Human Rights for Daily Use

Making the Legal Case for Women's Unpaid Work

by Marilyn Waring

L'auteure rapporte les efforts d'un groupe de féministes activistes de la Nouvelle-Zélande qui ont porté en justice le problème du travail non-rémunéré des femmes. Si cet effort reconnaissance ne réussit pas, le groupe projette de continuer le combat pour leur reconnaissance légale devant le Comité des droits humains aux Nations-Unies.

When a country signs the International Covenant on Civil and Political Rights, it guarantees that these rights are "immediately enforceable" in its domestic jurisdiction. One hundred and twelve countries have ratified this covenant since 1976.

"Human rights" arrived in English as a translation from the French *droites des hommes*—the rights of men—and wherever I examine civilizations that have espoused the "rights of men" that is precisely what was intended. Men who were slaves were excluded, as were men who were not citizens of that particular state or republic. Women were most definitely left out.

The protection of oppressed or endangered groups by international treaty started in the seventeenth and eighteenth centuries in matters of religious liberty. In the nineteenth century, international treaties were used to protect ethnic and racial groups and to combat slavery and the slave trade. In the twentieth century, these agreements came to prominence in order to improve labour conditions, most notably through the International Labour Organization (ILO), and to enable supervision of the administration of mandated territories. To a limited extent, an individual became a subject with enforceable rights in international law independent of her/his citizenship of a particular state.

Traditionally, international and domestic law have been separate systems. The international legal system was a law of nations incorporating the rights and duties of states in the international community. No sovereign body existed with universally accepted lawmaking and conflict-resolving authority. After the Second World War, a very different emphasis was given to human rights with the establishment of the new United Nations (UN). Since 1948 more than 70 international human rights instruments have been developed inside the UN framework. Some have the power of a treaty, others are supposedly endowed with universal moral force, whatever that might be.

From 1948 the UN Charter and the Universal Declaration of Human Rights were the sole international human rights instruments, but there was an impatience in the international community with their vague nature. As a result, the objectives were translated into two covenants. These are binding on the countries that sign them, and considered relevant in human rights jurisprudence in countries that have not signed.

In theory, the first covenant, the International Covenant on Civil and Political Rights (ICCPR), is the stronger. When a country signs this covenant, it guarantees that these rights are "immediately enforceable" in its domestic jurisdiction. The list of rights is extensive, but this article is focused on two specific protections; the right to equality and non-discrimination, and protection from servitude or forced labour. One hundred and twelve countries have ratified this covenant since 1976.

If signatories to the ICCPR want to go further, they can sign the Optional Protocol to this covenant. The UN Human Rights Committee (UNHRC), established in Part IV of the covenant, can receive and consider "communications" from individuals who claim to be victims of violations of the ICCPR in their own country. The protocol means that individuals who have exhausted the domestic legal remedies in pursuit of their claim can have access to the UNHRC. Because this committee does not have jurisdiction inside a nation state, we cannot call it a tribunal, we cannot say that it handles cases, we cannot say that it delivers judgements. We "communicate" with them, and they "communicate" with us. Their findings do have judicial force in the different regional Human Rights Commissions.[1] Sixty-seven countries have signed the Optional Protocol, effectively saying that they guarantee to their citizens the right to take cases to the UNHRC (Chinkin).

Both Canada and New Zealand are signatories to the covenant and protocol, and the Canadian Charter of Rights and Freedoms has been the instrument to affect these rights in domestic law.

The second covenant, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), covers the right to work and to reasonable conditions of employment, the right to form and join trade unions, social security rights, protection and assistance to the family, with special protection for children, adequate standards of living, the right to health, access to education, and the right to take part in scientific and cultural life.

ICESCR has no protocol, and no enforcement mechanism. While there are internationally agreed guidelines for compliance and reporting for countries that have signed the ICESCR, countries are obliged only to fulfill it "progres-

sively" according to their "maximum available resouce." There are no UN mechanisms for individuals or groups to complain if a country that has signed this covenant has not delivered. By 1995, 115 countries have signed this covenant.

In the context of these UN human rights instruments, the continuing substantive and conceptual neglect in the international community of human rights abuses against women is an unquestionable hypocrisy. Compare, for example, the actions of nation states against apartheid or racial discrimination with the inactivity against gender discrimination and sexual segregation in many parts of the world. Compare the efforts to outlaw torture with the lack of emphasis on rape, gender-specific torture, sexual surgery, and genital mutilation. Compare the efforts in the international community to outlaw and condemn slavery with the inattention to the practice of trafficking in women, forced prostitution, forced marriages, or sex tourism. There is great advocacy for fair trials and due process for all "persons," but where are the calls for a woman's right to appear before a court at all, to bear witness on an equal basis with men, or to be a complainant for equitable treatment.

The continuing neglect of human rights abuses against women is an unquestionable hypocrisy. Compare, for example, the actions of nation states against apartheid with the inactivity against gender discrimination and sexual segregation in many parts of the world.

A former judge of the International Court of Justice, Mr. Alejandro Alvarez, has said that "a treaty or text that has once been established acquires a life of its own. Consequently in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it." But the courts, the tribunals, the UN committees of international law, and the representatives at the UN debating and signing and ratifying human rights instruments, are overwhelmingly men. What faith could any woman have that her "contemporary life" would be paramount in interpretation?

Justice Bertha Wilson of the Supreme Court of Canada acknowledged:

> It is impossible for a man to respond, even imaginatively ... because it is outside the realm of his personal experience ... [and] because he can only relate to it by objectifying it.... The history of the struggle for human rights from the eighteenth century on has been the history of men. (R. v . Morgentaler)

The introduction of a gender perspective to international law requires asking all the fundamental questions all over again: looking carefully at language, making connections, not making assumptions, and taking great care to see clearly what is said or written. It requires a view from outside the cocoon of patriarchy.

As a former politician I know that a diverse range of strategies is needed by women to secure any changes in the old order. I am not interested in any approach which pretends that legal instruments and procedures are the answer. There are activist political campaigns available to make a more significant impact on women's oppression than recourse to an international system which can apparently do little to ensure that the rights are enjoyed in practice. But I had to explore what use, if any, human rights jurisprudence might be to the invisibility of women's unpaid work. I decided to investigate the non-recognition of unpaid work, particularly that done by women as mothers and homemakers, as a fundamental breach of human rights.

I have previously written at length on the conceptual problem of the definition of work (Waring). When I investigated how, in my "culture," the words of concern to us are "normally" used in debate, I found this. For "work," the *Concise Oxford Dictionary* listed: "1. expenditure of energy, striving, application of effort to some purpose; 2. task to be undertaken; 3. Employment." Under "labour" I found: "1. bodily or mental toil, exertion; toil tending to supply wants of community; 2. task; 3. pains of childbirth." "Employment" was defined as "one's regular trade or profession" and "occupation" as "what occupies one, means of fulfilling one's time, temporary or regular employment, business, calling." Turning to *Roget's Thesaurus* I found that alternatives for the word labour included work and housework. A "job" might be work, labour, employment, or occupation. But in my "culture" the way we "normally" use words is not necessarily the concept applied in law.

For many years I had intended to pursue the possibility of a human rights challenge on the question of unpaid work. I had discussed it with activists in Canada and Norway. I had strategized with individual women friends, usually parenting alone, who had just been dealt another discriminatory blow on the basis of their status as mothers and homemakers in unpaid work. The needed combination of passionate energy, time, and resources had eluded me.

A synchronicity of events made a combined effort possible. I heard an interview with an organizer of a lobby group called Women As Mothers (WAM). I called her. We met. At the same time my university department needed to offer a new third-year applied paper in social policy. The students, with one exception, were mature women. The majority were mothers, and sole parents. There was a wealth of combined experience in custody, maintenance, and matrimonial property battles. There was the shared experience of struggling to retrain while being called welfare beneficiaries. I offered the course. WAM offered the names for in-depth case studies. The students chose a specific area for study where the impact of the law, policy, and practice resulted in disparate outcomes for women

who had spent most of their working hours in unpaid and unrecognized economic activity. Their subjects included government censuses, superannuation, home schooling, levels of benefit payment, matrimonial property divisions, breast feeding, the care of the totally dependent, including the elderly and those with various disabilities, accident compensation insurance and payments, and paid maternity leave.

There was no obvious statute to test before the New Zealand courts. The Human Rights Commission and its legislation offered an alternative route this time in pursuit of domestic legal remedies. The grounds for opposing discrimination in the Human Rights Act 1993 included sex and other grounds which might be cumulatively useful, marital status, and family status. The definition of "employment status" in the Act included being a voluntary worker or a "beneficiary." "Employer" was defined as being the person for whom work is done by a paid and unpaid worker, and "employment" was deemed to have a corresponding meaning.

The subjects of my students' cases spoke consistently of this unpaid work leading to a restriction, if not an absence, of personal freedom. There was no question that this unpaid work was economically exploited by partners, family, the community, and the state.

After a formal complaint had been made, the legislation allowed the commission to take a number of steps. It could inquire generally into legislation claimed to be in breach of human rights guarantees in domestic and international law. It could report to the prime minister on the desirability of better legislation. It could investigate the specific cases of complaint contained in each students' submission. I was particularly attracted by the commission's power to instigate a declaratory judgment, so that what was and was not "work" might be clarified.

The case would have to be assembled from the sources in Article 18 of the Statute of the International Court of Justice, which sets down three major and two subsidiary sources of international law. The three major sources are international conventions, international custom as evidence of general practice accepted as law, and general principles of law recognized by civilized nations. The two subsidiary sources of international law are judicial decisions of the domestic courts and the teachings of the most highly qualified publicists of the various nations. These sources are described, in an irony that is not lost on me, as "hard" and "soft" law. Just as in pornographic material, "soft" law establishes custom and is generally described as a "norm."

We would begin with the ICCPR Article 2 ("Each State Party ... undertakes ... to ensure to all individuals ... the rights recognized in the present Covenant, without distinction ... such as ... sex ... or other status"), and Article 26 ("all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ... or other status").

I hesitate to introduce ICCPR Article 8 into the discussion at this point, because of the emotional response provoked by the suggestion of its relevance to the case. But it is very important. The key phrases read:

> 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
> 2. No one shall be held in servitude.
> 3.(a) No one shall be required to perform forced or compulsory labour; ...
> (c) The term "forced or compulsory labour" shall not include: ...
> (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community [or]
> (iv) Any work of service which forms part of normal civil obligations.

The term I am particularly interested in is "servitude." In the *Oxford English Dictionary* (OED) "servitude" is defined as "the condition of being a slave or serf or of being the property of another person, absence of personal freedom." In the first definition the OED notes that it usually carries the additional notion of subjection to the necessity of excessive labour. The second major definition is "the condition of being a servant, service, specially domestic service."

The subjects of my students' cases spoke consistently of this unpaid work being in the service of others, and leading to a restriction, if not an absence, of personal freedom. There was no question that this unpaid work was economically exploited by partners, family, the community, and the state.

In respect of the rights of these unpaid workers, the next source to be consulted was the ICESCR. Article 2 guarantees "that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to ... sex ... or other status." While there is no clear consensus among legal critics as to the breadth of the obligation imposed by the term "or other status," when the phrase was discussed in the drafting of the ICCPR it was regarded as all-inclusive (Bossuyt 486). Any argument that the phrase was to have a different meaning in the ICESCR would be extraordinary. On accepted rules of international law, the view held by the draftees of covenants should be applied. Its relevance and importance to this case will become clear as we proceed for, in addition to being a woman, clearly encompassed by "sex," "other status" might include being pregnant, being a mother, lactating, or being an unpaid worker.

The relevance of the next group of ICESCR articles is contingent upon the universal and unpaid work of women being categorized as work. It is perfectly obvious that women are not "at leisure," economically inactive, or unproductive when engaged in such activities. Neither are they unemployed. That leaves two options: either these women work, or they are in servitude. If their unpaid production, reproduction, and service provision is recognized as work, several other articles in the ICESCR apply.

Article 7 is particularly important. If what women do for hours a day in an unpaid capacity is defined as work, states parties are to:

Shlomit Segal, "Economic Globalization," linocut, 12" x 18", 1997.

> recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.
>
> These are the entitlements of all workers.

Of particular relevance to our debate, a state party will be in violation of the Covenant, *inter alia*, if

> (a) it fails to take a step which it is required to by the Covenant;
>
> (b) it fails to promptly remove obstacles which it is under a duty to remove to permit the immediate fulfillment of a right;
>
> (c) it fails to implement without delay a right which it is required by the Covenant to provide immediately;
>
> (d) it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
>
> (e) it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeur. (*Human Rights Quarterly* para. 72)

This should make it clear that patriarchal ideology and political expediency are not excuses for non-compliance with rights guaranteed by the covenant.

As a source, whatever the debate about meaning, the covenants are concrete. Other sources of international human rights law have both a selective and an illusive quality. In customary international law, states are seen to consent to the creation and application of international legal rules in terms of their general practice. Customary consent is not usually explicit, but evidence includes resolutions and recommendations of international conferences and public interest organizations, and the declarations of states.

This all sounds very well, but it soon becomes obvious that there is a hierarchy operating in human rights issues, and that decades of consents to recommendations on ending sexism are not ranked highly on the patriarchal nation state agenda.

What is more, the "customary" behaviour of men towards women in a religious, ethnic, or "normal" context is generally used to defeat any calls for women's human rights that would inconvenience "customary," "normal"

male behaviour, whether of individuals or collectively protected by the patriarchal state. Andrew Byrnes comments:

> A failure to be aware of and raise issues of gender can result in a distorted picture of patterns of human rights abuses, and can lead to an androcentric definition of substantive norms.... Quite simply, if you are not looking for something (or at least aware that it might exist), then your chances of finding it are significantly reduced. The importance of being aware that sex and gender may be significant, asking what

Shlomit Segal, "Achieving Sustainability," linocut, 12" x 18", 1997.

> the position of women is and whether that is reflected in universal norms and taken into account in designing responses to human rights abuses, has been demonstrated time and time again. However, it appears that too often, this dimension of a situation is not explored thoroughly, and such examination as there is limited to relatively formalistic invocation of androcentric standards of non-discrimination. (205)

The UNHRC is authorized to make general comments under Article 40(4) of the ICCPR. It has used this power to develop a jurisprudence of the ICCPR articles and to improve the quality of reporting under it. General comments are perceived by the UNHRC to be a source expanding on and clarifying the protections of the covenant.

The UNHRC general comment on discrimination in 1989 refers to CEDAW Article 1 and adopts the same concept.

> The Committee believes that the term discrimination as used in the Covenant, should be understood to imply any distinction, exclusion, restriction, or preference on the grounds of sex etc. which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons on an equal footing of all rights and freedoms. (Report of the Human Rights Committee 173–175)

On non-discrimination, the committee stated that:

> The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

Finally, the general comment describes systemic discrimination as "a complex of directly and/or indirectly discriminatory (or subordinating) practices which operate to produce general ... disadvantage for a particular group" (Report of the Human Rights Committee paras. 10, 36, 38, 39, 3.29). Overall, this general comment makes it clear that a discriminatory intention is not necessary to establish direct or indirect discrimination. It does not matter whether discrimination is conscious or unconscious, intended or unintended.

The expert commentators in international law agree that meanings do evolve, and the meanings of "equality" and "discrimination" are no exception. Through the general comments of the UNHRC we have now been introduced to indirect or systemic discrimination. In addition, the UNHRC general comment on discrimination established our justification for reading CEDAW in conjunction with the ICCPR and the ICESCR. Article 2 of CEDAW establishes the full ambit of government responsibilities:

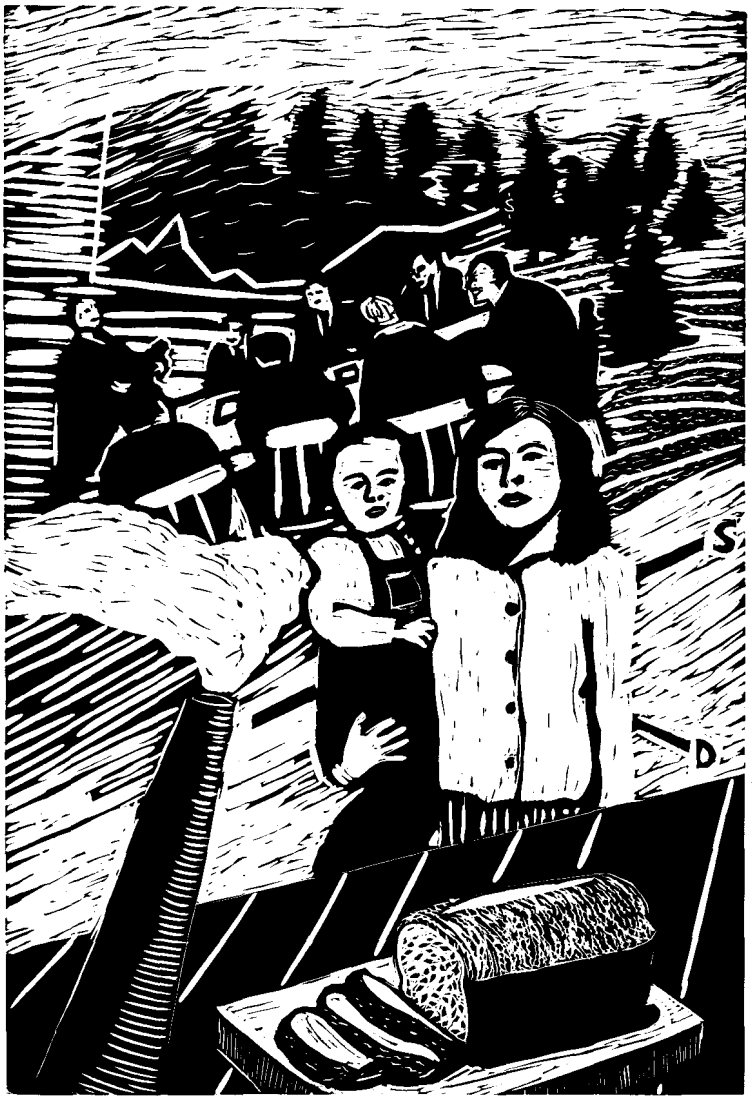
> States Parties ... agree to pursue by all appropriate

means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation ... and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of



Shlomit Segal, "What's Economics?," linocut, 12" x 18", 1997.

women on an equal basis with men ...;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

This convention obliges states parties to eliminate discrimination not only in public but also in private life. This is a major difference from what has always been understood as human rights territory, because of CEDAW's "recognition of discrimination outside the public sphere and particularly within families and the obligation of the state to ensure its elimination" there. CEDAW has no specific reference to systemic discrimination, but it does recognize the political environment providing for it. Article 5(a) obliges signatories to take appropriate measures to

> modify ... the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

A further dynamic feature of the convention is its recognition that the formal prohibition of discrimination is insufficient to redress its inherited consequences. The Committee on the Elimination of Discrimination Against Women has reported:

> Perhaps the most important obligation of state parties under the Convention is the achievement of *de facto* equality for women. These obligations are clear from the terms of the Convention. Also apparent are their obligations to ensure that women enjoy this equality in fact. (CEDAW para. 18,2)

Article 11 reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security, and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training, and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of

equal value as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity, and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

...

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority, or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed, or extended as necessary.

Shlomit Segal, "Unpaid Work," linocut, 12" x 18", 1997.

Article 14 is of major importance:

> States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

In addition to the convention, the CEDAW committee has released general recommendations, addressed to states parties, directly related to the question of women's unpaid labour. General Recommendation 16 requires unpaid work to be valued and recognized and requires states parties to report on the situation of unpaid women workers as well as to take steps to guarantee payment, including benefits to unpaid workers in rural and urban family enterprises. What we are talking about here, I think, is a farm of a corner dairy. The household itself is not described as an enterprise. But if a household is a school, and a school is an enterprise, why is the home-schooler not an unpaid worker in an enterprise? If the household happens to be the residence of a doctor and the spouse has constantly to answer the telephone, is she not an unpaid worker in the enterprise? This margin is very blurred, yet it is the daily reality in the lives of millions of women.

If the woman is relieving an institution of the full-time responsibility of the care and attention of somebody, is she an enterprise or not? If she were not "working," the service would have to be performed in an enterprise. There is no other place for it to be done. Isn't this work and service an important contribution to the livelihood, and the quality of life, of members of the household?

General Recommendation 17 states that the valuation of women's unpaid work is of major international importance. The committee requires the measurement and quantification of the domestic activities of women and the incorporation of the unremunerated domestic activities of women in national accounts.

The CEDAW committee has no doubt that women's unpaid work is work and, in interpreting all the articles of ICESCR, "due regard" (now overdue regard) is to be had to CEDAW.

Next we are directed by Article 38 of the Statute of the International Court of Justice beyond the covenants and conventions to look for evidence of customary international law, those resolutions, recommendations, gentlemen's agreements, etc. which in decades of soft law rise in status. At the UN World Conferences for Women held in Mexico City, Copenhagen, Nairobi, and Beijing, references to the economic value of women's unpaid work appeared in the final document. At the UN Conference on Environment and Development, known as the Earth Summit, the Vienna Declaration following the UN Human Rights Conference, the 1995 UN Human Rights Commission resolutions contained similar sentiments.

In violation of human rights guarantees, women's unpaid work has historically been systematically and cumulatively exploited in a socially created environment to the universal advantage of men, and the disadvantage of women.

Other committees, definitely comprising "experts of international standing," have contributed to a "soft law" input. The Commonwealth Human Rights Initiative, an advisory group chaired by former Canadian External Affairs Minister Flora MacDonald, reported in 1991. In its recommendations it stated:

> Commonwealth programs and reports should, as a matter or routine, be required to assess the impact of their activities and recommendations upon women. Cultural bias should be recognized where it exists. Economic measurements should include estimates of the value of women's labour and, where they fail to do so (for example in conventional recording of gross national product), this should be acknowledged.

In reference to our next source, we were fortunate that decades of precedents had established the relevance of decisions on the concept of "equality" from jurisdictions similar to that of New Zealand. The most important of these judgments, from the Canadian legal system, became a key reference in our submissions on parliamentary equality.

The equality provisions in the Canadian Charter are designed to protect those groups who suffer social, political, and legal disadvantage. Andrew's v. Law Society of British Columbia contested section 15 of the Canadian Charter: "everyone is equal before and under the law and has equal protection and benefit of the law." In addition to the meaning of equality, the court examined what was meant by non-discrimination.

First, the court established that, if a barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices which lead to the adverse impact may be discriminatory. Second, the court defined discrimination as

> a distinction whether intentional or not, but based on grounds relating to personal characteristics of an individual or group which has the effect of imposing burdens, obligations, or disadvantages on such an individual or group not imposed upon others or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

This was more than a question of formal equality.

In this concept, equality is "ameliorative," looking to the reality of people's lives and what discrimination actually does to them. It does not matter whether it is the result of innocently motivated practices or systems. The intention is not the point. The outcome is the measuring rod.

Justice McIntyre, writing for the majority in the judgment, noted that identical treatment may frequently produce serious inequality. "To approach the ideal of full equality," the judgment says,

> the main consideration must be the impact of the law on the individual or group concerned. Consideration must be given to the content of the law, to its purpose and its impact upon those to whom it applies and also upon those whom it excludes from its application.... The promotion of equality entails a promotion of a society in which all are secure in the knowledge they are recognized at law as human beings equally deserving of concern and respect and consideration. It has a large remedial component. (Andrew's v. Law Society of British Columbia)

The test adopted by the court in Andrew's determines discrimination in terms of disadvantage. If a person can show that a law, policy, or behaviour maintains or worsens that disadvantage, it is discriminatory. No comparator is needed. The requirement is to look at women as they are in the real world in order to determine whether any systemic abuse and deprivation of power that women experience is due to their place in the sexual hierarchy.

When a policy or action appears gender neutral but has different effects on men and women that are unreasonable, the result is gender discrimination. Indirect discrimination is disguised in policies and practices which appear to apply to all people equally. In violation of human rights guarantees, women's unpaid work has historically been systematically and cumulatively exploited in a socially created environment to the universal advantage of men, and the disadvantage of women.

And all this is to overlook the work of reproduction performed exclusively by women, the reproduction of human life for example, or lactation. How is it that any human rights guarantee of equality supposes that any such

worker can be compared with a man, who is utterly incapable of such work?

The 1995 Human Development Report tells us that while women are the primary nurturers of families, they also spend more time than men at work. If their labour were paid or given a proper market value women would emerge as the major breadwinners in most societies.

> Many household tasks are unrelenting, meals must be prepared three times a day, child care cannot be delayed until there is free time, this becomes clear on weekends. During weekdays men and women may have relatively equal total workloads but data from 18 industrial countries show that on Saturday women work almost two more hours than men and on Sunday one hour and three-quarters more, a difference that widens if the family has young children.

After describing the under valuation of the work women do and the lack of recognition of the contribution they make, the report states:

> the monetization of the non-market work of women is more than a question of justice. It concerns the economic status of women in society. If more human activities were seen as market transactions the prevailing wages would yield gigantically large monetary values. (*The Human Development Report*)

The legal, economic, social, and policy changes required to redress the universal inequalities experienced by women because their work is not recognized are enormous. But the international legal instruments require the changes. Article 4(1) of CEDAW states: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination."

Professor Eliane Vogel-Polsky has commented:

> This is the first ever clear statement in an international and universally applicable legal instrument to the effect that positive action neither constitutes discrimination nor derogates from the principle of equality (provided the measures are temporary and aim to correct inequality where it is actually experienced).... It is an internationally accepted interpretation of a general principle of law, the principle of equality between men and women. (Report to Council of Europe's Symposium on "Equality Between Women and Men")

Article 4(1)

> is a principle of interpretation that has entered directly into the domestic legal order of every state ratifying the Convention.... Once the principle has entered into a state's domestic legal order, it applies to all the laws, collective agreements or statutory provisions in which equality of opportunity and treatment is guaranteed to women and men. (Report to Council of Europe's Symposium on "Equality Between Women and Men")

The principle of interpretation

> is not static; in essence it is dynamic since it enters into every field where the issue of sexual equality arises and lends a new dimension to legal standards adopted in the country's constitution, its general or specific legislation, or the clauses of any collective agreement. Positive action measures must be adopted whenever and wherever they are seen to be necessary for the achievement of equality in this sense. (Report to Council of Europe's Symposium on "Equality Between Women and Men")

The UN does not need re-drafts or new covenants to improve the situation of women. The law is there and so are the mechanisms. What is missing is the political will. With the submission to the New Zealand Human Rights Commission, we are using the law to test political will. We are exhausting our domestic legal remedies. And, if the outcomes are negative, we will use the communication process to test the resolution of the UNHRC to hear these complaints of universal inequality.

I situate women in their own reality. Everywhere we work longer hours than men. We may not be paid, but no comparator is necessary. We may not be in servitude, we may even enjoy the time taken in all the production and services we furnish, but our reality is that this is work.

To refuse to recognize our economic production and reproduction as work, is a fundamental and universal breach of human rights for daily use.

Our lives are testimony.

[1]I am grateful to Christine Chinkin for her detailed explanation of these issues in "Using the Optional Protocol: The Practical Issues."

Excerpted from a presentation made by the author at the Eighth Barbara Betcherman Memorial Lecture at Osgoode Hall Law School at York University, Toronto, Ontario, in January 1997.

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ERRATA

Dans le dernier numéro des *Cahiers de la femmes* sur l'Éducation, le condensé rédigé en français au début de l'article de Patricia McAdie (page 6) s'est retrouvé par inadvertance sous l'article de Diana L. Gustafson (page 52) et vice versa. Nous demandons aux auteures et à nos lectrices et lecteurs de bien vouloir nous en excuser.

The editors of the "Women and Education" (Vol. 17, No. 4) deeply regret the inclusion of an offensive quote in a reprinted article published in that issue and sincerely apologize for the oversight.

RENEE NORMAN

Mother's Madness

I.
is this what you want them to remember?
the mud on the floor on the dress-up shoes
on the rug on the salamander on your face
the mother who rose up from the deep

the tension i'm sorry i'm sorry
a massive throbbing amoeba
crowding the room so viscous it spreads
like gel across the children
across the years i felt my own mother's anger
in the kitchen in the potatoes in the silence
i filled with worry about words unspoken

is this what you want them to remember?
stop running up and down the stairs
stop teasing your sister
stop bothering the dog
stop interrupting me when i'm working
stop stop stop
expecting me to be/hold
everything together in my hands
which are wringing words out of children
which are folding words into apologies
which are throwing words up into a barricade
STOP

is this what you want them to remember?

II. Out of the Fire and into the Frying Pan

for god's sake get a grip you
watched enough june cleaver brady bunch
        smile
        encourage
a salamander in time saves nine
good night sleep tight
don't let the children bite
to bed, to bed says mother head
after a while says it all
put on the ritz
put on the supper
there was an old mother who lived in a poem
1 potato 2 potato the 3rd potato looks like me
lullaby and good night.

Renee Norman is a doctoral student at the University of British Columbia, a part-time teacher, a writer, and a poet. Her poetry has been published in Prairie Journal, Prairie Fire, Contemporary Verse II, Room of One's Own, Dandelion, Whetstone, *and others.*