization is necessary.

That the equality principle must move beyond sameness/difference in order to facilitate its use to achieve material changes in the situation of minority groups and women, is accepted by many scholars including MacKinnon. She argues that

> "Until this model based on sameness and difference is rejected or cabined, sex equality law may find itself increasingly unable even to advance women into male preserves-defined as they are in terms of socially male values and biographies."[17]

It is my contention however that the construction of a comparative category before the equality principle is applied to a problem, is too deeply ingrained in the consciousness of the judiciary and the legal system to make this reformulation possible. One can point to Charter jurisprudence as an example of the tenacity of this view of equality. In Andrews v. Law Society of British Columbia and R v. Turpin[18] the Supreme Court of Canada moved away from a purely formal view of equality, and from the similarly situated test in use in the United States to create a concpet of equality which focused on the position of the group claiming the right to equality. As Madame Justice Wilson held in Turpin, one of the purposes of section 15 is

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17 MacKinnon, *supra,* note 8, at 1296. Bacchi's work in this area is also convincing. She shows how the history of feminism has been trapped into representation of women as either the same as or different form men, to the detriment of the feminist movement as a whole. See also Minnow, *supra,* note 8; Thornton, *supra,* note 12; and Scott, *supra,* note 13.
18 [1989] 2 W.W.R. 289 and (1989), 69 C.R. (3d) 97

"remedying or preventing discrimination against groups suffering social, political and **legal** disadvantage in **our** society."[19]

Despite the move to a substantive test focussing on the historic disadvantage of a group, and a test which requires a consideration of the effect of the impugned legislation on the position of this group, categories of sameness and difference are still constructed.

This is apparent in Canada v. Symes [20], where the Federal Court of Appeal held that child care expenses incurred by a parent were not business expenses within S. 18 (1) (a) of the 1970 Tax Act, so as to qualify for tax deductions. The appellant argued that this was not an interpretation of the section consistent with the guarantee of equality in Section 15 of the Charter.

Evidence was given that women bear by far the largest burden of child care in Canada and that "the absence of child care is a barrier to women's participation in the economy, in terms of paid work and income generating work." A view of equality as a provision designed to ameliorate the conditions of disadvantaged groups would seem to require the granting of tax deductions in order to offset the cost of childcare expenses for women and so remove a barrier to their participation in the Canadian economy.

In coming to his conclusion Decary J argued that the equality principle did not require strict numerical equality, but permitted distinctions and classifications. By constructing the comparative group as other taxpayers, the argument could be made that the distinction was not discrimination against women vis a vis men in the workplace reinforced by tax laws, merely a tax classification like many others.

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19 *Ibid* at 127.
20 Decary J., Federal Court of Appeal, June 19, 1991.

> "the Income Tax Act is full of examples where one taxpayer for certain reasons has deductions which another taxpayer does not have. Also, certain taxpayers are called on to pay more taxes than others. Some taxpayers are called upon to pay a higher rate than others."

Decary J., constructed the issue as the claim of one taxpayer to a special privilege not granted to other taxpayers. He viewed the respondent as " claiming privileged treatment for professional women and parents." He then made clear that professional women were not a group to whom section 15 applied.

> "I am not prepared to concede that professional women make up a disadvantaged group against whom a form of discrimination recognized by S.15 has been perpetrated by the adopting of s. 63 (of the tax act), or would be perpetrated by this Court's refusal to interpret s. 18(1) (a) so as to give a self-employed mother an additional deduction for a business expense."

The reasoning in this case illustrates clearly the defects of the equality principle, its construction of categories of difference, and the tendency to represent substantive equality as the claim for a special privilege. These limitations in addition to those discussed above, have lead many scholars to reject equality as effective in seeking justice for oppressed groups. Lessard for example prefers to seek advances for women using liberty rights,[21] Turpel similarly sees a greater value in self-determination .

> "As a concept that provides greater recognition of the cultural differences of peoples who live within enclaves defined by dominant cultures, rather than simply providing a predetermined context for minority or ethnic rights."[22]

The fundamental premise of self-determination, which will be discussed in more detail later in this chapter, is a recognition of the value and worth of the perspectives of other groups than one's own, which is not dependant on their sameness or difference. It is a movement away from mere toleration towards respect, from paternalism and control over a group, to ceding control to the group itself, thus to giving the group the power to define itself.

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21 Hester Lessard, "Relationship, Particularity and Change: *R v. Morgentaler* Feminist Approaches to Liberty." (1991) 36 *McGill Law Journal* 263

22 Turpel, *supra*, note 6 at 523.

C. Group Rights in International Law.

International Law, as it first developed, was primarily concerned with governing relations between states.[23] With the development of a more sophisticated structure of international relations following by both the League of Nations and The United Nations, international law became of broader application, and began to accord rights to many different subjects, including minority groups.[24]

International instruments and conventions and instruments abound giving detailed and specific rights to groups. This section will show that two broad principles can be said to underlie all of these rights, that is the principle of equality or nondiscrimination and the principle of self-determination. Each has a fundamentally different basis, which will be seen from an examination of the protection of groups at the international level. The first, equality, proceeds by ignoring difference, or providing for special treatment. The second, seif-determination, is ultimately a principle of liberation, as it aims to return control and choice to the claimant group.[25] Each will be looked at in turn, and I will conclude that the right to self-determination is the one most suited to women's needs.[26]

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23 Hugo Grotius *De Jure Belli et Paci* is the earliest work on International Law and dealt with the appropriate standards which should govern relations between states in times of war and times of peace.

24 See Ian Brownlie, *Basic Principles Of International Law.* 2 ed (Clarendon Press :1990)

25 There are international lawyers who disagree with this construction. Crawford, *supra,* note 2, for example argues that there are even newer rights centered around development. If self-determination is seen as the return of control and power to a dominated group in to facilitate the creation and development of their potential and capacities, rather than merely a right to secede, it is clear that development rights are included in self-determination.

26 There is a danger that international law and human rights become only the rights of western nations or the rights of men. International Conventions may cater for the needs of white women or women in the developed world, and not developing world women. Despite being called International Law, it has developed according to a western rights structure, and reflected the values and biases of these cultures. This is currently being challenged by third world feminists and human rights scholars, see A. Pollis and B. Schwab, "Human Rights: a

1. Equality/Nondiscrimination.

Although the equality principle and the standard of nondiscrimination is now close to being recognized as jus cogens, or a fundamental doctrine of International Law, and a central principles in legislation and other instruments concerning human rights, it's precise content is unclear.[27] It receives it's best examination in the famous dissenting opinion of Tanaka J in the South West Africa cases.[28] In his judgment he makes the point that the principle of equality

> "... does not mean the absolute quality, namely. equal treatment of men(sic) without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal."[29]

This formulation draws on the liberal legal concept of rights discussed in Chapter One, and is subject to the problems discussed there. It also illustrates that equality is dependant on the construction of categories of sameness and difference. Tanaka J, sees the equality principle as derived form the natural law ideal of equality of all men before God, and comes to the conclusion that black people are really the same as white people and should therefore be treated equally. The policy of apartheid enforced by the South African Government simply constructed the categories of sameness and difference in another way, seeing the indigenous population as unequal, therefore deserving of unequal treatment.

Western Construct of Limited Applicability", in A. Pollis and P. Schwab (eds), *Human Rights. Cultural and Ideological Perspectives.* (Praeger, New York, 1980)

27 Brownlie, *supra*, note 2

28 South West Africa Cases (Second Phase) 1966 in Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1966. An extract is reproduced in Ian Brownlie (ed) *Basic Documents on Human Rights* (Clarendon Press, Oxford 1981) at 441-470. The case concerned submissions made by Ethiopia and Liberia to the I.C.J. alleging that South Africa was in violation of it's international obligations under the League of Nations Mandate System in regard to the implementation of the policy of apartheid in South West Africa. Although a majority of he court held that they had no jurisdiction to hear the merits of the case, Tanaka J, dissented and found that South Africa's apartheid policy was in violation of the equality principle under international law.

29 Brownlie, *ibid*, at 461.

The use of this principle to accommodate groups within dominant legal systems is best illustrated by an examination of the treatment of groups in International Law. Protection for groups first became an important issue after World War I. Following postwar boundary settlements, displacement of large population groups lead to fears that these groups would suffer in their new states. To alleviate these fears and to facilitate the acceptance of postwar treaties, the protection of minorities was incorporated into the settlement provisions. Rights were attributed to minorities as collective entities and a complaints system was set up under the League of Nations.[30] Minority protection was political rather than humanitarian however, as it was only when disaffected minorities became a threat to peace or security that their interests were seen as important.[31]

The minorities system illustrates the two approaches to difference of the equality principle, eliminating or ignoring difference through same treatment, or preserving difference through special treatment. The minority system internalized the sameness/difference dualism. In so far as members of minority groups were the same as other nationals, they were to be treated the same, that is equally. In so far as they were different, that difference was to be preserved.

The practical implications of this dualism are revealed by the objectives of the system, summed up by the P.C.I.J. as amicable cooperation between all inhabitants of a state. The Minority Schools in Albania case made it clear that

> "In order to attain this object two things...[are] ... necessary ... the first is to ensure that nationals belonging to religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State, The second is to ensure for the minority ... suitable means for the preservation of their ... peculiarities, their traditions and their national characteristics."[32]

30 The procedure was to make a complaint to the Permanent Court of International Justice. Only interested Nation States could make complaints, groups themselves could not bring actions.

31 This discussion is based on Warrick McKean, *Equality and Discrimination under International Law.* (Oxford University Press, 1983) especially pages 24 and following.

32 (1935) P.C.I.J. Ser A/B #64 at 17 as quoted in P. Thornberry "Self-Determination, Minorities, Human Rights: a Review of International Instruments" (1989) 38 *I.C.L.Q.* 867 at 870.

Nevertheless there was some confusion about which of these alternatives was the ultimate goal of the system, assimilation into the political life of the state, or preservation of their cultural identity. The first is more of an individual right, awarding as it does rights to members of the groups to be the same as other individuals, that is ignore their group membership. The second is a true group right, as it can only be exercised by the group collectively. [33] Preservation of national traditions and characteristics helped to foster a sense of group identity and prevented their assimilation into their respective states. This characteristic of group rights was however a factor leading to the end of the minorities system of the League of Nations.[34]

After World War II there was therefore a change of direction with the emphasis on basis standards of human rights which would be applicable to all. The emergent United Nations recognized that membership of a nondominant group often lead to discrimination, and in order to end such practices, Conventions and Declarations adopted and promoted by the U.N. instructed nations to ignore this membership and treat the individual as if she was a member of the dominant group. An examination of the cornerstone documents of International Law, the Charter of the United Nations, the Universal Declaration of Human Rights,[35], as well as other international instruments illustrates the propensity of the equality principle to abstract group members from their backgrounds and ignore their distinct culture and values, in order to treat groups the same. Article 1.3 of the Charter, for example, provides that the principles and purposes of the United Nations include

> "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 13 requires the General Assembly to initiate studies to "assist in the realization of human rights and fundamental freedoms for all without distinction as to race, sex language or

33 McKean, *supra,* note 31, at 24.
34 There were other reasons however. The League of Nations system was used by Hitler prior to World War II to advance the claims of German minorities in Czechoslovakia and other eastern European countries, and the later invasion of these countries was justified as an action to preserve the rights of these minorities.
35 Adopted by the General Assembly on 10 December 1948, U.N. Doc. A/811

religion." Article 55 require the U.N. to promote similar goals. Article 2 of the U.D.H.R provides that

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion political or other opinion, national or social origin, property, birth or other status."

The Declaration then goes on to set out the human rights which are guaranteed to `everyone', such as the right to a fair and public trial, (Article 11), the right to life, liberty and security of person (Article 3) freedom of thought, conscience and religion (Article 18)

Many of the rights granted by the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights,[36] are also based on the principle of equality/nondiscrimination. Article 2, for example provides that

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals ... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status."

Although the policy in 1948 was to ensure the same rights to all regardless of difference, the U.N. subsequently recognized that accommodation of groups through formal equality and by ignoring difference was not sufficient. McKean notes that

> "Three organs were created specifically to deal with questions of discrimination. The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and the Commission on the Status of Women were established as subsidiary organs of the Economic and Social Council in 1946, while in 1952 the general Assembly set up an ad hoc commission to study the racial situation in South Africa." [37]

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36 Adopted by the U. N. General Assembly on 16 December 1966, 6 I.L.M. 368 [1967] G.A. Res 2200 G.A.O.R. Supp 16/A/6316 at 49

37 The U.N. Charter provided for the setting up of an Economic and Social Council to discharge the function of protecting human rights. Under Article 68, this Council was required to set up several Commissions to do this, one of which was the Commission on Human Rights. See Warrick McKean, *supra,* note 31, at Chapter 5 at 72.

The goal of these commissions was to see what special measures of protection would be required by minorities. The definition of minorities offered by the Special Rapporteur of the U.N. Sub-Commission the Prevention of Discrimination and the Protection of Minorities illustrates the view of the United Nations that this protection required the preservation of difference. A minority was defined as

> "a group numerically inferior to the rest of the population of a State in a nondominant position, whose members... possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[38]

The definition also reveals the process of comparison of the minority group with the dominant group. The minority are defined purely by their difference from the rest of the population. This begs the question, who are the rest of the population, and who defines what is included or excluded from this dominant norm?

Other important instruments which protect groups qua groups, also aim to preserve difference. An example is Article 27 of the International Convention on Civil and Political Rights 1966 provides that

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language."

The protection of indigenous peoples illustrates the form of group rights which provide special treatment on a temporary basis in order to eliminate difference. The Indigenous and Tribal Populations Convention, for example, adopted by the International Labour Organization in 1957, called for the special and differential treatment of the indigenous as long as their deprived social conditions warranted it. Progressive integration was to be the ultimate goal. The construction of difference as inferiority is also apparent. Implicit in the convention is the

38 As quoted in Thornberry, *supra*, note 32, at 878

view of the group as disadvantaged due to an inherent inferiority. Indigenous people are not seen as possessing a distinct and equally valid culture, but instead as

> "members of tribal or semitribal populations in independent countries whose social and economic conditions are at a less advanced stage than..... other sections of the national community."[39]

Not surprisingly the I.L.O. Convention has been rejected by the World Council of Indigenous peoples in 1977, and the Congress of Indian Movements of South America in 1980. Both groups, rejected the view of Indigenous Peoples as `less advanced' and opposed the policies of integration and assimilation. Instead a right to self-determination was claimed.[40]

The criticism of special treatment in this section is made with an awareness that for many dominated groups, to be treated the same as a majority is an advance of previous conditions of deprivation and exclusion. The argument I make here is that special treatment does not go far enough in recognizing the distinct character and value of oppressed groups, but assumes instead that they wish to be included in the institutions and structures created by the majority. As discussed in Section B, this assumption is seriously flawed. Group rights must facilitate the desire of groups to define and create themselves, and the institutions under which they live their lives.

Insofar as women have been protected or accorded rights at the international level, these rights have provided equal treatment or special treatment. The use of the equality/nondiscrimination principle to prevent discrimination against women is firmly entrenched in International Law. The preamble of the foundational human rights instrument, the U.N. Charter, reaffirms faith in the equal rights of men and women. Article 1.3 of this Charter declares that the achievement of fundamental freedoms for all without distinction as to sex is one of the

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39 I.L.O. Convention #107, discussed in V. Van Dyke, *Human Rights, Ethnicity and Discrimination* (Greenwood Press :1985) Chapter 4 at p 82.

40 This is discussed in Van Dyke, *ibid,* at 82-83. See also Barsh "Revision of I.L.O. Convention # 107" (1987) 81 *American Journal of International Law.* 756

purposes of the U.N. Obligations are also placed on the U.N. itself to ensure the equal participation of men and women in its principal organs (Article 8) and to promote respect for human rights without regard to sex. (Article 55) The emphasis is clearly on equality with men. Distinctions between women and men are to be ignored so that women can be treated as if they were men.

The emphasis on the use of the equality principle is illustrated by the history of women's rights at the U.N. The U.N. Charter provided for the establishment of The Economic and Social Council (ECOSOC) to promote human rights. Although separate Commission on the Status of Women was established by this council, the major work of ECOSOC at that time remained the drafting of the Universal Declaration of Human Rights.[41] As well as setting out general standards of human rights, this document explicitly affirms the equal rights of men and women. Article 2, for example, guarantees rights and freedoms to everyone, regardless of sex. Article 16 guarantees to men and women equal rights as to marriage. As Elder points out however,

> "The underlying concept in the Universal Declaration is that all proclaimed human rights should be equally available to men and women. Areas in which women have been particularly victimized as women per se, such as in the institution of polygamy, forced marriage, invasion of bodily privacy and sexual mutilation, are not covered"[42]

That these issues are not dealt with underscores the defects of the Equality/Nondiscrimination principle. Because the male is the explicit norm for the protection of human rights, it is assumed that women's needs are the same as men's. Thus the issues which are central to the protection of women, such as prevention of prostitution, genital mutilation and oppressive practices are not dealt with.

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41 Adopted by the General Assembly on December 10, 1948, G.A. Res 217 A/III/4

42 Betty Elder, "The Rights of Women: their status in International Law." 25 (1986) *Crime and Social Justice* 1

International covenants continued to see the setting of standards of non-discrimination as the way to protect the human rights of women. Article 2 of The International Covenant on Civil and Political Rights 1966[42], the most important human rights document the international level, stresses that all rights are to be enjoyed without distinction as to sex, Article 3 requires states to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the covenant, Article 26 guarantees equal protection of the law and prohibits discrimination on the grounds of sex. The prohibition of the death penalty for pregnant women, is the only special measure for women.

Apart from these major international agreements which prohibit discrimination on a number of grounds including sex, there have been a number of treaties protecting women qua women. Concern for practices whereby women were specifically victimized lead to the setting up of the working group on slavery and slave like practices which first met in 1974. There had been an earlier Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others [44], but this had not been successful in eliminating practices such as marriage without consent, wife and widow burning, prostitution, and the transference and inheritance of women. While this was a significant development for the U.N., Elder points out that women's issues remain a low priority at the U.N.[45] At one point Special Rapporteur Benjamin Whittaker attributed this lack of attention "to women's underrepresentation in virtually every international and diplomatic forum and also in the highest posts at the U.N."[46]

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43 *Ibid.*

44 Approved by G.A. Resolution 317 (IV) dec 2 1949.

45 Elder, *supra,* note 41.

46 As cited in Elder, *ibid,* at 16. There are a number of other explanations for the neglect of women's interests and needs in International Human Rights Law. The first criticism is the institutional one mentioned by Whittaker, that there are not enough women in the U.N. institutions, another critique is the inescapably patriarchal nature of the U.N. as an institution. Critics who take this view do not see any advance to be gained by simply seeing more women in U.N. positions. A third critique is similar to the critique of law and rights in national systems, namely that rights themselves, particularly rights in western dominated systems, are constructed primarily with the experiences of the western male in mind, cannot be adapted to suit women's interests, particularly non western women. These ideas were discussed by Karen Engle in a guest lecture "International Human Rights and Feminism" at the University of British Columbia, November 16 1990

This concern has to some extent been noted by the U.N. and lead to the enactment of the Convention on the Political Rights of Women.[47] That convention provides women with the right to vote, to hold public office and exercise all public functions, and to be eligible for election to all publicly elected bodies, on equal terms with men. In practical terms the Convention has little effect, because there is no system requiring progress reports, or reports to the Committee on the Status of Women. Nor does the Convention attempt to examine customs and practices, or the particular obstructions women face, all of which keep women's representation in official bodies low. Ironically the failure to put these safeguards in place may be due to the underrepresentation of women among those enacting the Convention.[48]

The emphasis on women's equality with men, and right to political participation in the same way and on the same terms as men, assumes that women accept these institutions unchanged, and would not wish to change existing systems and structures, or construct a new type of democracy. The fundamental defect of the equality principle is that in offering to women only the same as what men already have, it restricts the potential desires and opportunities of women for change.

Perhaps the most important source of women's rights in International Law however is the Declaration on the Elimination of Discrimination against Women[49] and the subsequent Convention on the Elimination of all Forms of Discrimination against Women, which came into force in 1981.[50] The Declaration and Convention, as with other international instruments protecting women, aim to achieve women's equality with men. As the definitive legal instrument requiring respect for and observance of the rights of women, the Convention sets

47 T.I.A.S. 8289, 193 U.N.T.S 135.
48 Elder, *supra*, note 42, at 17
49 Approved by the General Assembly on November 7 9167 (G.A. Res 2263/XXII)
50 G.A. Trd. 34/W180 (XXXIV) 34 U.N.G.A.O.R. Supp (No 46) at 193. It has been ratified by over 101 countries including Ireland and Canada.

the tone for future treatment for women.[51] The definition of discrimination in Article 1 underscores the goal of equality with men.

> Article 1: discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status, on a basis of equality with men, of human rights and fundamental freedoms in the political, economic, social, cultural civil or any other field.[52]

Article 4 goes on to provide that the adoption of special temporary measures aimed at accelerating de facto equality, shall not be considered discrimination in the convention, neither are special measures designed to `protect' maternity. Article 11.2, for example, seeks to prevent discrimination against women in work on the grounds of maternity or marriage, by preventing dismissal of women on the grounds of pregnancy or maternity leave, and requires states to introduce maternity pay. Article 12 requires states to take equal measures to guarantee equal access to health care services for men and women, with special services for women in connection with pregnancy. A special exception is made from the principle of non-discrimination on this ground, and Article 4.2 which provides that such special treatment shall not be seen as discrimination, is evidence that such exceptions are seen to require justification.

In this Chapter I have already outlined one of the limitations of the equality/nondiscrimination principle as its tendancy to homogenize the experiences of women. This amounts to saying that there is one type of woman and one type of man in human rights discourse. The World Conferences for Women held under the auspices of the U.N. illustrate the falsity of this assumption. There were three conferences in all, held in Mexico in 1975, Copenhagen in 1980

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51 For a discussion of the possibilities of the Convention see Rebecca J. Cook, "The Women's Convention: Opportunities for the Commonwealth." 16 (1990) *Commonwealth Law Bulletin* 610.

52 Other provisions are similarly written. Part II of the Convention requires states to take appropriate measures to eliminate discrimination against women in the political and public life of the country. (Articles 7, 8 and 9). Part III requires states to eliminate discrimination in education, employment and employment opportunities, access to loans and bank finance, grant full civil and legal equity to women as well as the right to women to choose their own domicile.

and in Nairobi, Kenya in 1985, all as part of the U.N. decade for women. At these conferences, attended by women from many developing countries as well as from affluent nations, it was apparent that women often had very different priorities. Elder points out that "women from developed countries felt their problems related more to their childbearing and domestic roles than to international economies"[53] For women from developing countries on the other hand,

> "the problem of inequality between men and women was related to the problem of general economic inequality between nations. The growing poverty in the third world made more urgent the search for a new economic order in which women shared in development."[54]

Clearly in the context of hunger and poverty in the third world, to give women the same rights as third world men is meaningless. Are third world women then to be given the same rights and treatment as western men? In light of the different economic resources, cultures and lifestyles of both, this seems absurd. To which men are women form underdeveloped countries to be equal?

If the equality principle only ensures the same treatment to all women then this is a grave defect of the principle. If special treatment is accorded to third world women, to deal with their special needs, this risks entrenching the view of the third world as inferior and backward and requiring special protection to come up to the standards of the West. Western concepts of human rights cannot simply be transplanted to other countries.[55] While a detailed examination of these problems is beyond the scope of this thesis, it is my contention that the equality/nondiscrimination principle obscures these difficulties by homogenizing difference.

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53 *Ibid.*
54 Elder, *supra*, note 42, at 26.
55 The genital mutilation of women is a case in point. It is defended as a traditional practice by many cultures. Can the west condemn such practices without imposing western values on these cultures, or is it up to the cultures themselves to organize their own changes? For a good discussion of the problems involved see A. Slack, "Female Circumcision:A Critical Appraisal" (1988) 10 *Human Rights Quarterly.* 431

There is evidence of a movement among women to articulate demands for human rights in terms of women's particular needs and interests rather than merely aspiring to attain the rights and privileges which men have. During the Copenhagen Conference, a number of strategies for the future advancement of women were agreed upon, and subsequently adopted by the U. N. General Assembly.[56] Using language closer to self-determination than equality, the document stresses the importance of the participation of women in development, particularly the rural women who are often the chief food producers, and the importance of women's traditional occupations. Resolutions were approved at the conference calling for the U.N. to spend 5% of its budget specifically on women.

The importance of focusing on women specifically as women, rather than on areas of women's lives which are the same as men's lives, is recognized by other commentators. As Cook points out "Aid policies can bypass women or even make their situation worse, such as with agricultural modernization policies"[57] Demands are made for the total development of women which Elder sees as including political, economic, social , cultural and other dimensions of human life.[58] If women are merely granted the rights to be the same as men as far as is possible, this development is unlikely to take place.

2 Self-Determination

The second type of right guaranteed to groups is the right to self-determination. The existence of this right has been very clearly established, Pomerance going so far as to call it `the

56 Forward Looking Strategies of Implementation for the Advancement of Women, and Concrete Measures to Overcome Obstacles to the Achievement of the Goals and Objectives of the U.N. Decade for Women for the period 1986 to the Year 2000: Equality, Development and Peace. 8A/Conf.116/28/Rev.1, 1985 G.A. Res. A/40/108 December 13 1985.
57 Cook, *supra*, note 52, at 613. For a general discussion of the effects of the imposition of western ideas of agricultural modernization on developing countries, see Susan George, *Ill Fares the Land: Essays in Food, Hunger and Power.* (Penguin :1989)
58 Elder, *supra*, note 42, at 27.

peremptory norm of International Law.'[59] It is listed as one of the principles and purposes of the U.N. Charter in Article 1.260, The resolution which firmly established it as a legal principle, is however the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, [61], one of the most often cited General Assembly Resolutions. It declares in Article 1 that

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and co-operation.

Article 2 provides that

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Its position has been further strengthened by its incorporation into the 1966 Conventions on Civil and Political Rights and Economic Social and Cultural Rights. Common Article 1 of these Conventions reproduces Article 2 of the Colonial Declaration, using exactly the same language. The principle of self-determination is now the grounding principle and component part of many international instruments, whether sponsored by the U.N. or by other International Organizations such as the I.L.O.[62] The central value of this principle is the rejection of the domination and exploitation of one group of people by another, and the right of those dominated to control and create the structures of their own existence.

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59 Michla Pomerance, *Self-Determinationin Law and Practice. The New Doctrine in the United Nations.* (Martin Nijhof:The Hague, 1982)

60 See also Chapters XI and XIII ibid. where one of the basic objectives of the trusteeship system which was directed towards the administration of former colonies was "progressive development towards self-government or Independence."

61 G.A. Resolution 1514 (XV).

62 Two of the more important are the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States G.A. Resolution 2625 (XXV), better known as the Friendly Relations Declaration, and Principle VIII of the Final Act of the Conference on Security and Co-operation in Europe in Helsinki, 1975. The Final Act was signed by representatives of thirty-five states, including the U.S. and the U.S.S.R. See Brownlie, *supra,* note 28, at 320.

However while the existence of some core concept of self-determination is certain, it is not one whose ambit is very clearly defined. It remains a very ambiguous right, it's interpretation depending on the political agenda of the interpreter. The range of meaning includes a right to complete Independence and secession only, to some form of self-government, to simply a guarantee of representation and democracy within an existing state.

The U.N. has had the interpretative monopoly of the concept. As first introduced by Woodrow Wilson after the First World War it was seen as self-government tied to a general spirit of democracy. Under the influence of the U.N. it became linked to nationalities and Independence. A doctrine of self-determination was developed which was exclusively *external,* and claimable only by those countries deemed capable of self-government after 1945.[63] This was the result of the pre-occupation of the U.N. at that time with the dismantling of Colonialism. As Ofuatey-Kodjoe points out

> "The preoccupation of the U.N. with self-determination as applied to colonial territories is the result of a political situation that changed after World War II ... the overseas colonies ... were in revolt, and making the claims. Thus the answers have been provided in relation to colonial peoples.[64]

Even colonialism was seen only as `salt-water colonialism', or the oppression by the metropolitan European powers of other races under their control. Other arguments that `similar problems to colonialism existed wherever there were underdeveloped groups' were not taken into account. This `Belgian thesis', would have extended the concept of self-determination to include disenfranchised indigenous peoples living within the borders of independent states, especially if the race , language and culture of these peoples differed from the dominant population, but it was never taken up.[65] Instead states adopted a restrictive interpretation of the phrase to include only cases involving liberation from a colonial power in

63 Pomerance *supra*, note 59, Chapter II `From the U.N. Charter to the New U.N. Law of Self-determination.' discusses the origin of the U.N position.

64 W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law.* (New York 1977) at 127.

65 See Pomerance *supra*, note 59, at 82 n72 and Thornberry *supra*, note 29, at 873 for a detailed discussion of this thesis.

order to curb the extreme implications of other strands of self-determination.[66] This interpretation was consolidated by Resolution 1541 (XV), which linked an ethnic or cultural group with a geographically separate area, and saw only these groups as entitled to the right.[67]

On an overview, the U.N. created an extremely restrictive definition of the `self' entitled to self-determination. A particular subject was created at the international level with the concepts of European colonialism, territorial size and color of indigenous populations in mind.68 Thus subject was endowed with certain characteristics not for any logical reason but for purely political reasons. Ofuatey-Kodjoe is clear that the inclusion of all subject communities is consistent with the Charter definition of self-determination. Only the political clout to press these claims is lacking.

Historically the only groups with sufficient power to claim self-determination, have been the colonial territories, but other groups are now starting to claim its application in *their* struggles against domination and oppression. As mentioned above indigenous peoples are asserting their right to self-determination. The principles drafted by the World Council of Indigenous Peoples are almost identical to Article 2 of Resolution 1514 and Common Article 1 of the 1966 conventions, adding only freedom to pursue religious development.

In contrast with other rights granted to groups, "which appear only to impose a duty of toleration on states, a duty of non-interference with the cultural and religious practices of the groups." [69] self-determination is a concept of liberation. As Thornberry makes clear

> "The right to self-determination means full rights in the cultural, economic and political spheres. The essence is political control, accompanied by other forms of control." [70]

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66 E.M. Morgan "The Imagery and Meaning of Self-determination" 20 (1988) *N.Y.U. Journal of International Law and Politics* 355 at 372.
67 G.A.O.R. 15th sess. Supp 16 at 29.
68 This is the main argument of Pomerance *supra*, note 59, at Chapter III.
69 Thornberry, *supra*, note 32, at 673.
70 *Ibid*, at 680.

It allows holders of the right to make their own choices and decisions, and is precisely this characteristic that is crucial to the development of women, as identified by the World Conferences for Women. As a step towards ending powerlessness, and a redefinition of subject groups as capable of making the necessary plans and decisions to create the structures of their own existence, it is my contention that self-determination is the group right most suited to ending the oppression of women.

D. Group Rights and the Canadian Charter.

This section will examine the group rights of aboriginal peoples under the Canadian Charter in order to illustrate the group rights available to in this system. As with international law these rights are informed by the equality/nondiscrimination principle, or the principle of self-determination.

Historically, Canadian public policies toward minorities have taken three forms: nondiscrimination designed to further assimilation of aboriginal peoples into the dominant culture, special treatment based on the groups unique characteristics, or to end a groups disadvantage, or group self- government. [71] This has translated directly into legal rights guaranteeing this treatment.

1. Equality/Nondiscrimination

The rights to nondiscrimination is guaranteed by Section 15.1 of the Charter which provides

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

71 These are discussed by F.L. Morton *supra*, note 5. I am conscious here that minorities can cover both aboriginal peoples and groups of immigrants, as well as other groups of disadvantaged people, including women.

It is however, essentially individualistic, and amounts to a claim of an individual to be treated the *same* as everyone else *regardless* of minority group membership. As Morton points out

> "The additional rights to equality under the law and equal benefit of the law were added to proscribe the use of certain designated minority group characteristics as legislative classifications" [72]

Although this protection is necessary, it is not the full story of group interests. It is assimilationist and assumes that all group characteristics can be ignored in order to construct a homogeneous legal individual. The defects of this approach have been discussed in the sections B and C above. Aboriginal peoples have completely rejected the assimilation which same treatment fosters, arguing that a failure to respect their uniqueness and distinctiveness betrays them.[73] Although section 15 is of much broader scope that mere same treatment, as discussed in section B above, and adopts a substantive view of equality, it is still of limited use to Aboriginal Peoples.

> "The scope for Aboriginal rights claims under section 15 is limited because any theory of equality which the court is likely to accept will always be comparative, even if "identical treatment" is not the persuasive legal test." [74]

She maintains that equality rights analysis can only be sensitive to the cultural differences of Aboriginal Peoples if it rejects comparison, and accepts that an entirely different conceptual framework applies which the courts may not be capable of knowing. Turpel sees this development as unlikely however and so prefers to advance aboriginal claims using different Charter rights.

Special treatment for aboriginal peoples began in Canadian Constitutional history with the British North America Act of 1867. Section 91(24) of the B.N.A act authorized the creation of special legal status for Aboriginal Peoples. This resulted in the Indian Act which removed "Indians" from provincial jurisdiction and gave their lands to the Federal Government. [75]

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72 *Ibid,* at 171.
73 See Leo Driedger, "Conformity vs. Pluralism: Minority Identities and Inequalities." in Nevitte and Kornberg, *supra,* note 5, at 157 and Turpel, *supra,* note 6.
74 Turpel, *supra,* note 6, at 516.
75 Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 *Buffalo Law Review* 325 at 342. The discussion here is based on Duclos pages 340-348.

Although the Indian Act did create a special legal status for Aboriginal Peoples, the Act and the reserve system were really created as temporary measures in a larger plan for complete assimilation of aboriginal peoples into the dominant culture.[76] With the growth of anticolonial thinking after the second world war, the policy of assimilation became outdated, and recognition of the distinct claims of Aboriginal Peoples began to take root.

With the advent of the Charter, special legal status for all aboriginal peoples is affirmed by section 25, which provides that

> The guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...

Existing Aboriginal and Treaty rights are protected and recognized in section 35, and section 27 can also be said to confer special rights by providing that

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The legitimation given to affirmative action in section 15.2, designed to ameliorate the conditions of disadvantage of groups, can also be seen as a claim to special status. Section 15.2 provides

> Subsection (1) does not preclude any law or program or activity that has as its objec the amelioration of conditions of disadvantaged individuals or groups inclu ng those that are disadvantaged because of race, national or ethnic origin, colou, religion, sex, age or mental or physical disability.

This status is merely temporary however, and is granted only a long as the disadvantage lasts. Unlike other rights in this category which treat groups differently in order to preserve difference, this treats groups differently in order to end difference.

The problems with claiming special status have been discussed earlier. It reinscribes the position of the dominant group, and its power to define what is normal and what is abnormal,

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76 *Ibid* at 343. See also Douglas Sanders, "Prior Claim: An Aboriginal People in the Constitution of Canada." in Stanley M.Beck and Ivan Bernier, *Canada and The New Constitution:The Unfinished Agenda.* Vol 1(Montreal. The Institute for Research on Public Policy.)

special or needing extra protection. As the second half of the Equality principle it merely makes a special case for those who do not conform to the norm.

Special treatment has been rejected by aboriginal peoples as still enshrining a relation of dependance on the federal government. Macklem points out that despite the use of S.35.1 in R v. Sparrow to recognize and affirm the rights of the Musqueam Indian Band to fish in a traditional manner contrary to an otherwise valid federal fisheries Act,

> "Underpinning the Court's interpretative understanding of S.35.1 is the proposition that native people are in a hierarchical relationship with the Crown, " [77]

By assuming jurisdiction over the conflict, Sparrow retains the assumption that Canada enjoys sovereign authority over it's indigenous population. It also illustrates that the use of group rights cannot challenge the imposition of Anglo-European frameworks on native reality. This had lead to the claim by Aboriginal Peoples to self-determination. As Turpel writes,

> "Self determination is viewed as a more hopeful concept, although it too has its European antecedents, because it is fluid enough to permit various arrangements between existing of recognized states and Aboriginal peoples. It is viewed by them as a concept that provides greater recognition of the cultural differences of peoples who live within enclaves defined by dominant cultures rather than simply providing a predetermined context for minority or ethnic rights." [78]

2. Self-Determination.

If self-determination is conceived solely as the right to secede then it will not be found anywhere in the Charter. A better view of self-determination is the return of choice and control over their own affairs to a dominated/disadvantaged group . The latter view accords with the claims of Aboriginal peoples. Macklem summarizes the claim to self-government as

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77 Macklem, *supra*, note 1, at 449.
78 Turpel, *supra*, note 6, at 522-3.

"the desire of native people to have control over the ability to define their own individual and collective identities."[79]

The right to self-determination so defined can be seen in several places in the Charter.[80] Sections 35.1 and 37. provides for a First Ministers Conference to "identify and define the rights of aboriginal peoples" and limited aboriginal participation in constitutional conferences. Although Bruyere details the difficulties with negotiations between aboriginal groups and other governments caused primarily by the power differential , they led to the growing realization that the way forward was to provide self government for aboriginal peoples.[81]

E. Conclusion

This chapter has shown that the equality principle and the right to self-determination have fundamentally different theoretical bases. While equality remains enmeshed in comparison, despite the efforts of many scholars to reform the principle, self-determination seems able to offer recognition of a group as intrinsically deserving of respect. The move from a reliance on the equality principle to the principle of self-determination to end the subordinate status of groups, represents a move form paternalism and condescension to liberation. For these reasons it is argued here that the principle of self-determination is the one most suited to advancing social change-for women.

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79 *Ibid*, at 389.

80 Most obviously with regard to Quebec. Duclos identifies the override provision in section 33 as a tool used by Quebec to reject the Charter as a threat to cultural autonomy of the province.Duclos, supra, note 72, at 347 n103

81 Louis Bruyere, "Aboriginal Peoples and the Meech Lake Accord" 5 (1988) *Canadian Human Rights Yearbook* 49, at 58 contrasts the First Ministers conferences with the debates with Quebec over the Meech Lake accord, saying "In terms of motivation for success it is obvious that the Federal and Quebec governments brought to Meech Lake a capacity to trade which aboriginal peoples, without aggressive federal support, could not and cannot mount." More hours were logged by the First Ministers "in the two meetings held within six weeks than in all the aboriginal conferences combined."

CHAPTER 5.

THE APPLICATION OF THE PRINCIPLE OF SELF-DETERMINATION TO WOMEN AS A GROUP.

A. Introduction.

Self-determination for women as a group is necessarily different from self-determination of nations and territorial entities discussed in the previous chapter. The core characteristics remain the same however. This chapter seeks to expand the right to self-determination at the international level into a theory of self-determination for women within the framework of an existing state, as a constitutional right. The implications of this right for the cases on Abortion information, S.P.U.C. v. Wellwoman, and S.P.U.C. v. Coogan and Grogan, [1] discussed in the opening chapter will also be examined.

B. The Core Values of Self-determination

The core characteristics of the right to self-determination, as expressed in Resolution 1514, the Colonial Declaration, are the rejection of domination and exploitation of one group by another, the right of a group to freely determine their political status; and the right of a group to freely pursue their economic, social and cultural development. The emphasis is on returning control, choice and power of making decisions to a subject community. Or as Brownlie puts it,

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1 See Chapter One, notes 15, 16 and accompanying text.

> "This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives"[2]

In Chapter 4, it was shown that self-determination is not necessarily external. Brownlie agrees that "self-determination does not necessarily involve a claim to statehood and secession".[3] It is however unclear exactly what the specific working out of the principle of self-determination involves. New prospects for self-determination expanding on these core values are already being developed to respond to new circumstances. Shivji's discussions of the end of colonialism and the rise of authoritarianism in Africa leads him to argue that the right to self-determination needs to be reconceptualized to give it a broader meaning, and "translated into constitutional norms or standards on the domestic plane".[4] He believes that the multi-ethnic character of most African states makes the internal aspects of the right to self-determination crucial, and that this requires the right to some form of democratic government and participation of citizens therein.

The link between self-determination and democracy has been stressed by others working in this area.[5] Donna Greschner maintains that the democratic process is a means of implementing the deeper principle of self-determination.[6] Even where the self-determination of the states is concerned, it is seen as both the creation of a sovereign entity and a process of equal participation in the political system.[7] The

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2 Ian Brownlie, "The Rights of Peoples in Modern International Law." in J. Crawford, *The Rights of Peoples*, (Clarendon Press, Oxford:1988) 1 at 6.
3 Brownlie, *ibid.*
4 Issa G. Shivji, "State and Constitutionalism in Africa: a New Democratic Perspective." 18 (1990) *International Journal of the Sociology of Law* 381
5 W. Reisman, "Sovereignty and Human Rights in Contemporary International Law." 84 (1988) *American Journal of International Law* 866
6 Donna Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle.*" 35 (1990) *McGill Law Journal* 633 at 644.
7 E.M. Morgan, "The Imagery and Meaning of Self-Determination." 20 (1988) *N.Y.U. Journal of International Law and Politics.*

principle of self-determination requires more than representative government. It also requires some model or form of participatory democracy in order to allow a subordinate group to create the institutions under which it lives. The conception of democratic government as the

> "Hobbesian individual participating in the affairs of his/her government through periodic elections to choose representatives who then constitute the government and a legislative body at the level of the state"[8]

is rejected by Shivji as inconsistent with the right to self-determination, as it does not effect or facilitate the self-government of groups within a particular state. Instead, the formation of state organs should be at the local village or town that is the level where people work and live. While there are many institutional variations possible,

> "The point of principle, however, is that the formation of state organs is from the base to the center; that it rests on the principle of popular elections, right to recall and accountability operating at all levels whose foundation is village/workplace assemblies".[9]

Similarly, Greshner's discussion of democracy for women, endorses C.B. McPherson's statement that

> "Democracy is now seen, by those who want it and those who have it ... and want more of it, as a kind of society -- a whole complex of relations between individuals -- rather than simply a system of government." [10]

The above discussion demonstrates that there is an important link between self-determination and democracy. For internal self-determination to be pursued, some form of democracy, and particularly participatory democracy, is necessary to end hierarchy and domination and return decision making power and control hitherto subordinated

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8 Shivji, *ibid,* at 398
9 Shivji, *ibid,* at 399
10 Greschner, *supra* note 6, at 643.

groups. The importance of participatory democracy is recognized by Young, who sees participation and inclusion in all of society's institutions and social positions, especially those of most power and value, as the objective of the social struggles of women, aboriginal peoples and other disadvantaged and marginalized groups.[11] Duclos also sees participation as so important that it should be a cross cultural constant.

> "In the face of evidence that sexism permeates all cultures, and that there are always disputes within a culture about what that culture is or should become, I believe that some such condition (a minimum procedural condition of participation) is necessary for a workable (feminist) pluralist state." [12]

The principle of self-determination also emphasizes the importance of freedom to pursue economic social and cultural development as well as political status.[13] Gould's concept of self-development shares many of the core concepts of self-determination, and is useful therefore in any attempt to examine the more practical implications of the international principle. She emphasizes the importance of self-development of individuals in their social contexts, which she defines as

> "the process of concretely becoming the person one chooses to be through carrying out those actions that express one's own purposes and needs."[14]

Self-development is also the development of one's natures and capacities through carrying out those actions that express one's own purposes and needs.[15] Importantly, Gould points out that the process of self-development includes a right to participate in

11 I.M. Young, "Difference and Policy: Some Reflections in the Context of New Social Movements." 56 (1987) *Univ.Cinn. Law. Rev.* 535 as cited in Lessard, "Relationship, Particularity and Change:Reflections on *R.v. Morgentaler* and Feminist Approaches to Liberty." 36 (1991) *McGill Law Journal* 263.

12 Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity." 38 (1990) *Buffalo Law Review* 325 at 380 n217.

13 See Article 2, of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, discussed in Chapter Four.

14 Carol C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society*. (Cambridge University Press:1988) at 46

15 Gould, *ibid*,

decisions that concern common activities. These decisions must be uncoerced however. While people may often choose to act for the benefit of others,

> "where a person is constrained coerced or manipulated to act on behalf of another's interests or aims then it may be said that such actions do not contribute to the person's self-development. These are cases of domination by others, and the conception of freedom as self-development is incompatible with such domination."[16]

Freedom from coercion and domination is one of the objectives of self-determination in International Law. The coercion of colonial states and peoples, and the process whereby they were manipulated to act in the interests of colonial powers is precisely what the principle of self-determination is designed to end. While Gould's concept of self-development is more individualistic than the right to self-determination put forward in this thesis, she nevertheless recognizes that

> "In a social context the principle moves from internal transformation to objective changes in the world where agents act." [17]

The principle of self-determination put forward here wishes to create a space for women as a group to develop their own natures and capacity free from domination and coercion and have their own distinct characteristics reflected in the institutions under which they live their lives. The examination of existing theories of self-determination indicates that one of the methods of achieving this is to ensure that women participate in decision making in the institutions and structures which shape and form the kind of society in which they live. The next section examines what these institutions are.

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16 Gould, *ibid*, at 48-49.
17 Gould, *ibid*, at 48.

C Where is self-determination applicable?

It is clear from the above discussion that participation in the process of making decisions about the institutions which govern and shape our lives is one of the core components of self-determination, and one of the key ways in which self-determination is achieved. As formulated in this thesis, it is both a substantive value and a process so that the principle itself and the methods of achieving it's objectives merge.

Women at present, are not self-determining. As MacKinnon points out

> "No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented".[18]

Or, as Senator Mary Robinson (as she then was) writes about the Irish State and Legal System

> "No woman had a hand in drafting the constitution. The vast majority of T.D.'s (Teachta Dála, members of parliament) and Senators have been and continue to be, male ... Ireland inherited the common law system which had been compiled by male judges, and most of the judges who interpret our constitution and laws are men".[19]

It needs little observation to conclude that women have not participated in decision making at the level of government and state institutions. The ratio of women to men in elected positions is very low, in Ireland there ae fifteen men in positions of power for every one woman. The position in Canada and other western "democratic" countries is similar.[20] Theories of democracy readily acknowledge that the political sphere must be

18 Catharine A. MacKinnon, "Reflections on Sex Equality Under law" 100 (1991) *Yale Law Journal* 1281

19 Mary Robinson, "Women and the Law in Ireland" 11 (1988) *Women's Studies International Forum* 351

20 Joni Lovenduski, *Women and European Politics* (Wheatsheaf Books: 1986)

reconstructed to become more democratic, and to increase the participation of subordinate groups. [21] The necessity for the inclusion of women in the public life of the state is recognized also in the International Covenant on Civil and Political Rights. Article 25 for example provides:

Every citizen shall have the right and opportunity, ...

(a) To take part in the conduct of public affairs directly or through freely chosen representatives.
(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot of guaranteeing the free expression of the will of the electors.
(c) To have access, on general terms of equality, to public service in his country.

The Convention on the Elimination of all Forms of Discrimination Against Women provides also for the inclusion of women in public life.

Article 7 provides that.

States Parties shall take all appropriate measures to eliminate discrimination against women n the political and public life of the country, and in particular, shall ensure. on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to publicly elected bodies;
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Self-determination cannot be restricted to the public sphere however. Gould recognizes that democracy cannot be restricted to the political sphere, if it is to advance self

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21 See Gould, *supra*, note 14; C.B. MacPherson, *supra*, note 6; Carole Pateman, "Feminism and Democracy" in Graeme Duncan, (ed) *Democratic Theory and Practice.* (Cambridge University Press:1983) at 213; Carole Pateman, *The Problem of Political Obligation- A Critique of Liberal Theory.* (University of California Press:1985)

development, and that there is a requirement for greater participation in all contexts of decision making.

> "democratic forms of decision making, which involve equal rights of participation, are relevant not only to political contexts, but should be extended to social and economic contexts as well."[22]

This leads her to argue that all institutions of society - social, economic, political and cultural, should be democratized.[23] Gould's theory applies only to the public sphere however, and does not include the private sphere to which women have been relegated.[24] Her description of the economy excludes women's (often unpaid) work, her description of social and cultural institutions does not include institutions which shape women's lives, such as the family. Restricting democracy to the public sphere, means that the self-determination of women is limited.

This shortcoming of existing political theories is recognized by Carol Pateman. She maintains that the feminist critique of marriage and personal life must be taken into account if democracy is to be more than "a men's club writ large".

> "The assumptions and practices which govern the everyday personal lives of women and men, including their sexual lives, can no longer be treated as matters remote from political life and the concerns of democratic theorists ... The structure of everyday life, including marriage, is constituted by beliefs and practices which presuppose that women are naturally subject to men - yet writers on democracy continue to assert that women and men can and will freely interact as equals in their capacity as enfranchised democratic citizens".[25]

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22 Gould, *supra,* note 14, at 33.
23 See Gould, *ibid*, at Chapter 9, for a discussion of her development of democracy.
24 As Pateman writes, "the seperation of the two spheres, public and private, is also a seperation of the sexes." *supra*, note 21, at 190.
25 Pateman (1983, *supra*, note 21, at 213.

If the core of self-determination is the right of a group to have their distinct character and values reflected in the institutions under which it lives, to paraphrase Brownlie, then self-determination for women must include an opportunity to participate in the regulation of the institutions of marriage and the family. It should even envisage the participation of women in the re-definition of these institutions so that they reflect the needs and interests of women.

The principle of self-determination for women must therefore apply to the family and personal life, that is to the private sphere as well as the public sphere. The argument that self-determination is applicable to the institution of marriage and family becomes even stronger with the realization that legitimacy based on consent and acceptance, is absent here. As Pateman makes clear, just as the social contract leading to government and state is based on, and legitimated by the consent of citizens to it, so the family legitimates the marriage contract by the consent of a woman to become a wife. In *The Sexual Contract,* Pateman develops the argument that this consent is not legitimate as it is based on the coercion of woman by society to adopt that role.[26] The presence of coercion also has the consequence that women cannot develop their own natures and capacities within the institution of marriage as it presently exists. To achieve self-determination for women, this institution would have to include the participation of women in its creation and in the development of the laws which regulate it.

Lack of consent by women to sexual relationships and intimacy is also recognized by Pateman.[27] In this area of fundamental importance to women, women cannot be said to be self-determining, because they are not allowed to make their own decisions or determine for themselves the conditions under which they engage in intimacy.

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26 Carole Pateman, *The Sexual Contract* (Stanford University Press: 1988)
27 Pateman, *supra*, note 21.

> "Women are held to lack the capacities required by individuals who can give consent, yet in sexual relations, where consent is fundamental, women are held always to consent, and their explicit refusals are re-interpreted as consent."[28]

While there are many other areas of women's personal lives where they cannot be said to be self-determining, the focus here is on reproductive self-determination. Reproduction and procreation are fundamental areas in women's lives where they are denied an opportunity to participate in creating the social conditions governing them, and where they are coerced and manipulated to act for the benefit of others. Law and legal rights operate as significant methods of imposing constraints on women's reproductive self-determination.

This is apparent in Ireland, where the redefinition of women as possessing a right to life equal to the right to life of a foetus resulted directly in the denial to women of information necessary to make a choice about the future structure and shape of their lives. Even where abortion is not directly made criminal, that is where negative constraints are absent, the failure of law to protect the enabling conditions necessary for women's exercise of self-determination amounts to a denial of the right.[29]

Lessard points out, for example that the decisions of Harris v. McRae and Maher v. Roe [30] in the United States which held that the denial of federal funding for abortions did not unduly burden or interfere with a woman's constitutionally protected freedom to decide whether or not to terminate her pregnancy, manipulated the social context of the decision making, and

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28 Pateman,(1985) *supra*, note 21, at 191

29 The failure to provide enabling conditions to pursue a right has been recognised by the European Court of Human Rights in Airey v. Ireland, as a denial of a that right.

30 448 U.S. 297 (1980) and 432 U.S. 464 (1977)

> "rearranged the social and economic environment of impoverished women so as to channel and constrain their reproductive choices".[31]

Similarly in Canada, Lessard explains that although R. v. Morgentaler[32] struck down negative constraints on abortion, transferring control from state sanctioned hospital committees to the medical profession "did not hereby empower women to determine the shape of their reproductive lives"[33] The power to make the decision was not returned to the women themselves.

It is my contention that the group right to reproductive self-determination goes beyond abortion and to the right of women to participate in the creation of the structures that govern the way they live and bring up children. It is nothing less than the right of women as a group to define and determine whether , when and how they will have children, and also determine the future consequences childbearing will have for women. This view is shared by feminist scholars such as MacKinnon and Lessard. Lessard for example writes that

> "A claim for reproductive control is a claim to determine one's relations to specific others, to children, to parents, and to a specific community ... to constrain self-determination in this regard is to exclude women from full political social and economic participation within a society that is structured around the male experience of reproduction".[34]

MacKinnon also asserts that the right to reproductive control would include the abortion right but not center on it. It would begin instead with the place of reproduction in the status of the sexes. She recognizes that

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31 Hester Lessard, "Relationship, Particularity and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty." 36 (1991) *McGill Law Journal* 263, at 293.
32 [1988] 1 S.C.R. 30
33 Lessard, *supra,* note 31, at 293.
34 Lessard, *ibid,* at 307.

> "A narrow view of women's "biological destiny" has confined many women to child bearing and child rearing and defined all women in terms of it, limiting their participation in other pursuits, especially remunerative positions with a social stature".[35]

The social consequences of child bearing for women make the right to self-determination in this area particularly important. Greschner writes that

> "Women's exclusion and lack of voice within democratic practice seems particularly unjust with respect to abortion laws. Not only do restrictions on abortion affect women far more than on men; the debate about the regulation of abortion is a debate about the role, status and value of women, about the meaning of women's lives and our freedom to determine the course of our own lives."[36]

From pregnancy onwards, women's reproductive choices are constrained, and their lives are constrained by reproduction. During pregnancy their health-care decisions are limited by the medical profession.

> "Decision-makers in health care and government have left women little choice about the type of care they will receive during pregnancy, who will attend them in childbirth and whether the birth will be in hospital or not." [37]

For women in the paid workforce, pregnancy may result in the loss of their jobs. Time spent away from the workplace disadvantages women in terms of future advancement

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35 MacKinnon, *supra,* note 18, at 1318.

36 MacKinnon, *supra,* note 18, at 1312. writes that "Women often do not control the conditions under which they become pregnant; systematically denied meaningful control over the reproductive use of their bodies through sex, it is exceptional when they do. Women are socialy disadvantaged in controlling sexual acess to their bodies through socialization to customs that define a woman's body as for sexual use by men. Sexual acess is regularly forced or pressured or routinized beyond denial ... Poverty and enforced economic dependence undermine women's physical integrity and sexual self-determination. Social supports or blandishments for women's self-respect are simply not enough to withstand all of this."

37 Leaf Factum for Sullivan v. Lemay, at p 12. In Ireland, unlike British Columbia, midwifery is an established profession, so that women's choices in this area are extended somewhat. The following discussion is informed by the arguments in this factum.

and promotion. Neither do women have any hand in creating the social conditions in which child-rearing takes place. Women do not participate in making the decisions which determine which of society's resources are devoted to day-care, to child support, to welfare, and the other supports necessary to assist combining child-rearing with participation in society. Irish women live in a country with a low employment, a huge national debt and depressed economic climate. This makes the necessity to participate in the process allocating these meagre resources vital. When only men make these decisions, women's needs are forgotten.

The lack of reproductive control for women further inhibits their right to self-determination, by limiting the time and energy they have available to participate in public decision making, which in turn means that women's needs are neglected. The result is a spiral of powerlessness. A concrete example is provided by the structure of the social welfare system in Ireland. Because of a two tiered system, claimants of social assistance are not allowed to register as unemployed thereby making themselves available for work, nor are they eligible for the various unemployment training schemes. Noreen Byrne explains that this is an important factor for women who have not ever been in the paid workforce, or have not been there for some time.

> "this combined with an almost total lack of child minding facilities creates a poverty trap–out of which it is almost impossible to escape."[38]

In a society where women were decision makers in the political, public and private spheres, it is surely not unreasonable to assume that more emphasis would be placed on the re-organization of work to take account of the child-care responsibilities of parent, that career structures would reflect the likelihood of a year or two taken away from the public workplace.

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38 Noreen Byrne, "The Feminization of Poverty." in 11 (1988) *Women's Studies International Forum.* 367

A law of reproductive control would have to solve this problem. Although MacKinnon seeks to use equality to realize these goals, and Lessard attempts to reconstruct liberty rights of Section 7 of the Charter, the vision is the same as the one argued for in this thesis. For all the reasons given in previous chapters, it is my contention that women's status and lives are best improved by using a group right to self-determination, which applies to both the public and private spheres as they are presently consitituted. Lack of self-determination in the private sphere impacts on the oportunities for self-determination in the public sphere. When women are coerced, constrained and oppressed in their day to day lives, they do not develop the self-confidence or qualities necessary to participate sucessfully in the male-dominated public sphere. The overburdening of women with responsibilities in the private sphere of family and childcare, means women will be reluctant to take up responsibilities in the public spheres of work or government, even where opportunities for participation in the decision making process are available. For this reason, the right to reproductive self-determination has a great impact on self-determination for women throughout all levels of society, in both the public and private spheres.

D Self-Determination as a Constitutional Right

The earlier sections of this chapter have traced the outlines of self-determination for women as a general principle. This section will develop self-determination as a constitutional right, with particular regard to the impact of a right to self-determination for women on the decision in S.P.U.C. cases discussed in the opening chapter. These cases are a clear illustration of the place of law in coercing and manipulating women to act on behalf of anothers interests, and for anothers benefit, that other being the foetus.

The coercion of one for the benefit of another is inconsistent with the basic tenets of self-determination discussed in section B.[39]

Yet how is such coercion to be ended using constitutional rights? There are essentially two ways in which the right to self-determination could become a constitutional right. Firstly by the adoption of an express right to self-determination, secondly by an adoption of an interpretative principle requiring existing rights to be construed in a manner consistent with women's right to self-determination. This right could be expressly adopted through a referundum, or implied by the judiciary. Although the struggle to prevent the adoption of the pro-life amendment illustrates the difficulty with which such a referendum would be accepted by the Irish People, the process of having a right approved in this manner would endow it with a moral legitimacy which the judiciary would find difficult to ignore.

The adoption of an overarching interpretative principle which would operate to modify existing constitutional rights, would be perhaps the simplest option. Such a principle would not be new to Irish Constitutional jurisprudence. Article 45 of the 1937 Constitution contains a number of directive principles of social policy, which have been used by the courts to amplify existing rights, even though these principles are more specifically directed towards the Oireachtas (Parliament). An example of relevance to women is Murtagh Properties v. Clery.[40] Article 45.2.1, provides that

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39 Underlying the application of this principle is an awareness of the limitations and difficulties of engagement with law. These defects have been discussed throughout this thesis, particularly in Chapter One, but may be summarized by MacKinnon's observation: "Treacherous and uncertain and slow, law has not been women's instrument of choice. Their view seems to be that law should not be let off the hook, it is too powerful to be ignored." MacKinnon, *supra,* note 21, at 1285.

40 [1972] I.R. 330. The case concerned the exclusion of a woman from employment because the union concerned objected to non-male labour being used.

> The State shall, in particular, direct its policy towards securing: That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.

In Murtagh, Article 45 was used to expand the personal rights guaranteed under Article 40.3 of the constitution.[41] to include the right to earn a livelihood without discrimination. A right to self-determination could be used to expand the personal rights to provide protection of various kinds for women. Interpretative principles are also to be found in other Bills of Rights. The Canadian Charter, for example, contains interpretative principles of this kind. Article 27, for example requires that the Charter be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.

Self-determination as an interpretative principle would however mean that existing rights structures and concepts would continue to be used, bringing with them all the defects already discussed in this thesis. For example, claims to end the disadvantage of women might be made using the equality principle, which has been criticized above as constructing issues in a way which is ultimately detrimental to the ending of women's domination. While at a theoretical level it is certainly possible to reconstruct equality in a way that requires self-determination, it is my contention that this is not possible at a practical level. The use of the equality principle in Canadian Jurisprudence, as discussed in Chapter Four, demonstrates that the construction of categories of sameness and difference as a precondition for the application of the principle of equality is inescapable. The better approach is simply to advocate a right to self-determination *ab initio*, with an express right to self-determination.

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41 Article 40.3.i provides that `the State guarantees in it's laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of the citizen.

Secondly, existing interpretative provisions in the Irish Constitution and Canadian Charter tend to be either ignored completely or little used.[42] There is the danger therefore that a right to self-determination as an interpretative principle would not be used and would therefore have little practical effect.

An interpretative principle would have the advantage however, that it could be used in cases where an express right to self-determination was not specifically claimed. In criminal and welfare cases, for example, a provision requiring that existing laws be interpreted in a manner consistent with the right to self-determination for women could have an important impact in returning power and control of their lives to women in those areas. The legal regulation of welfare, which assumes that women are economically dependant on men so that women who cohabit with men are denied welfare benefits, could be challenged as coercing women to adopt a particular lifestyle, thus denying their right to control and create the conditions under which they live. For self-determination to have its greatest impact therefore, the adoption of both an express right and an interpretative provision would be preferable.

What would the implications of this right be ?

In the S.P.U.C. cases under consideration, a consideration of a right to self-determination could result in a finding that the criminal prohibition on abortion was unconstitutional, or that the provision of information on abortion facilities available in other countries was not unconstitutional.

42 See, J. Kelly, *The Irish Constitution*, (Jurist Press:1986) at 454 and following, where he shows that the directive principles have been used on only five occasions since the Constitution was adopted in 1037. The Supreme Court of Canada has yet to adress any of the interpretive positions in the Charter in a cultural controversy, Duclos, *supra*, note 12, at 348, n104

The right to self-determination argued for in this thesis has as its core the return of decision making power and control to groups so that they can create and define the structures of their own lives. The criminal ban on abortion, enacted by an Irish legislature composed largely of men, has not given women an opportunity to participate in creating the laws on abortion. Section C of this chapter demonstrated the importance of the participation of women in decision making in this area. Given the importance of childbearing for women, and its impact on the future course of their lives, the regulation of women without their consent would not be consistent with the right to self-determination outlined here.

Of course it is also possible that if Irish women did have an opportunity to regulate the availability of abortion services, the conservative Catholic background of the women would still result on the prohibition of the service. The vastly different context in which this would take place would make such a result less objectionable. One would expect, for example, that if women were participating in creating the societal arrangements under which childcare took place that greater support would be provided for women and children. Even MacKinnon is prepared to listen to arguments against abortion under these circumstances,

> "If authority were already just and body already autonomous, having an abortion would lose any dimension of resistance to unjust authority or reclamation of bodily autonomy. Under condtitions of sex equaltiy, I would personally be more interested in taking the man's view into account."[43]

Arguments of women against abortion, under conditions of self-determination, would be even easier to listen to.

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43 MacKinnon, *supra* note 18, at 1230.

The express constitutional right to life granted to the unborn by Article 40.3.3 of the Irish Constitution means that it is not open to the Irish Courts to find that a foetus has no rights. A right to self-determination would however strengthen the existing right to life of the mother. This could draw on the right to life which was held in G v An Bord Uchtála[44] to include the right of every individual

> "to be reared and educated, to liberty, to work, to rest and recreation, ... and the right to maintain that life at a proper human standard in the matter of food, clothing and habitation."[45]

An expansive interpretation of the right to life of the mother, informed by a right to self-determination would facilitate the reinterpretation of the issues in the S.P.U.C. case, and the cutting down of the rights of the foetus. It could be argued that the consequences for women of child-bearing are so great, and the effect on the future participation of women in society so negative, that denying women the power to control and determine their ability to reproduce (or not) has the effect of denying women the power to control and determine the future shape of their lives. This is contrary to the core values of self-determination as discussed in the opening sections of this chapter. In effect this is the point made by Greschner when she argues that restrictions are incompatible with democracy for women.[46]

Even if the principle of self-determination did not result in a different decision in the cases being discussed, the redefinition of women as a a group capable of and entitled to make decisions about their lives, would change their status in the Irish Constitution, and act as a counterweight to the existing constitutional provisions which define women completely in terms of their roles as wives and mothers.

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44 [1980 I.R. 32
45 *Ibid* at 598
46 Greschner, *supra,* note 6, at 667.

A group right to self-determination would also enable women to become more visible in Irish Constitutional Law. The importance of making women's voices heard in law is recognized by many feminist scholars, who argue that the imposition of a discourse on a subject group is inconsisent with a right to seldetermination.[47] In the context of reproduction, Greschner asserts that the language used by legal linguists to conceptualize and control sexuality, pregnancy, abortion and birth, has been heavily influenced by two powerful and male dominated institutions: organized religion and the medical profession.[48] This was apparent in the abortion referendum campaign discussed in Chapter One, where the Catholic Church and Medical Association dominated the debate to the exclusion of women's voices. By bringing evidence into court of women's experiences of reproduction and childrearing, the paternalistic and stereotyped attitudes towards women and women's decisions which were revealed by the judges in the S.P.U.C. cases, could be combatted.

The potential effects of a right to self-determination on other decisions concerning women would also be important. The underinclusion of women in Government, courts and the Judiciary would also potentially be in violation of the right of women to self-determination. Circumstances could be envisaged where the government would be required to investigate restrictive practices and customs which prevented the participation of Irish Women in the process of making decisions which go to creating the fabric of Irish Society.

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47 Greschner, *ibid*, at 654.
48 Greschner, *supra* note 6, at 647.

The above discussion attempts only to suggest possible applications of a right to self-determination. Working out every application of the principle in advance, risks defeating the very right self-determination attempts to protect, that is the right of oppressed groups, particularly women, to make their own decisions and work out for themselves the structures which they wish to live under.

E. Conclusion.

Through an attempt to pose solutions, or alternative strategies to the litigation in the S.P.U.C. cases, this thesis has attempted to develop a theory of a right to self-determination for women as a group. The principle which I argue for would aim to return, as far as possible, decision making power and control over their lives to women, in order to facilitate their self-development, and the development of a society which reflects their characteristics and values. Under conditions of self-determination women would finally be given the opportunity to develop their own natures and capacities ascertain whether for example women are more caring and nurturing than men, or whether in developing this capacity women were simply making a virtue out of necessity. At it's core, self-determination for women as a group, is both a substantive recognition that women as well as other oppressed groups have the right to define and create their own liberation, and a process by which this liberation can be achieved.

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