

# An Historical Review of Social and Economic Rights A Case for Real Rights

by Lucie Lamarche

*Afin de mieux comprendre les notions de droits économiques et humains, l'auteure de cet article nous prévient qu'il est nécessaire de les situer dans un contexte global. En soulignant l'interdépendance de tous les droits humains, l'auteure*

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*démontre que toute infraction à la dignité physique et psychologique des femmes a une pertinence économique dans le contexte actuel de restructuration d'un nouvel ordre économique global. D'après l'auteure, toutes formes de discrimination, oppression et exclusion des femmes basées sur l'économie sont inter-reliées et toutes demandes de solutions ayant rapport à l'égalité essentielle des femmes en tant que droit humain doit exiger de l'état le respect des droits économiques des femmes et le respect en général.*

"A woman should not be discriminated against because she is a woman..." So simple to say! As we go through the first generation of gender antidiscrimination standards offered by the international law of human rights, we discover the nature of the premises on which they were developed. Quite simply, it was presumed that women were in a similar social position to men and that it was sufficient to correct the gender variable to attain equality. Of course, it was accepted that some affirmative action measures were required, more specifically in the field of employment or even education. This is clearly a case of believing in the integration into a precise political and social model: women, with a bit of help and protection and affirmative action were going to behave as industrial male workers of developed countries. Put in other terms, all women's problems were going to be solved if we created a normative content dedicated to bringing them into formal work and social life. This positioning in the sphere of formal work would, as an example, in itself guarantee access to social security as a means of assuring decent living conditions. What is missing is nothing less than the specifics of women's living conditions and their particular aspirations.

To understand this situation, one has to take into account what women's social and economic exclusion is all

about. For sure, it is about being kept out: family, violence, invisible domestic work, informal work, formal work without protection, the absence of fertility control, the exclusion from public processes of decision making, *de facto* or *de juris*; these elements create exclusion. These situations are the real causes and consequences<sup>1</sup> of women's social exclusion and preclusion from decent conditions of living. These causes and consequences reveal many faceted situations for the different communities of women in the world. The failure of equality is above all a matter of prejudicial effects created by a sum of oppressive circumstances that can vary from one group of women to another. They all share a common root: the fact of being a woman somewhere in the world.

Substantive equality is about taking into account the causes and consequences of women's social exclusion. It is about naming, stopping, and correcting the exclusion mechanisms. It is not about integrating women into society as if it could be done notwithstanding the reality. Equality proposes a principled approach to society. It concerns structural adjustment as well as domestic production. It concerns the so-called reorganization of work in the North as much as the push for micro-enterprises as a means for women's survival in Latin America. This principled approach applies to every state and every private decision in the state.

Some constitutions have taken such an approach. The case of Canada should be cited as an example in that regard (Brodsky and Day), although it seems that in the field of social and economic rights, the Canadian norm of equality is having trouble guaranteeing more than the right to be equally poor. Strangely, it seems that as litigation gets to the heart of public policy the courts cease to see themselves as legal experts, suddenly deferring to Parliament. This is called the wall, not only for women but for other groups of the society affected by the process of impoverishment as well. One major conceptual problem with the welfare state approach to equality is its incapacity to integrate the interdependence of all human rights. Equality is a norm of equity to the benefit of persons who, aside from being women, are similarly situated in the economic and social world. This highly individualistic approach to equality is certainly in accordance with the logic of civil and political rights. But it does not take into account that economic and social rights were framed by the principle of mutuality and solidarity. An economic tension was resolved each time such a right was recognized.

Women are at the heart of new economic tensions. Even the World Bank is recognizing it (Collier). Not only is international trade counting on women to manage poverty and the essential needs of family and community in

countless ways (in the North as well as in the South) but it also relies on devaluation of their work (formal and informal) to lower direct and indirect production costs. The structuring of a two-tiered civil society (rich and poor) is in fact the structuring of a three-tiered society (rich-poor, male-female). Among the poorer, women are adversely affected by structural changes and expected to assume new responsibilities to respond to the so-called need for structural adjustment. Cultural, religious, and sexual ways of discrimination and exclusion are participating in this new restructuring of women's exclusion. The singular claim for the integrity and respect of women's civil and political rights won't do it. The mutuality principle needs to be redefined in a legal way to ensure women's equality. We must then contribute to the process of legally shaping women's equality in a global economy.

### **The interdependence of all human rights as a shaping model for women's substantive equality**

The adoption of the Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW) was certainly a move in the right direction. It is imperfect (more specifically as situations of domestic work and violence against women are concerned). It can even be said that its Preamble is not too clear in its objectives. But it remains a valid example and standard of substantive equality for women. Basically, CEDAW integrates the prin-

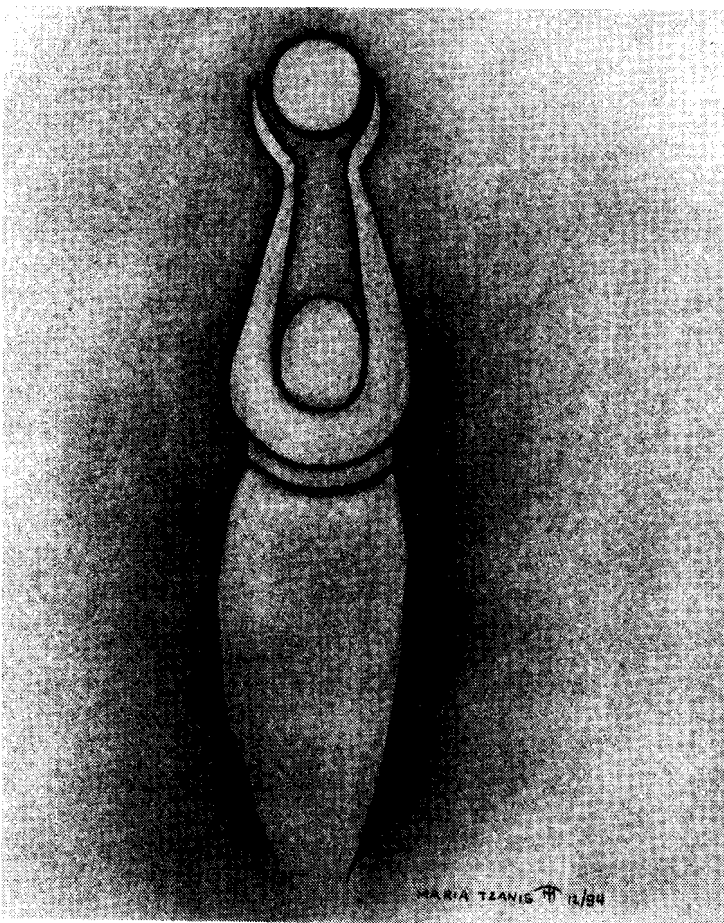
ciple of the interdependence of women's rights as human rights. It gives a sense to the numerous affirmations of such a principle taken by the UN General Assembly. CEDAW affirms that women count and that their legal claims have valid foundations. It proposes a principled approach to equality that suggests a new reading of women's social and economic rights in the actual context. It can be summarized, from an economic perspective, by the three following affirmations: women must not be adversely affected by economic change because they are women (i.e., economic decisions must not rely for social peace on women's invisible or devaluated work either in the market or at home); women should be protected from any manifestation of physical commodification (i.e., women are not goods that can be freely circulated toward the world: prostitution and trafficking of women); states have the burden of proof to demonstrate that they are effectively taking into account women's right to substantive equality in any decision affecting the enjoyment of their economic and social programmatic rights (right to health, education, work).

CEDAW is a proper legal standard for such an interpretation. First, it recognizes that the sources of exclusion are public (state is gendered) and private (society is gendered). Second, because CEDAW as most of the human rights normative instruments, relies heavily on state commitment, it forces an analysis of the adverse effects that the privatization of the social sphere are producing on women. CEDAW is requiring more from the state than the attitude of a good government (see Archer). It requires the government to be responsible for the achievement of women's equality.

One major dimension of CEDAW's philosophy is the need for interdependence of all human rights including economic and social programmatic rights. Perhaps the best example of this is the recent work the Committee on Economic, Social and Cultural Rights (CESCR) Experts' Committee that did not hesitate in taking into account prejudicial effects on women of some manifestations of social exclusion. In matters such as rights that can be guaranteed through not only legislation but also policy, this interdependence between CEDAW and the CESCR is of fundamental importance.

### **State obligations according to CESCR**

At its tenth session (1994), the CESCR Committee organized a General Debate around the theme of social security schemes as a means of protecting economic rights confronted in the context of major structural adjustments policies. Quite interestingly, the major point of this debate, to which were invited the International Labour Organization (ILO), the United Nations Development Program (UNDP,) and the United Nations Research Institute for Social Development (UNRISD), revolved around the question of finding the appropriate place of economic and social rights in the process of shaping human develop-



ment. This question is of crucial importance because it is unclear whether the economic and social rights are a condition or a presumed consequence of human development. The Committee position is quite clear. Human rights are not negotiable. Henceforth, their respect should be a fundamental condition of any structural adjustment deal of reshaping of the economic models. This implies firstly that state obligations are such that they should not be forced to deal (directly or indirectly) with international agencies neglecting that premise and, secondly, a state can never rely on globalization arguments to negatively affect the level of development of the national social and eco-

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conomic rights. In the same manner NGOs involved in the field of international cooperation or assistance should develop a principled approach based on preliminary guarantees in regard to social and economic rights and not one based on assumptions that the accomplishment of such rights would occur as a consequence of their presence or assistance plan.

This proposed approach is based on the interpretation of section 2(1) of the CESC that is provided by General Observation no. 3 of the CESC Committee. This is the first application of the interdependence principle. Accordingly, women's economic and social rights can be said to force the state to take into account the exclusionary impact that any decision related to laws and social policies (as to their existence, modification, or non-existence) can create. This principled methodology of economic and social rights applies to basic rights as well as to the case of dismantlement of economic and social rights in developed countries. It is not only principled but universal as well. The international community, according to the general principles of the UN Charter, is bound by the CESC.

The implementation of those rights is not about defining their objective and immutable content. The sanction of denying such rights is not about damages, would they be collective damages. The maturity of economic and social rights should provide any group of persons with the ability to denounce, in a formal international forum, the adversarial effects of any related national policy; economic and social rights should also *civilize* the international law of human rights. The principle of interdependence requires that a treaty body or judicial committee take into account the entire body of law relevant to the dignity of the person. It should not confine itself to the instrument that created it. Ultimately, the justifiability of programmatic economic and social rights is about

forcing the state not to implement any law or policy that constitutes a reduction or a denial of any person's right. It is about stopping the state from adjusting itself to globalization while forcing it to adopt or comply with the law of international economic and social rights, which includes the more positive labour rights.

This general principle is of very important significance for women's right to equality. The causes and consequences of women's exclusion are prejudicial to them. In the actual scheme of social development, women are seen as an economic variable that international financial institutions must consider if they want to avoid trouble in constructing a new deal. This is legally wrong mainly because correcting from a need perspective, taking into account the adverse effects on women of any economic model of adjustment, means managing their economic and social rights as a consequence of such adjustments. This approach is not the legal standard of either CEDAW or the CESC. Criticisms of structural adjustments or economic strategies for change are to be juxtaposed to an accountable state before their implementation. Structural adjustments or economic strategies are one thing. Respecting human rights and their implementation is another, that should not be sacrificed to the former. The justifiability of economic and social rights is then necessary to shape the process of adjustment (North and South) in respect to women's rights and more specifically to women's right to equality which is a requirement for any other right of any generation of rights.

### **The implementation of economic rights**

Economic rights have been built and designed against the state, not for its ability to violate them but for its capacity to protect the economic and social dimensions of human dignity. It is actually the same states that are opposed to any mature form of accountability in the field of human economic rights. They are trying to restrict this idea of rights' maturity, that would be expressed through a right of petition at the international level, to a general obligation for the states to report on progress in regard to the implementation of rights. The difference between the maturity of a right and its legal meaning is crucial. Indeed, accountability has much more to do with its maturity than with new mechanisms dedicated to the recognition and implementation of some so-called new economic rights. Trying not to be bound by existing rights, states, in the scope of their little remaining sovereignty that has not been decimated by new market rules, are actually looking for new limits and new core definitions of economic rights in order to introduce in the commercial field an operative mechanism that would protect them from the consequences of human rights maturity in the human rights sphere.

The implementation of economic human rights is above all a matter of states' accountability in the socially oriented perspective of the *Universal Declaration on Human Rights*.

Accountability mechanisms must be persons oriented and not trade oriented. Consequently, the persons' struggle for state accountability in the field of economic human rights has as a pre-requisite struggle the rehabilitation of state sovereignty. As we are fighting for this goal, political pressure and lobbying should also be exerted on the United Nations and the ILO for the definition of an operative way to respect the interdependence of all existing human rights and for the adoption of additional protocols granting persons and groups of persons a right of petition at the international level in the field of economic human rights. To accept that the human rights

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institutions must adapt to international financial and trade institutions, is to accept the fact that human rights have to be economically and not socially considered.

#### **Social clauses in trade agreements**

Social clauses can be nothing other than a commodification product of human rights. This specific commodification is ruled by one prevalent principle: an accountable state in the field of human and labour rights is a protectionist one, which is contrary to the market rules. Controlling social dumping would not be a compatible approach in a market system. If we accept this globalization argument, one must then look for another operating principle designed for social peace. It seems that the notion of fundamental rights was recently picked up as this operative concept.

"Fundamental rights" is a puzzling expression. Beside the fact that fundamental rights have some specific consequences in regard to international law principles (Meron), we must admit that the sole reference to some rights that would be more fundamental than others creates a hierarchical organization of human rights. Furthermore, according to the general principles of international law, few rights would be really fundamental.

More than one perspective on fundamental human rights exists. The ILO itself, through its numerous working groups on labour standards, always maintained its own hierarchy that recognizes some fundamental rights: interdiction of forced labour, banning of discrimination and the right to associate and bargain collectively are such fundamental rights (see ILO). One can understand the internal purpose of such a hierarchy. The ILO has to set priorities, to make it clear for member states that some rights are not negotiable.

Now, we discover that the recourse to fundamental rights in international commercial institutions and agreements is determined by some specific considerations and historical trade customs that are much more economically than socially or humanly oriented. The fact is that it cannot be really more than the actual bilateral practice, used by the United States of America as well as the European Community in the field of commercial cooperation, which is designed to attach some conditions to this type of cooperation. You need to be a good government, which means a democratic state, economically designed. Matters such as wages, social security, health, education, and citizenship (not solely designed through the industrial model of unionized participation or participation in free elections) are not part of this new deal for the respect of fundamental rights.

The problem is much more complex as we consider women's economic rights. Social clauses in commercial agreements are commodifying economic human rights while women's economic rights are being decommmodified in many circumstances. Women's input in productivity is more and more either invisible or discounted. Unless we use as a perspective the classical equality approach that guarantees equality notwithstanding women's specific forms of oppression, the core and fundamental rights approach of social clauses is just not making it. This is worse than being back to square one!

#### **Operative aspects of social clauses and the maturity of economic human rights**

To reiterate, we are facing a specific problem in the field of labour and economic human rights: most of those rights are immature by reason of the states' collective wishes to preclude any serious pattern of accountability. This problem, though, must not be confused with the rhetorical one regarding the legal meaning of such rights. After all, what is the difference, in terms of certainty, between the right to freedom of speech and the right to work? Both are flexible, submitted to limits, and variable according to different constitutional contexts. Both are submitted to a principled approach regarding ways and means of implementation which are state binding. If good governments admit that approach in regard to the right of freedom of speech, it is not the case for economic rights. The Experts' Committee of the CESCR established such an approach to the implementation of economic and social rights actually denied by state members. What we are currently offered is a trade-oriented approach to economic rights, some form of soft and supportive framework in the field of trade, as if no other possibility could legally exist.

We need more than ever ways and means to take advantage of the principled approach developed by the CESCR Experts' Committee. The question is not to submit trade and cooperation agencies to a principled human rights approach designed commercially but to force states to respect, in a principled way, economic rights. What we

need is a right to petition at the international level. We must then fight against the United Nations and the ILO's attempts to transform economic human rights into trade-related economic rights, even if there is a strong temptation to focus on the operative aspects of social clauses in commercial agreements. This strategy inevitably takes for granted the need for new trade-related rights instead of reaffirming existing economic human rights. This simple affirmation requires from human rights activists much more discipline than it would seem at first sight. So much energy has been recently invested in work dedicated to social development instead of human rights. So much

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work has been done to force international financial institutions to take into account the prejudicial effects of structural adjustment policies or free-trade agreements on people's rights instead of simply requiring mechanisms that would make economic rights mature rights.

#### **The implementation of state accountability mechanisms**

A sovereign state is the operative concept in human rights related matters and so it must remain, or, shall we say, become again. The market globalization is operating against people in that respect in two major ways: first, by presuming the existence of a good faith state, it annihilates its capability to take into account the population's best interest. Second, it provides the state with the best excuse to not allocate resources in people's best interest. Women's interests are doubly neglected in that process because states' limitations do affect them more seriously and secondly, in the process of allocating or reallocating resources a state relies on women's invisible contribution to the family, to the cohesion of society, and to social needs. The principled and flexible approach to equality for women in regard to economic rights is determined by women's capacity to blame the state for not taking their rights seriously, in the North as well as in the South.

It is about time that the doctrine and the NGOs provide the world of human rights institutions with practical models of human rights interdependence. They are more than necessary. We are talking about an intertwined reading of both CEDAW and CESCR. We discussed the need for such an interdependence above. Ironically, both CEDAW's and CESCR's Committees started such work. It is for NGOs and women's groups to carry on such an approach through their multiple dialogues in international events. Any in-

fringement of women's right to physical and psychological dignity has an economic meaning in the actual context of restructuring a new global economic order. Any discrimination and oppression as well as economic-based exclusion of women are inter-related.

The most practical approach to interdependence, is for women to ground their claims on the combined meaning of CEDAW and the CESCR and oppose them to any commercial institution as well as to Human rights institutions and agencies. One of the best ways to do this is to work for the adoption of an "optional protocol" to the CESCR, not as a secondary target but as an immediate objective. This strategy supports a short-term commitment for a *legal playing ground* in the field of human rights.

#### **The operative aspects of optional protocols to CEDAW and the CESCR**

Both the Parliamentary Assembly of the European Council and the CESCR Experts' Committee have produced recent work on the issue of the introduction of a right to petition in regard to economic and social rights.<sup>2</sup> First, let's underline the fact that, as in the case of other petition rights in international human rights law, such a right of petition would be submitted to the exhaustion of internal remedies. What may be seen, in certain circumstances, as an obstacle in matters related to civil and political rights, is, at the opposite, no obstacle in regard to rights that can be nationally implemented through policies or programs. Most of the standards creating legislations that determine such policies and programs no longer even affirm a person's right to...health, education, employment, social security, or social services. Accordingly, the modern state is more than ever vulnerable to such an international right of petition.

Second, neither the CESCR Committee nor the European Council have excluded the idea that such a petition right could be available to groups of persons affected in a patterned way by national policies, programs or economic and social legislation. Thus, women as a group could take advantage of such a legal space, all the more because their claim to social and economic equality is often based on the identification of some exclusion or prejudicial effect of a government policy, program or legislation. Contrary to a constitutional right of action which is often conditioned by the existence of legislation, this international recourse privileges the examination of programs and policies. Such an examination is governed by all human rights principles and conditioned by state obligation to take into account the exclusionary effects on groups of persons of any of its decisions or of its abstention to decide in regard to economic human rights. Such a forum could be seen as a strategic place for women to conceptually construct at the universal and international level their right to social and economic equality.

In the specific field of labour rights, this right of petition would also force the ILO to contribute, according

to its own existing legal standards, to the sense and meaning of women's labour rights in the actual context of women's work de-commodification. This contribution could then be used as a counterweight to the ILO's institutional strategy in the sphere of international trade. Without creating undesirable distinctions between unions' interests and those of people, it is worth noting that a community group would have access to this right to petition, which is not the case in the ILO perspective by reason of the historical tripartism that reserves persons' representation to unions.

Of course, the third question concerns the output or result of such a petition right. Strangely, we do not think that this is the most important aspect of the question in the actual context. Considering the weak operative guarantees offered by the social clauses approach in the field of trade and its excluding effect on persons, it seems that the primary objective should be the creation of a legal forum for definition of state liability in regard to economic and social rights. Ultimately though, what we can expect as a result of such a petition right, is a declarative recommendation from the international community to invalidate states' decisions, programs, legislations or policies that would negatively affect people's economic and social rights. The sole political impact of a human rights forum that could, within the limits of its jurisdiction, conclude, as an example, that the allocation of resources to the military, the nuclear industry or even tax exemptions for companies, is against the right to equality of women and other groups that are victims of exclusion is not negligible. To see this political output in a more positive way, let's imagine the examination of a complaint that would show how structural adjustment policies constitute an obstacle to the maintenance of education or health care systems. The Committee responsible for such a Protocol could then conclude that it was impossible for this member state to decide in any other way that structural adjustment policies are negatively affecting people's right to education or health. This conclusion would in itself represent a victory that would undoubtedly put pressure on the commercial international community. We need such a legal forum simply because not too much can be expected from domestic tribunals in this regard. Further more, an international right to petition in regard to economic and social rights is some form of defensive answer to international structuring phenomena.

## Conclusion

This short paper is about strategizing in the actual context of women's economic and social rights. Mainly, what I have tried to demonstrate is the need for a new focus and argumentation around the notion of economic and social human rights. For some of us, economic rights are still new rights or not even rights. The distinctions and similitudes between labour rights and economic rights may also still have to be made in some cases. But surely,

what we are actually accepting against our will is a trade-oriented redefinition of those rights. If we can get a common understanding of this determining phenomenon, economic and social human rights will then start to constitute a real and operative obstacle to their commodification.

*Excerpted from a presentation given at the Conference "From Basic Needs to Basic Rights: Shaping Women's Agenda for the '90s and Beyond" held in Kuala Lumpur, Malaysia in October 1994.*

*A longer version of this article will be published in August 1995 by the Institute for Women, Law and Development in Washington, D.C. in a book entitled, From Basic Needs to Basic Rights.*

*Lucie Lamarche is a Professor of Law at the University of Quebec in Montreal. She has Ph.D. in International Social Law from the Université Libre de Brussels. Her book, Perspectives occidentales du droit internationale des droits économiques de la femme, will be published by Bruylant Brussels in 1995.*

<sup>1</sup>This is in direct reference to the wording of the last UN General Assembly *Declaration on the Elimination of all Forms of Violence Against Women*, Res. 48/104.

<sup>2</sup>See *Status of Preparation of Publications, Studies and Documents for the World Conference, Note by the Secretariat, Addendum*, Contribution Submitted by the Committee on Economic, Social and Cultural Rights, Doc NU CONF. 157/PC/62/Add.5 (26 March 1993), *Annex II, Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Analytical Paper adopted by the Committee on Economic, Social and Cultural Rights at its seventh session, 11 December 1992). Also, see Conseil de l'Europe, Comité pour la Charte Sociale européenne, *Projet de Protocole additionnel prévoyant un système de réclamations collectives*, Strasbourg, 20 mai 1992, FCRVM 924.L et Assemblée Parlementaire du Conseil de l'Europe, *Rapport assorti d'un avis sur le projet de deuxième Protocole additionnel à la Charte sociale européenne prévoyant un système de réclamations collectives*, 2 février 1993, Doc. 6755.

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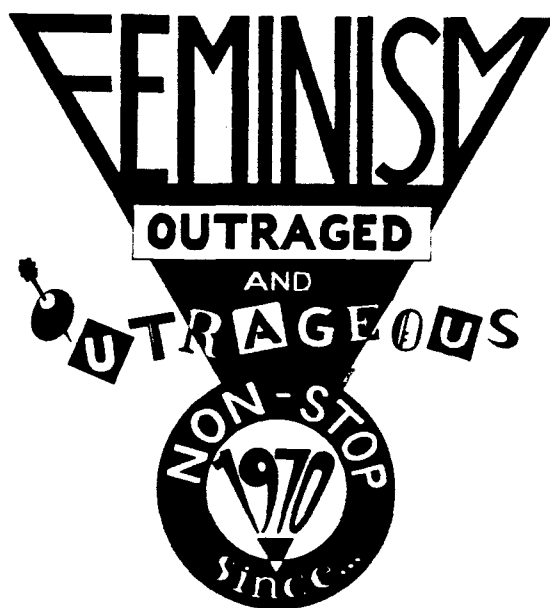
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**LYN LIFSHIN**

### **My Sister Says Doesn't Everyone Waste Their Life?**

as Mother shrivels, as her  
kingdom reaches only to the  
night stand, to arranging the  
way her slippers point. "So

full of the joy of life,"  
someone wrote in her college  
yearbook, maybe why she named  
her second child Joy. Maybe

she felt it slipping from  
her. My sister, blonde,  
the pretty one with  
boys giving her roses

and watches now sinks  
back into her shell like  
the turtles she cages,  
covers windows to keep

out light. She reminds me  
of our mother, sitting  
in darkness with a  
cigarette, waiting for

my call, expecting the  
worst. My sister and I  
chose to have cats  
instead of children.

We feared becoming  
what we clawed at and  
bit to move away from,  
as if we could help

keep genes hostage,  
howling at each other  
like animals caught in  
traps they'd gnaw  
their own legs off to escape

*Lyn Lifshin lives in Washington, D. C., U.S.A.*