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Reservations About Women: Population Policy and Reproductive Rights

Paula Abrams*

The number of children a woman may have should not be solely a matter of her private concern; it should be a matter of profound *public* concern.¹

The 1994 Cairo Population Conference² established a consensus that governmental population policies must be built on the cornerstones of human rights. Central to these rights is the principle of reproductive self-determination; individuals should be able to choose for themselves the particulars of their reproductive behavior, including the number and spacing of their children. Reproductive self-determination was not perceived by the Conference as a newly-created human rights principle because it incorporates "certain human rights that are already recognized in national laws, international human rights documents and other consensus documents" which protect physical integrity and self-determination and applies them to population programs.³ From these sources, the Cairo Conference has articulated a transformative norm that accords the individual the personal right to make informed choices about reproductive activity. This norm is of particular significance to women, who often lack control over their own reproductive decision-making.

In practical terms, articulation of this norm, while significant, is far removed from its realization in population programs. First, population policies are classically utilitarian; they seek to manipulate birth rates for desired demographic goals.⁴ As such, inherent tension exists between population programs and reproductive self-determination. Second, discrimination against women remains pervasive throughout the world, particularly in the developing countries with the most serious concerns about population growth. This discrimination denies women the most basic rights of self-determination and reproductive autonomy. Third, conflicts between the principle of reproductive self-determination and reli-

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1. PAUL R. EHRLICH & ANNE H. EHRLICH, *POPULATION--RESOURCES--ENVIRONMENT* 273 (1970) (italics in original).

2. *Report of the International Conference on Population and Development, Programme of Action of the International Conference on Population and Development*, Annex, at 5, U.N. Doc. A/CONF.171/13 (1994) [hereinafter Cairo Programme].

3. *Id.* para. 7.3.

4. *POPULATION THEORY AND POLICY* 441 (Joseph J. Spengler & Otis Dudley Duncan eds., 1956) (explaining that both expansionist and restrictive population policies are formed based on, for example, men's welfare, per capita income concerns, and military, labor, and economic advantages).

gious traditionalism or fundamentalism present questions of sovereign imperative and competing human rights. Finally, and perhaps most troubling, the existing human rights principles from which the Cairo norm was derived have ineffectively protected women's reproductive rights.

Discrimination against women permeates consideration of all these factors. Women historically were not involved in the development of population theory or policy. Without status, power, or rights in most cultures, women were perceived as the obvious targets of population programs. Acceptance of reproductive self-determination for women raises specific issues which go to the heart of historical perceptions about the role of women in patriarchal society.

This Article examines the dynamics of population policy as they affect human rights. In particular, it examines the role of law in protecting women's rights in the formulation and implementation of population policy. Its thesis is that, because of marginalization or complete disregard of women's reproductive interests, the law has ineffectively protected women's reproductive rights. This parsimonious treatment has occurred both at the international level, with the definition of the public interest, and at the national level, with the abstention of law from the private and domestic spheres. At the national level, laws implementing population policies have not incorporated women's reproductive experiences or needs. In the international arena, laws that ostensibly protect women have not been interpreted to preclude violations of bodily integrity and self-determination manifested in the implementation of some population policies. In addition, specific human rights documents addressing "women's issues" lack viable enforcement mechanisms.

The limited success of law in protecting women's reproductive self-determination is directly related to the patriarchal constructs which shape the law. Women have been valued historically for their capacity to bear children. Reproduction, along with other aspects of women's lives, has generally been controlled by men.⁵ One element of this control is the devaluation of women's judgment.⁶ The legal and cultural devaluation of women's reasoning ability creates substantial social ambivalence towards ceding reproductive autonomy to women. Further, the role assigned to women by patriarchal society—essentially of service to family, husband, and children—is antithetical to an image of woman as an individual entitled to self-determination. In fact, this servial role is so deeply embedded through religious and cultural traditions that it is almost inaccessible to the

5. It is only very recently that safe and effective methods of contraception have become available. Nonetheless, women historically have sought whatever means available to them to limit reproduction, including crude contraception and abortion techniques. See Mahmoud F. Fathalla, *The Impact of Reproductive Subordination on Women's Health*, 44 AM. U. L. REV. 1179, 1181 (1995).

6. Until the mid-nineteenth century, women in most cultures lacked the legal capacity to sue, could not hold, manage, or inherit property, and lacked the legal competence to be considered a person. Women could not give evidence in court or, in some cases, it took the testimony of two women to equal that of a man. See NOT IN GOD'S IMAGE 144-53, 220-33 (Julia O'Faolain & Lauro Martines eds., 1973).

rule of law in many societies.⁷ The persistence of these perceptions of women results in social responses to the principle of reproductive self-determination ranging from ambivalence to complete disregard. Religious traditionalism or fundamentalism also tends to perpetuate valuation of women primarily for their reproductive role, thereby rejecting reproductive self-determination.⁸

These powerful cultural and religious traditions must be addressed before reproductive self-determination can be realized. In this regard, the law must function both as norm and process. A rights-based evaluation of reproductive regulation is a critical first step in changing the patterns of discrimination against women which deny them basic control over their lives. These rights must be defined by reference to women's reproductive experiences. At the same time, a rights-based approach has significant limitations in protecting women's reproductive self-determination. These limitations center around two problems. First, it will be difficult to ensure that human rights are defined to protect women's reproductive self-determination since the legal system traditionally has resisted that interpretation. The more substantial limitation, however, is that even a successful articulation of rights is meaningless if the cultural milieu does not value the protected right. In other words, not only the rules, but also the playing field must change to facilitate reproductive self-determination. Cultural traditions which deny the very principles upon which women's self-determination rest are not readily accessible to legal change. The more complex problem therefore is transformation of the cultural climate to make the exercise of rights available and meaningful to women.

The emergence of reproductive self-determination for women is truly a paradigm theoretical shift, both in population policy and in the social perception of women. Because of pervasive gender discrimination against women, reproductive self-determination for women cannot be achieved without a redefinition of the relationship between the state and women.

Part I of this Article explores the relationship between population theory and human rights. It traces the theoretical bases of population theory and the tension between its utilitarian premises and human rights princi-

7. Ruth Dixon-Mueller quotes a report on population policy in sub-Saharan Africa which concludes that "[t]he policies have changed but the system remained fundamentally the same." RUTH DIXON-MUELLER, *POPULATION POLICY AND WOMEN'S RIGHTS* 22 (1993).

8. Reproductive autonomy facilitates sexual autonomy for women, an unacceptable outcome in most cultures and religions. See Fathalla, *supra* note 5; Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 463-70 (1995). Regarding contraception, the Islamic Foundation stated:

Free distribution and easy availability of contraceptives to unmarried, even married people away from families, is illegitimate. The uncontrolled distribution of contraceptives has opened the floodgates of adultery and fornication . . . for turning our women folk, particularly of our high class society, into half prostitutes as in the west, and be condemned to the most perpetual hell . . .

Sajeda Amin & Sara Hossain, *Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319, 1335 (1995) (citing SHAMSUL ALAM, *ISLAM AND FAMILY PLANNING* xix (1985)).

ples. Part II examines the development of international reproductive rights and their application to women. Part III explores the international articulation of women's rights and analyzes the conflict between universal application of women's rights and cultural relativism. Part IV synthesizes the analyses to consider the relationship between population planning policies and human rights. Finally, Part V applies these considerations to population policy as it affects women.

I. Population Theory and Human Rights

In 1798, economist Thomas Malthus postulated that population increases exponentially while subsistence increases only arithmetically.⁹ When Malthus opined that the human species could double its population every twenty-five years, he advocated moral restraint as a means of checking population growth.¹⁰ The Neo-Malthusians¹¹ evinced less optimism that humans would exercise such restraint. Recognizing that complex economic, social, and biological factors affect population, the Neo-Malthusians concluded that controlling conception was the simplest means to reducing population growth.¹² The evidence is to the contrary.

Population programs seek to adjust fertility, mortality, and migration rates in order to better balance demographic, economic, and resource dynamics.¹³ Targeting these areas necessarily brings into play not only demographic goals, but a myriad of connected social programs concerned with education, health, employment, welfare, housing, and economic development.¹⁴ This Article focuses on the fertility component of population policy, whereby the state seeks to regulate population growth through policies intended to influence family size. Family planning programs, in and of themselves, do not necessarily involve state regulation of fertility. A family

9. THOMAS R. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 2-6 (Richard D. Irwin, Inc. 1963) (1798).

10. *Id.* Malthus ultimately advocated that a system of private property would restrain population growth. *See id.* at 281-82. Since, however, Malthus believed the human imperative to reproduce to be stronger than any systemic restraint, he advocated celibacy and delayed marriage as a means to avoid the human suffering which inevitably follows overpopulation. *See id.* at 7-8, 264-71.

11. Neo-Malthusians, including Margaret Sanger and Dr. George Drysdale, also view overpopulation as a cause of poverty, but promote the use of contraceptives and family planning rather than moral restraint. Paul Meadows, *Toward a Socialized Population Policy*, in POPULATION THEORY AND POLICY 443, 445 (Joseph J. Spengler & Otis Dudley Duncan eds., 1956).

12. THOMAS M. SHAPIRO, POPULATION CONTROL POLITICS 17 (1985). For documentation of the historical struggle to increase the status of women by promoting the control of conception, see MARGARET SANGER, MY FIGHT FOR BIRTH CONTROL (1931).

13. DIXON-MUELLER, *supra* note 7, at 5.

14. *Id.* at 16. Beginning in the 1950s, demographic theory described four major direct influences on fertility: use of effective contraception, marriage age of women, length of time after childbirth when a woman cannot conceive (due to breast-feeding or abstinence, and availability and use of abortion). Bryant Robey et al., *The Fertility Decline in Developing Countries*, SCI. AM., Dec. 1993, at 60, 61. In addition, education, occupation, wealth, location, religious practices, and social status are considered indirect determinants of fertility. *Id.* at 62.

planning program that merely educates individuals and couples on contraception and assists with birth planning does not regulate fertility. A population control program, in contrast, includes state actions or regulation intended to influence the size of families.¹⁵

Population policy has always been infused with social politics. Malthus argued that the uneducated classes, by virtue of their "general corruption of morals, with regard to . . . sex," must be subject to conditions which "shorten the natural duration of human life."¹⁶ These conditions include "unwholesome occupations, severe labour and exposure to the seasons, extreme poverty, bad nursing of children . . . diseases, wars, plague, and famine."¹⁷ The political system should not intervene to correct these excesses but allow the "natural" cycle of subsistence and distress for the lower classes to run its course.¹⁸ Eugenics theorists emphasized improvement of the quality of the population by maximizing the white-skinned, Anglo-Saxon population and decreasing all others.¹⁹ Since World War II, overpopulation has been identified with "others" as the Lesser Developed Countries in the Third World. Population programs, devised by the industrialized countries and imposed "top down" upon the Third World, have been accused of "cultural imperialism" as they handed out contraceptives with little regard for the social and economic conditions responsible for high fertility.²⁰

Population programs can be characterized as either anti-natalist or pro-natalist depending upon whether the governmental objective is to decrease or increase population.²¹ Inherent to population programs is a

15. DIXON-MUELLER, *supra* note 7, at 16-17.

16. MALTHUS, *supra* note 9, at 7-8.

17. *Id.* at 8.

18. *Id.* at 9, 258.

19. SHAPIRO, *supra* note 12, at 33. Eugenics is the belief that the human race can be improved through the application of genetic principles. *Id.* The eugenics movement was popular both in Northern Europe and the United States during the 19th and early 20th centuries, where concerns about the growing population of immigrants led to restrictive immigration policies and a push to increase birth rates in the white upper classes, while reducing birth rates of the "undesirable." *Id.* at 33-36. See DIXON-MUELLER, *supra* note 7, at 42. See also JAMES C. MOHR, ABORTION IN AMERICA 86-88 (1978) (noting that well-off married women having abortions were considered heartless and depraved, while abortions by poorer, unmarried women were more excusable).

20. See generally Adrienne Germaine & Jane Ordway, *Population Policy and Women's Health: Balancing the Scales*, in BEYOND THE NUMBERS 135, 136-39 (Laurie Ann Mazur ed., 1994) (describing the limited efficacy of conception-oriented strategies).

21. See, e.g., KLAUS M. LEISINGER & KARIN SCHMITT, ALL OUR PEOPLE 49 (1994) (using the term pro-natalist to describe those favoring moderate population growth); Dorothy M. Stetson, *Family Policy and Fertility in the United States*, in POPULATION POLICY ANALYSIS 103, 104 (Michael E. Kraft & Mark Schneider eds., 1978) (defining policies which reduce the psychological and material costs of having children as pro-natalist and those which add to the costs as anti-natalist). Generally speaking, population programs usually encompass several components, including policies aimed at either decreasing or increasing fertility, a health component aimed at reducing infant and maternal mortality, and an immigration component designed to control the flow and distribution of population. DIXON-MUELLER, *supra* note 7, at 13-14. Other factors affecting fertility, and thereby population policies, are legal age of marriage, divorce laws, and health and old-age security programs. *Id.* at 16.

utilitarian perspective on social problems; the greatest social good is the best policy, with emphasis on the goals rather than the means of achieving these goals.²² For many years, population was perceived primarily as an economic issue with little attention given to the social dynamics affecting fertility.²³ Emphasis on lowering birth rates as the primary priority produces the “machine theory of implementation”²⁴ where individuals, overwhelmingly women, are viewed as receptacles for contraception services. A singular focus on lowering birth rates offers little or no consideration of the overall health of the individual, or her ability to make an informed choice about contraceptive options.²⁵ Indeed, missing from population theory and policy for most of its history was specific consideration for the human rights of the individuals who were the targets of population programs.

22. For useful descriptions of utilitarianism, see JOHN RAWLS, *A THEORY OF JUSTICE* (1972) (commenting that utilitarians such as Jeremy Bentham sacrifice the individual in favor of promoting the good of society at large).

23. A large part of population policy theory and writings focus on population planning from an economic standpoint. See, e.g., *POPULATION THEORY AND POLICY*, *supra* note 4, (Chapter 5 discussing “Population and Level of Economic Activity” and Chapter 6 discussing “Population Growth and Economic Development”); *THE EVOLUTION OF POPULATION THEORY* (Johannes Overbeek ed., 1977) (described by the editor as a textbook on “population economics”). There are many formulas defining the causes of population growth or decline. Most focus on the relationship between fertility, mortality, and resources. Malthus presented one of the earliest formulas when he postulated a straight correlation between population and total production. See *supra* notes 9-10 and accompanying text. There are many others. For example, Raymond Pearl developed a mathematical formula depicting the rate of growth as a function of the size of the existing population and the amount of unused resources. See, e.g., E.T. Hiller, *A Culture Theory of Population Trends*, in *POPULATION THEORY AND POLICY* 371, 371 (Joseph J. Spengler & Otis Dudley Duncan eds., 1956); Alan T. Peacock, *Theory of Population and Modern Economic Analysis*, in *POPULATION THEORY AND POLICY* 190, 196-97 (Joseph J. Spengler & Otis Dudley Duncan eds., 1956) (reformulating Malthus’ theory to reflect the realities of Western experience and postulating that population decreases as per capita income decreases). Environmentalists argue that improved living standards increase consumption and resource depletion beyond the sustainability of the planet; only reductions in population growth and resource consumption can achieve sustainability. See, e.g., Alan Thein Durning, *The Conundrum of Consumption*, in *BEYOND THE NUMBERS* 40-47 (Laurie Ann Mazur ed., 1994) (“Only population growth rivals high consumption as a cause of ecological decline”). Cf. F. Landis MacKellar & David E. Horlacher, *Population, Living Standards and Sustainability: An Economic View*, in *BEYOND THE NUMBERS* 76 (Laurie Ann Mazur ed., 1994) (arguing that so long as markets function, resource depletion will stabilize and decrease as global living standards and population increase).

24. See DONALD P. WARWICK, *BITTER PILLS* 40 (1982).

25. See Germaine & Ordway, *supra* note 20, at 136 (commenting that family planning programs initially measured success by how many women had accepted sterilization and contraception). Aart Hendriks, *Promotion and Protection of Women’s Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women’s Convention*, 44 *AM. U. L. REV.* 1123, 1124 (1995) (“Health and human rights, however, were commonly perceived as separate and unrelated issues.”) (emphasis in original). See generally Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, *STUD. FAM. PLAN.*, Jan./Feb. 1993, at 18 (noting that international health policies must treat reproduction as inextricably linked to the role and status of women in society).

Population policies impact the individual in a variety of ways. Both anti-natalist and pro-natalist policies may be pursued through regulation which is direct, indirect, or a combination of both. Pro-natalist policies may use a variety of indirect incentives to encourage births, such as tax advantages and favorable marriage, employment, health, or status benefits.²⁶ More direct regulation, such as denial or restriction of access to birth control, abortion, or sterilization,²⁷ also may be invoked. Anti-natalist policies may invoke a corresponding array of direct or indirect regulations to discourage births, including delayed marriage age and various legal and monetary penalties.²⁸ Most anti-natalist policies authorize wide legal access to a variety of birth control methods, sterilization, and abortion.²⁹ At the far end of the regulatory spectrum, anti-natalist policies may authorize coercive practices such as forced abortion and sterilization.³⁰

Indirect regulation or incentives present their own problems. Supporters insist incentive programs offer real motivation for individuals to change their reproductive behavior without coercion.³¹ Individuals choose whether to accept the incentive and its consequences. In reality, incentive programs are inherently coercive. The most common incentive program is

26. POPULATION THEORY AND POLICY, *supra* note 4, at 442.

27. *Id.* at 441. See, e.g., Charlotte Hord et al., *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, STUD. FAM. PLAN., July/Aug. 1992, at 231 (recounting direct methods of effecting population policies in Romania); Reed Boland, *Abortion Law in Europe in 1991-1992*, 21 J. L. MED. & ETHICS 72 (1993) (reviewing abortion laws in post-Communist Europe). Boland notes that Romania had one of the most oppressive pro-natalist policies. Its ban on abortion, forced gynecological examinations, and monitored pregnancies led to thousands of unwanted pregnancies. Reed Boland, *Population Policies, Human Rights, and Legal Change*, AM. U. L. REV. 1257, 1259-60 (1995) [hereinafter Boland, *Population Policies*].

28. *Id.*

29. Access to legal abortion is not always available even in countries which seek to reduce births. For instance, in Rwanda abortion is only legal when the mother's health is at risk. The same holds true for Guatemala and Honduras. Nigeria, Afghanistan, and Burma limit abortion to when the mother's life is in danger. Abortion is illegal without exception in the Philippines, Niger, Chile, Colombia, Haiti, Paraguay, and Peru. JOHN A. ROSS ET AL., FAMILY PLANNING AND CHILD SURVIVAL 42-43 (1988). See Stanley K. Henshaw, *Induced Abortion: A World Review, 1990*, FAM. PLAN. PERSP., Mar.-Apr. 1990, at 76. These countries often have religious objections to abortion and do not perceive access to abortion as a necessary element of population reduction. Other countries consider safe and legal abortion a necessary element of population policy since contraceptive failures are inevitable. The excessive focus of the Cairo Convention on the role of abortion in population policy is an example of how divisive this issue has been internationally. Cairo Programme, *supra* note 2, arts. VII-VIII.

30. China's policy is "one couple, one child." Although China denies coercive practices, there is overwhelming evidence of mandatory sterilizations, forced abortions, and infanticide. See James M. Wines, Note, *Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures*, 20 N.C. J. INT'L L. & COM. REG. 685, 688 (1995) (discussing forced sterilization); BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS 157-69 (1995) (discussing China's history of coercive population control). Similar pressures exist in India. Women there are often denied abortions unless they first agree to an IUD or sterilization. *Id.* at 262-63.

31. Hartmann, *supra* note 30, at 66 (discussing World Bank and AID support of incentive programs).

a single payment in exchange for sterilization.³² Offering an impoverished family the equivalent of a year's wages or a washing machine in exchange for sterilization does not offer that family a true choice.³³ The state, in making such "offers," intends to reduce choice rather than enhance it. These incentives are, at best, a Hobson's choice. Further, population programs that focus primarily on sterilization and contraception fail to address the underlying social conditions which encourage large families.

Social, religious, economic, and political factors significantly influence a country's birth rate.³⁴ Throughout most of history, religious, political, and cultural institutions valued high birth rates and their policies reflected this valuation.³⁵ A State's shift to policies intended to reduce birth rates is just as politically significant. Regardless of whether the governmental policy is anti-natalist or pro-natalist, optimal population size is perceived as a critical element of state power and therefore a legitimate regulatory interest. State regulation of population variables therefore often occurs without consideration for the individuals regulated.

High fertility is encouraged, or commanded, by many religions.³⁶ Births are considered a divine blessing.³⁷ Religious and cultural factors may also function to limit births.³⁸ Where a religious sanction of high birth rates is accompanied by strong discrimination against women, birth rates are particularly high.³⁹

Historically, large populations were perceived as a necessary component of economic and political strength.⁴⁰ High status and economic privi-

32. *Id.* at 67. Other forms of incentives include monthly payments every month a woman does not become pregnant, payments to physicians for sterilizations, payments to "recruiters" charged with rounding-up "acceptors" for sterilization, and penalties, such as decreased educational, health, housing, or tax benefits, when a couple has more than the legal number of children. Freedman & Isaacs, *supra* note 25, at 24-25.

33. Marika Vicziány, *Coercion in a Soft State: The Family Planning Program of India, Part I: The Myth of Voluntarism*, 55 PAC. AFF. 373, 378 (1982).

34. See Hiller, *supra* note 23, at 375-84.

35. See *infra* note 41 and accompanying text.

36. Genesis 1:28 ("Be fruitful and multiply . . ."); Martin Luther, *Die Tischreden*, No. 3613, in 8 LUTHERS WERKE 122, 123 (Otto Clemen ed., 3d ed. 1962) ("Je mehr kinder, jehe grosser gluck." (The more children, the more good luck)).

37. LEISENGER & SCHMITT, *supra* note 21, at 36.

38. Sexual taboos during breast-feeding or menstruation, as well as practices like postpartum abstinence, prohibitions on remarriage for widows, and length of lactation, limit birth rates. *Id.*

39. This demographic result exists in, for example, many Islamic nations. Cf. J.R. Weeks, *The Demography of Islamic Nations*, 43 POPULATION BULL., Dec. 1988, at 1, 45-49 (noting that the high fertility rates in some Islamic nations is not attributable directly to Islam, but rather to the recency of social and economic development).

40. See Abrams, *supra* note 8, at 458-63; ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 67-68 (rev. ed. 1990).

Plato and Aristotle both analyzed the ideal city-state from the perspective of optimal population. The Romans and Chinese tended to value increasing population without concern about the potential of excess growth. See United Nations, Population Division, *History of Population Theories*, in POPULATION THEORY & POLICY 5 (Joseph J. Spengler & Otis Dudley Duncan eds., 1956). Patriarchal organization of society is frequently associated with military competition to control limited resources. See Frank Lorimer, *Culture and Human Fertility: Conclusions*, in POPULATION THEORY & POLICY 395, 395 (Joseph J.

leges were bestowed by the state on large families.⁴¹ Early marriage was, and still is in many countries, sanctioned as a means of increasing population.⁴² It was not until the end of the eighteenth century, when Malthus argued that population increases faster than sustenance, that theorists and politicians began to contemplate the potential of excess population.

Large families remain economic necessities in many societies where children are essential workers.⁴³ High rates of infant mortality provide incentive for couples to have large families to assure economic survival and security.⁴⁴ In some cultures, land is power and the amount of land allocated to a family is determined by family size.⁴⁵ Industrialized societies, in contrast, emphasize accumulation of capital rather than land, and large families deplete capital without increasing productivity.⁴⁶

The relationship between population and economic development remains controversial. The debate is essentially a "chicken and egg" dispute. Some theorists argue that high population hinders economic development,⁴⁷ and that population must be reduced before economic development can occur.⁴⁸ Others insist that economic development must

Spengler & Otis Dudley Duncan eds., 1956). In early patriarchal societies, the status of a man was determined by the number of children he had. Hiller, *supra* note 23, at 380.

41. "[T]he father of three sons shall be exempt from military service, and he who has four from all the burdens of the state." ARISTOTLE, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1113, 1167 (Richard McKeon ed. & Benjamin Jowett trans., 1941). See generally Abrams, *supra* note 8, at 456-63, (noting that births became a matter of state interest due to the military, tax, labor demands, and economics of the family and city-state).

42. Approximately 50% of African women, 40% of Asian women, and 30% of Latin American women are married by age 18. Men tend to marry much later. Nafis Sadik, *Investing in Women: The Focus of the '90s*, in *BEYOND THE NUMBERS* 209, 211 (Laurie Ann Mazur ed., 1994).

43. Young children, six to eight years old, may work anywhere from three to more than ten hours per day. This is particularly true in poor rural areas. See *WORLD BANK, WORLD DEVELOPMENT REPORT 1984*, at 59 (1984) [hereinafter *WORLD BANK REPORT*].

44. While the overall rate of infant mortality is declining, in the least developed countries (e.g., Mozambique, Afghanistan, Angola, Mali, Sierra Leone, Bhutan) the average is still as high as 120 per 1000 births, and in some countries is as high as 297 deaths per 1000 births (one in three births). See LEISINGER & SCHMITT, *supra* note 21, at 45; and *Fourth Review and Appraisal of the World Population Plan of Action Experiences Concerning Population and Development Strategies and Programmes*, United Nations, International Conference on Population and Development, Provisional Agenda Item 8, at 62, U.N. Doc. A/CONF.171/PC/4 (1994) [hereinafter *Fourth Review*]. Another significant factor affecting birth rates in many countries is the lack of any viable social security system. In these countries, parents look to their children for support when they are too old to support themselves. In many developing countries over 80% of parents interviewed expected their children would support them in old age. *WORLD BANK REPORT*, *supra* note 43, at 52.

45. LEISINGER & SCHMITT, *supra* note 21, at 41.

46. EHRLICH & EHRLICH, *supra* note 1, at 19.

47. This is the underlying principle of neo-Malthusian doctrine. See *supra* note 12 and accompanying text.

48. See Barbara Stark, *International Human Rights and Family Planning: A Modest Proposal*, 18 *DENV. J. INT'L. L. & POL'Y* 59, 64 (1989). Some policy-makers fall into a hybrid middle ground, respecting the link between improving quality of life and population reduction but believing that overpopulation is too critical to await the long-term benefits of social and economic transformation. The World Bank's Report on Population

occur before population can decrease.⁴⁹ Population policy thus becomes part of comprehensive economic and social change, the primary emphasis of which is improvement of the quality of life. These two theoretical distinctions are at the heart of very different approaches to population policy. Where reduction of the birth rate is the goal, extensive distribution of contraceptives and sterilization becomes the primary policy. Where the goal is socioeconomic change, birth reduction becomes a product of social policy rather than its engine.⁵⁰

International studies show that generally, as per capita income increases, the birth rate declines.⁵¹ However, some population planners argue that this dynamic occurs only where there also is an equitable distribution of resources.⁵² The World Population Plan of Action recognizes the correlation between population and economic development.⁵³ It posits

in 1984 insisted that "many developing countries cannot afford to wait for fertility to decline spontaneously." WORLD BANK REPORT, *supra* note 43, at 106.

49. HARTMANN, *supra* note 30, at 291. Some commentators argue that both must occur and that socioeconomic emancipation of women will only provide short-term gain. These commentators believe that consumption patterns must be transformed. See, e.g., Russel Lawrence Barsh, *Indigenous Peoples' Perspectives on Population and Development*, 21 B.C. ENVTL. AFF. L. REV. 257 (1994).

50. Socioeconomic change must, of course, include ready access to family planning information and contraception if meaningful reduction of birth rates is to occur.

51. LEISINGER & SCHMITT, *supra* note 21, at 152-53. For example, studies done in Colombia and Malaysia during the 1970s show that the families with the lowest incomes had three times as many children as those with the highest incomes. *Id.* at 152. Economic prosperity also results in decreases in child mortality at birth. *Id.* at 152, 154. However, in China, Thailand, Sri Lanka, and Costa Rica, lower birth rates have not been accompanied by significant positive economic changes. *Id.* at 155. In other countries, such as Kenya, Jordan, Algeria, and Nigeria, declining birth rates have not reflected increases in per capita income. *Id.* Social and religious factors may explain these deviations. For example, China and Thailand have implemented more "aggressive" population policies. Conversely, Sri Lanka implemented broad-based social change to improve education, health, and social security benefits for all citizens and enhance the status of women. The crude birth rate in Sri Lanka dropped significantly from 1970 to 1991. See HARTMANN, *supra* note 30, at 297. In developing countries with high birth rates, religious emphasis on high fertility and the low status of women negate many of the advantages of increased economic prosperity. LEISINGER & SCHMITT, *supra* note 21, at 155.

52. HARTMANN, *supra* note 30, at 292. The question of the equitable distribution of resources raises another aspect of the population-development debate. Western countries' consumption of resources per capita is far in excess of the lesser developed countries. The industrialized countries, with 22% of the population, consume approximately 70% of the world's resources. See *id.* at 23. Focusing on overpopulation as the source of environmental crisis unfairly asks the lesser developed countries to reduce their population so the West can continue its excesses. See generally Andrew J. Ringel, *The Population Policy Debate and the World Bank: Limits to Growth vs. Supply-Side Demographics*, 6 GEO. INT'L ENVTL. L. REV. 213 (advocating limits on population growth to decrease environmental destruction).

53. Report of the International Conference on Population, United Nations, Department of Technical Co-operation for Development, at para. 14, U.N. Doc. E/CONF.76/19 (1984); Cairo Programme, *supra* note 2, para. 1.5 ("[The] Programme of Action builds on the considerable international consensus . . . to consider the . . . interrelationships between population [and] sustained economic growth . . ."); Report of the United Nations World Population Conference, at 3, U.N. Doc. E/CONF.60/19 (1974) [hereinafter Bucharest Report]. The World Population Plan of Action is a consensus document resulting from U.N. world population conferences.

that socioeconomic transformation is the key to reducing population.⁵⁴ The motto "development is the best contraceptive" arose out of the Bucharest World Population Conference in 1974.⁵⁵

Women's reproductive behavior is the focus of most population programs. Since women bear children, this emphasis appears logical at first glance. But in most societies seeking to reduce birth rates, men dominate most, if not all, of the decisions in the family, including reproductive decisions. In reality, women are the target of most population programs because women have always been subject to extensive social control.⁵⁶ The message underlying most population programs is that women are not to be trusted with independent authority over such a significant matter of social policy.

The legal and cultural impact of such programs is to perpetuate discrimination against women by denying women control over their own reproductive functions.⁵⁷ This occurs regardless of whether a country's population policy is pro-natalist or anti-natalist. In either case, the decision is the state's rather than the woman's. Population programs which emphasize state manipulation of women's reproduction rather than individual decision-making are inherently flawed because they fail to recognize that the reproduction decision is an essential element of a woman's individual dignity.

In the last decade, numerous studies have shown that, while reduction of birth rates presents complex economic, social, and political issues, the most consistent factor in reducing birth rates is meaningful change in the legal and social status of women.⁵⁸ In particular, education of and economic participation by women are the key factors affecting reproductive behavior.⁵⁹ Women who can only find status and security in society through children will continue to have many children no matter how many

54. See Fourth Review, *supra* note 44, at paras. 10-46.

55. See Robey et al., *supra* note 14, at 64.

56. This assumption of control by men is enhanced by the historical perception of women as incapable of making reasoned and moral judgments. See *supra* notes 5-7 and accompanying text.

57. See SHAPIRO, *supra* note 12, at 9-12.

58. 3 WORLD POPULATION 1589-1789 (James A. Joyce ed., 1976) (reprinting reports from various countries made in preparation for the 1974 World Population Conference that detail the significance of the relationships between the status of women and population questions). The reports concluded that "a relationship can be firmly established between women's access to material and social resources . . . and the exercise of choice in the planning of the number and spacing of their children." *Study on the Interrelationship of the Status of Women and Family Planning*, U.N. Economic and Social Council, Commission on the Status of Women, 25th Sess., Provisional Agenda Item 5, para. 24, U.N. Doc. E/CN.6/575 (1973), reprinted in 3 WORLD POPULATION 1648, 1653 (James A. Joyce ed., 1976) [hereinafter ECOSOC Study].

59. Fourth Review, *supra* note 44, para. 50. See also HELEN WARE, WOMEN, DEMOGRAPHY AND DEVELOPMENT 84 (1981) (An educated woman . . . is more likely to feel that she can do something about the conditions of her life, including the conditions of pregnancies . . .") (citing D. MANDELBAUM, HUMAN FERTILITY IN INDIA 54-55 (1974)).

birth control pills are distributed.⁶⁰ As far back as the early 1970s, a U.N. commissioned study of over seventy countries concluded that there is a strong correlation between women's status and reproductive behavior: "[T]he exercise of the right to determine the number and spacing of children can have a direct impact on the woman's exercise of her economic rights."⁶¹ Employment opportunities increase status, and necessarily decrease the desire to gain status from having children.⁶²

These employment opportunities must provide desirable jobs. Employers too often use perceived family obligations as a justification for channeling women into low-status, low-paying jobs which offer them little incentive to change their reproductive behavior.⁶³ Without significant economic options, women may perceive few alternatives to large families.⁶⁴ Women must be given real opportunities to participate in the marketplace, own and control property, and make their own decisions about marriage and reproduction. When these rights are granted, women invariably choose options other than having many children.⁶⁵

Studies also have shown that susceptibility to family planning is affected by the level of equality within the marriage. Where the pregnancy decision is achieved through unequal power dynamics such as force, reward, or other forms of patriarchal control, higher fertility rates tend to occur than where the pregnancy decision is achieved through a joint decision-making process.⁶⁶

Status and reproduction are tightly woven dynamics. Reproductive autonomy cannot exist in a vacuum. Neither can enhancement of women's status achieve reductions in birth rates unless broad reproductive choices are available.

60. HARTMANN, *supra* note 30, at 49 ("If women's powerlessness can increase their need for children, then steps toward their empowerment could presumably have the opposite effect. The educational level of women is the single most consistent predictor of fertility and contraceptive use . . ."). Kenya is one example of a country where a vigorous, official family planning program, begun in 1967, failed for many years to reduce the birth rate. Great disparities in economic levels, high infant mortality, and the low status of women coupled with continued social pressure upon women to have many children are some of the socioeconomic factors in Kenya which leave little incentive for individuals to change their reproductive behavior. *Id.* at 83. Other disincentives included the perception that the population program was one imposed by white Westerners to "control" the population. *Id.* at 85.

61. ECOSOC Study, *supra* note 58, para. 77.

62. *See id.* para. 112.

63. *Id.* para. 78.

64. *Id.* para. 83.

65. *Id.* para. 155. The ECOSOC Study found the status of women has "a marked, and even decisive influence" in demographic change. *Id.* para. 68(b). In a recent study of women throughout the developing world, data confirmed that educated women are more likely to use contraception and that enhancement of women's status furthered this dynamic. Robey et al., *supra* note 14, at 63.

66. Paula E. Hollerbach, *Power in Families, Communication, and Fertility Decision-Making*, 3 POPULATION & ENV'T 146, 166 (1980).

II. Development of International Reproductive Rights

The application of human rights norms to reproduction in particular has evolved much more slowly than the international acceptance of these norms in general.⁶⁷ The concept of reproductive rights first received international attention at the International Conference on Human Rights in Teheran in 1968.⁶⁸ The Final Act of the Teheran Conference included language recognizing that "Parents have a basic human right to determine freely and responsibly the number and the spacing of their children."⁶⁹ The phrase "freely and responsibly" became the significant and operative language in subsequent international documents addressing population and human rights.⁷⁰ The World Population Plan of Action adopted in Bucharest in 1974 expanded the language from the Teheran document to include the following:

All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community.⁷¹

This language not only includes "couples and individuals" instead of parents, but also addresses the means to exercise decision-making rights and attempts to define responsible decision-making.⁷² The first treaty to include this language was the Convention on the Elimination of All Forms Of Discrimination Against Women (the Women's Convention).⁷³

67. The first significant international human rights document was the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d mtg. at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

68. *Final Act of the International Conference on Human Rights*, United Nations, U.N. Doc. A/CONF.32/41 (1968) [hereinafter Teheran Proclamation]. The General Assembly endorsed the "Proclamation of Teheran as an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights and in other international instruments . . ." G.A. Res. 2442, U.N. GAOR, 23d Sess., Supp. No. 18, at 49, U.N. Doc. A/7218 (1969).

69. Teheran Proclamation, *supra* note 68, at 4. This language has been criticized as an attempt by the international community to pressure lesser developed countries to encourage the use of contraception rather than a clear endorsement of reproductive autonomy. Freedman & Isaacs, *supra* note 25, at 21-22.

70. See, e.g., *Declaration of Social Progress and Development*, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, art. 4, U.N. Doc. A/7630 (1969); Bucharest Report, *supra* note 53, at 39. These documents are consensus policy commitments, not treaties. Notably, two treaties which address protection of the family, *inter alia*, fail to include any language addressing reproductive decision-making. See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360 (1967) [hereinafter Economic Covenant]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368 (1967) [hereinafter Political Covenant].

71. Bucharest Report, *supra* note 53, at 7.

72. See Freedman & Isaacs, *supra* note 25, at 22.

73. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980), *reprinted in* 19 I.L.M. 33 (1980) [hereinafter Women's Convention].

The application of human rights principles to women, including reproductive rights, is even slower in its realization. The political and civil liberties defined in the Universal Declaration of Human Rights prohibits distinctions made on the basis, among others, of "sex."⁷⁴ Among the basic rights protected in this document are the right to "life, liberty, and security of person"⁷⁵ and freedom from "torture"⁷⁶ or "cruel, inhuman or degrading treatment or punishment."⁷⁷ The International Covenant on Civil and Political Rights (Political Covenant) protects the "right of self-determination."⁷⁸ It also reiterates rights designated in the Universal Declaration of Human Rights.⁷⁹ The Political Covenant also protects the "security of person."⁸⁰ State regulation of reproductive functions of men, such as involuntary castration, have been denounced as violations of fundamental rights.⁸¹ Yet these provisions generally have not been interpreted to apply to arbitrary and pervasive deprivations suffered uniquely by women throughout the world.⁸² In particular, although each of these rights encompasses the right to self-determination in reproductive decisions,⁸³ it was not until the adoption of the Women's Convention that the association between human rights and reproductive self-determination was made.

The linkage between human rights norms and reproductive choices is complicated by limiting legal interpretations of culpable state action. Human rights violations resulting from direct state action are the classic political and civil rights protected by international law.⁸⁴ To the extent that reproductive rights violations result from direct intrusions by the State, such as coerced abortion, they are more likely to be accepted as human rights violations. But where reproductive self-determination for

74. Universal Declaration, *supra* note 67, art. 2.

75. *Id.* art. 3.

76. *Id.* art. 5.

77. *Id.*

78. Political Covenant, *supra* note 70, art. 1(1).

79. Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* art. 7.

80. *Id.* art. 9(1).

81. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). India's forced sterilization of men in the 1970s resulted in international outrage. As a result, the government shifted its program to focus on "what it considers its simplest and surest method of population control: sterilization of women." Molly Moore, *Teeming India Engulfed by Soaring Birthrate*, WASH. POST, Aug 21, 1994, at A1, A32. Ninety-seven percent of all sterilizations in India are now performed on women, despite the fact that male vasectomies are simpler and safer operations than female tubal ligations. *Id.*

82. See Hilary Charlesworth, *What are "Women's International Human Rights?"*, in HUMAN RIGHTS OF WOMEN 58, 71-72 (Rebecca J. Cook ed., 1994) (characterizing the most common deprivations: unsafe abortions, maternal morbidity, infanticide of girl babies, malnutrition from favoring males with available food, and continuous violence against women).

83. See Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991) (arguing that international resolutions, and declarations of the United Nations and other international groups acknowledge that reproductive self-determination is an individual right).

84. See Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 989 (1995).

women is denied because of pervasive cultural or religious discrimination against women, it is less likely to be perceived as state action denying human rights. In international law, as in domestic law, actions relegated to the "private" sphere are considered beyond the scope of human rights law, which addresses only "public" state action. This interpretation ignores the systematic marginalization of women into the "private" sphere.⁸⁵ Pervasive violence against women, extending from private sphere violence to the ancient—and still prevalent—practice of rape during war, may be interpreted as outside the scope of the basic international human rights documents.⁸⁶

This public/private distinction does not completely explain past failures to recognize reproductive self-determination as a civil or political human right. Clearly, in some countries, there is state action in regard to unsafe contraception which may constitute impermissible state-sponsored or endorsed medical experimentation without consent. Coercive reproductive policies, whether they include compelled sterilization and abortion or compelled parenthood, are violations of liberty, security of person, self-determination, and in some cases life, as completely as the classically accepted human rights violations.⁸⁷ But the harms suffered specifically by

85. One commentator argues that States can be held responsible for systematic "private" violence against women under two theories. The State's failure to provide legal protection for women from private actors makes the State a party to denial of life, liberty, and security. Alternatively, the State's failure to prohibit and punish violence against women denies women the equal protection of the law. See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, 85, 99-102 (Rebecca J. Cook ed., 1994).

86. See Charlesworth, *supra* note 82, at 72. Charlesworth cites an example of research done in Brazil which found that the defense of "honor" was successful, when invoked, in some regions in 80% of the cases of murder of an allegedly unfaithful wife by her husband. *Id.* Husband-murder was viewed as a more serious crime. *Id.* Similarly, the rape of women held in detention historically has been considered a private act and only recently addressed in human rights dialogue. Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN 532, 544 (Rebecca J. Cook ed., 1994). It is only recently that some countries have begun to recognize the systematic rape of women during war as a basis for seeking political asylum. See Jan Burgess, *New UNHCR Guidelines for Protection of Women*, REFUGEEES, Oct. 1991, at 40.

The Draft Declaration on Violence Against Women is a start at addressing some of these problems. See *Monitoring the Implementation of the Naivoni Forward-Looking Strategies for the Advancement of Women, Draft Declaration on Violence Against Women*, United Nations, Economic and Social Council, 36th Sess., Provisional Agenda Item 4, app., at 11, U.N. Doc. E/CN.6/1992/4 (1991). The Geneva Convention of 1949 specifically prohibits attacks against the "honour" of civilian women, "in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3517, 75 U.N.T.S. 287. The problem is not the lack of protective legal norms but the failure of governments to place a priority on these protections.

87. Other examples include violation of equality rights where men, rather than women, make the decisions about whether to reproduce, violation of life through unsafe health practices relating to reproduction, loss of liberty, and self-determination by denial of contraception, genital mutilation, rape, and other violence against women. See Cook, *supra* note 84, at 993-1013. Professor Cook categorizes human rights violations

women have for the most part been excluded from the theoretical formulation of human rights. As a result, international law has failed to perceive what is for women a basic interpretation of existing rights: reproductive self-determination is synonymous with liberty.⁸⁸ Clearly, denial of reproductive self-determination for a woman is at least as powerful a deprivation of liberty as denial of "thought, conscience and religion,"⁸⁹ "vote,"⁹⁰ and "liberty of movement and freedom to choose . . . residence,"⁹¹ all examples of classic civil and political liberties protected by international agreements. Article 17 of the Political Covenant highlights this dichotomy by providing that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."⁹² The language of this provision reinforces the suspicion that the drafters and ratifiers of these documents were not thinking of women when they defined human rights.⁹³

The harm from failure to incorporate women's perspectives in the articulation of human rights is compounded in many countries by the low value placed on women's needs. The status accorded women in many societies results in States' failure to perceive violations of reproductive autonomy as violations of rights classically defined by reference to men's experiences. Thus, States fail to equate reproductive autonomy with the rights of "security of person" and "self-determination," even though they are equivalent protections. Even where legal norms are clear, gender bias may result in lack of enforcement.

Human rights relating to women and reproduction have historically been classified as social and economic rights. While social and economic rights are protected throughout numerous human rights documents, they have been deemed less universally credible and therefore less important internationally than classic civil and political rights.⁹⁴ As a result, the international enforcement mechanisms, both for women's rights and social

in three classes: (1) violations resulting from direct state action, (2) violations resulting from a State's failure to protect minimum obligations of human rights, and (3) violations relating to a pattern of discriminatory practices. *Id.* at 989. Violations of reproductive rights can occur throughout the three categories.

88. Rebecca Cook defines the reproductive interests that implicate international human rights protections as: reproductive security and sexuality, reproductive health, reproductive equality, and reproductive decision-making. *Id.* at 979.

89. Political Covenant, *supra* note 70, art. 18(1).

90. *Id.* art. 25.

91. *Id.* art. 12(1).

92. *Id.* art. 17(1) (emphasis added).

93. Katharine Bartlett argues that legal analysis must begin by "asking the woman question," that is, asking whether the law takes into account women's experiences and values. This approach challenges the assumption that a law is derived from gender-neutral principles. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

94. See Hendriks, *supra* note 25, at 1130. The controversy centers on disputes about "negative" and "positive" rights. Since most social rights impose affirmative obligations upon States, they are at odds with the Western, particularly the U.S., interpretation of rights as negative, that is, the right to be free from State interference in certain matters. See *id.* at 1133.

and economic rights, are less effective than those established for violations of civil and political rights.⁹⁵

III. Development of International Women's Rights

The development of women's international human rights began with the Universal Declaration of Human Rights in 1948, which prohibits discrimination on the basis of sex.⁹⁶ Numerous subsequent treaties include similar protections.⁹⁷ In addition, commentators have argued that prohibition of gender discrimination is a principle of customary international law.⁹⁸ The Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) creates the international legal standard for protection against gender discrimination.⁹⁹ It is premised on the recognition that legal, social, political, cultural, and economic norms are permeated by gender discrimination.¹⁰⁰ The Preamble expresses the concern that, despite numerous international treaties promoting equality, extensive discrimination exists. The Women's Convention defines "discrimination against women" as

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 of men and women, of human rights and fundamental freedoms in

95. The only enforcement mechanism currently available under both the Women's Convention and the Economic Convention is self-reporting. See Economic Covenant, *supra* note 70, art. 16; Women's Convention, *supra* note 73, art. 18.

96. Universal Declaration, *supra* note 67, art. 2.

97. Political Covenant, *supra* note 70, art. 14(1) ("All persons shall be equal before the courts and tribunals."); *id.* art. 2(1) ("Each State Party . . . undertakes to respect and to ensure . . . rights . . . without distinction of any kind, such as . . . sex."). The Economic Covenant requires States to guarantee economic and social rights and opportunities. Economic Covenant, *supra* note 70, art. 2. Article 3 specifically requires States "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." *Id.* art. 3.

98. Customary international law binds a State that has not ratified an agreement on the issue. Customary law is defined as law which "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). "A state violates international law if . . . it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." *Id.* § 702(g). Equality of women is a generally accepted human right. See *id.* § 701. See IAN BROWN-LIE, STATE RESPONSIBILITY 81 (1983) (concluding that the principle of non-discrimination on the basis of gender is now firmly established as customary international law).

99. Women's Convention, *supra* note 73.

100. Article 2 requires States "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women[.]" *Id.* art 2(f). Article 7 requires States Parties to eliminate discrimination against women in their access to the political process. *Id.* art. 7. Other emphasized areas include: nationality rights, *id.* art. 9; education, *id.* art. 10; employment, particularly as it relates to discrimination on the basis of pregnancy, *id.* art. 11; health care, *id.* art. 12; rural women, *id.* art. 14; legal capacity, *id.* art. 15; and marriage and family, *id.* art. 16. As of March 21, 1996, 152 countries are party to the Women's Convention. U.N. Treaty Data Base, Multilateral Treaties Deposited with the Secretary-General, <http://www.un.org/Depts/Treaty> (March 21, 1996).

the political, economic, social, cultural, civil, or any other field.¹⁰¹

Article 2 requires States to take all legal and "appropriate means and without delay" to "ensure" the realization of the "principle of the equality of men and women" and to "eliminate discrimination against women."¹⁰²

The Women's Convention reflects a strong understanding of the complex and pervasive nature of gender discrimination within a society. It imposes responsibility to change not only the laws but also the underlying traditions and practices which are often more powerful forces within a society than legal regulation. In essence, the Women's Convention is intended to reach not only public but private conduct that perpetuates discrimination against women.¹⁰³ Article 2(e) requires States "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise[.]"¹⁰⁴ Article 2(f) specifically requires States "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women[.]"¹⁰⁵ Article 5(a) imposes a duty on States "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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[.]"¹⁰⁶ Article 10 requires "[t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education . . ."¹⁰⁷ Article 17 establishes the Committee on the Elimination of Discrimination Against Women which is charged with monitoring compliance.

International documents subsequent to the Women's Convention also recognize freedom from discrimination against women and gender equality as basic human rights.¹⁰⁸ Despite the foundation established for recognition of women's rights through myriad international documents,

101. Women's Convention, *supra* note 73, art. 1. By relying upon distinctions "made on the basis of sex," Article 1 reaches only those laws which are discriminatory on their face. Gender neutral laws which may have discriminatory impact do not violate Article 1. They do violate other provisions. See, e.g., *id.*, art. 5(a) (parties should modify social and cultural patterns of conduct); *id.* art. 10 (equal educational opportunities and access).

102. *Id.* art. 2.

103. This is the principal perceived difference between the protection of the Women's Convention and the Covenant on Civil and Political Rights, which also prohibits gender discrimination. See Political Covenant, *supra* note 70, art. 26.

104. Women's Convention, *supra* note 73, art. 2(e).

105. *Id.* art. 2(f).

106. *Id.* art. 5(a).

107. *Id.* art. 10(c).

108. See, e.g., *Fourth Review and Appraisal of the World Population Plan of Action, Review and Appraisal of Progress Made Towards the Implementation of the World Population Plan of Action*, United Nations, Preparatory Committee for the International Conference on Population and Development, 3d Sess., Provisional Agenda Item 4, U.N. Doc. A/CONF.171/PC/3 (1994). Paragraph 18 of the Vienna Declaration and Programme of Action, the product of the 1993 World Conference on Human Rights in Vienna, provides:

improvement in women's status has proved to be "much slower than expected" and has in fact deteriorated in many developing countries since the adoption of the Women's Convention.¹⁰⁹ Although many countries took positive action to remove legal discrimination, the source of pervasive and continuing gender discrimination lies in the traditions and practices which control social relationships.¹¹⁰

These traditions conflict with the very essence of the Women's Convention. Article 28(2) prohibits reservations "incompatible with the object and purpose" of the document.¹¹¹ Of the 152 States party to the Convention, approximately one-third have made substantive reservations, making the Women's Convention one of the most reserved international human rights documents.¹¹² The most sweeping reservations were entered by Muslim countries which claimed that provisions of the Women's Convention conflicted with the *Shari'a* (Islamic law).¹¹³ Bangladesh's reservation, for example, reads in part "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of [Article 2] as [it] conflict[s] with Sharia Law based on Holy Quran and Sunna."¹¹⁴ Article 2 of the Women's Convention is the heart of the treaty, for it includes the requirement that States agree to use all appropriate means to eliminate discrimination in laws or tradition-based practices.¹¹⁵ It seems doubtful that a country that objects to Article 2 could be said in

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Report of the World Conference on Human Rights, Vienna Declaration and Programme of Action, United Nations, World Conference on Human Rights, at 20, para. 1(18), U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993) [hereinafter *Vienna Declaration*]. The Vienna Declaration further calls for the elimination of gender-based violence, sexual harassment, and exploitation. Improvement in "safe maternity and health care" are two of the designated areas of focus for legal change and "national action and international cooperation." *Id.*

109. Fourth Review, *supra* note 44, para. 49.

110. *See id.* paras. 49-50.

111. Women's Convention, *supra* note 73, art. 28(2). This language is consistent with the restrictions on reservations found throughout international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. b (1987).

112. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 282-83 (1991). Over forty countries have made substantive reservations. This is a significant number of reservations for a treaty although other human rights treaties tend to have large numbers of reservations. *Id.* at 283. The United States has not yet ratified the Women's Convention.

113. These countries include Bangladesh, Libya, Egypt, and Iraq. *See id.* at 284 (noting reservations by Bangladesh and Egypt).

114. *Multilateral Treaties Deposited with the Secretary General*, United Nations, at 171, U.N. Doc. ST/LEG/SER.E/8 (1990). Egypt entered a reservation to Article 2 to the extent it was inconsistent with the *Shari'a*. *Id.* at 173. Iraq entered reservations to Articles 2(f) and (g) without explanation. *See id.* at 174. Bangladesh also has entered reservations to Articles 13(a), 16(1)(c), and 16(1)(f). *Id.* at 171.

115. *See supra* text accompanying note 102.

any meaningful way to comply with the Convention.¹¹⁶

Some of the reservations reflect profound disagreement with the meaning of "discrimination." Several countries entered reservations to Article 16, which protects women's rights in the family and in family planning. Iraq and Egypt's objection to Article 16 is premised on equivalent rights in marriage under *Shari'a*. While the argument has been made that *Shari'a* is more favorable to women than the Women's Convention, in reality the assignment of "equal" responsibilities in marriage perpetuates stereotypes.¹¹⁷ Women's responsibilities are inevitably domestic, without economic value, whereas men are assigned the political and economic leadership roles. This very concept of "separate but equal" is incompatible with the Women's Convention, which requires equal social and economic opportunities.¹¹⁸

Numerous other countries entered substantive reservations derived from conflicts between the rights protected in the Women's Convention and their cultural norms.¹¹⁹ Malawi, for example, entered a reservation stating that, "owing to the deep-rooted nature of some traditional customs and practices' the Government did not, 'for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.'"¹²⁰ South Korea entered numerous reservations to women's rights within the family based on traditional practices.¹²¹

These reservations are incompatible with the object and purpose of the Convention.¹²² Where cultural and religious norms perpetuate system-

116. Numerous countries objected to these reservations under Article 28(2), which prohibits reservations incompatible with the object and purpose of the treaty. See Clark, *supra* note 112, at 283-87. Denmark and Norway objected to a reservation by Libya claiming that, since a state may not use internal law to justify a failure to perform a treaty, religious law similarly should not excuse performance. See Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 807 n.32 (1992). Compare these reservations to the reservations favoring male succession to the monarchy made by Belgium, Spain, the United Kingdom, and Luxembourg, which have limited impact on the lives of women in these countries.

117. Clark, *supra* note 112, at 300 (claiming *Shari'a* is more favorable in this area).

118. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 705 (1990); Sullivan, *supra* note 116, at 844-45.

119. India ratified the Women's Convention without reservation but made declarations concerning Articles 5(a) and 16(1) that assert a policy of governmental non-interference in practices of religious and ethnic minorities. RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 220.19 (2d ed. 1990). This policy will allow certain discriminatory religious laws to continue.

120. Clark, *supra* note 112, at 300 (citing U.N. Doc. C.N.78.1987.TREATIES-3(IV.8)). Tunisia's reservation centered on conflicts between the Women's Convention and its Constitution. *Id.* at 301.

121. See generally Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B.C. THIRD WORLD L.J. 145, 158 (1994); Cook, *supra* note 118, at 694.

122. See Clark, *supra* note 112, at 299; Julie A. Minor, Recent Developments, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 144 (1994); Anna Jenefsky, Note,

atic discrimination against women, reservations based on these norms undermine the principles of gender equality required by the Women's Convention. Reliance on religious and cultural traditions to deny human rights to women is a profoundly troubling dynamic because it offers no expectation or opportunity for enhancement of women's status. More importantly, international acquiescence validates the moral authority of traditions inconsistent with rights for women.

There are several articles in the Women's Convention which specifically address reproductive rights and health. Article 10(h) guarantees "[a]ccess to specific educational information to help ensure the health and well-being of families, including information and advice on family planning."¹²³ Article 11(1)(f) guarantees "[t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."¹²⁴ Article 11 also requires States to prohibit discrimination based on pregnancy or maternity leave, to "encourage" the provision of adequate social services, such as child-care, to assist working parents, and to provide special protection to women from harmful work during pregnancy.¹²⁵ Article 12 requires States to eliminate discrimination with regard to access to health care, including family planning and to ensure appropriate health care during pregnancy, childbirth, and the post-natal period, including adequate nutrition and "free services where necessary[.]"¹²⁶ Article 14, in addressing the special problems of rural women, guarantees access to adequate health care, "including information, counseling and services in family planning[.]"¹²⁷

Article 16 of the Women's Convention, establishing rights of women within the family, is intended to eliminate both public and private discrimination. Article 16 explicitly establishes a right of reproductive autonomy:

States Parties shall take all appropriate measures to . . . ensure, on a basis of equality of men and women . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[.]¹²⁸

Article 16 uses language similar to the Bucharest World Population Plan of Action. In accordance with the rest of the Women's Convention, the theoretical basis for this language is specifically grounded in an explicit recognition that for women, reproductive self-determination is essential for the meaningful exercise of other rights.¹²⁹

Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 15 MD. J. INT'L L. & TRADE 199 (1991).

123. Women's Convention, *supra* note 73, art. 10(h).

124. *Id.* art. 11(1)(f).

125. *Id.* art. 11(2)(a)-(d).

126. *Id.* art. 12.

127. *Id.* art. 14(2)(b).

128. *Id.* art. 16(1), (1)(e).

129. Freedman & Isaacs, *supra* note 25, at 23.

The Women's Convention's strong language of equality and autonomy is a valuable articulation of principles. In this regard, the treaty rates high as an educational and political tool. The enforcement value of the treaty is marginal, however. Some of the weaknesses of the Women's Convention are highlighted by comparison to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the model for the Women's Convention.¹³⁰ CERD includes both a complaint process for alleged violations and a mechanism for determining if reservations are incompatible with the purposes of the treaty.¹³¹ The Women's Convention lacks both.¹³² The recent Beijing Conference on Women called for action to ensure that no reservations to the Women's Convention are incompatible with either that document or with other international treaties.¹³³ The Beijing Declaration also recommended adoption of an optional Protocol which would allow individual enforcement against other state parties by citizens of the state or by other states.¹³⁴

IV. Human Rights and Population Planning

Although the World Population Plans of Action since Bucharest have included language recognizing reproductive rights of individuals, the efficacy of these protections is not apparent.¹³⁵ The late recognition by the international community of the human rights issues in population programs continues to hinder enforcement of these rights. The significant heritage of Malthusian theory in population programs results in policies where achievement of fertility reduction is top priority.¹³⁶ Indeed, because

130. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 212 [hereinafter CERD].

131. *Id.* arts. 11-14, 20.

132. See Women's Convention, *supra* note 73.

133. Draft Platform of Action, U.N. Commission on the Status of Women, paras. 230(c)-(d), U.N. Doc. A/CONF/177/L 124, available at <http://www.igc.apc.org/women-snet/beijing/beijing.html> (1995) [hereinafter Beijing Declaration].

134. *Id.* para. 230(l).

135. The World Population Plan of Action is a consensus document without binding legal obligations. It is reviewed and revised periodically at U.N. sponsored conferences, such as the conferences in Teheran and Mexico City. Its value, as with other consensus documents such as the Vienna Declaration and Beijing Declaration, is in articulating international principles which can be used nationally as both blueprint and ammunition for legal and social change. International financial assistance may also be linked to acceptance and implementation of principles delineated in consensus documents.

136. For example, Bangladesh reduced its fertility rates from seven births per woman to under five between 1975 and 1990 through use of an "aggressive" contraception program without a corresponding reduction in the high death rate in the country. Men or women who agreed to be sterilized received the equivalent of several weeks wages, access to emergency wheat, and other forms of payment. Government personnel were penalized if they failed to meet sterilization quotas. As might be expected, it is primarily the poor who are sterilized. See HARTMANN, *supra* note 30, at 223-41.

Robey et al. claim that fertility rates can be reduced even in the absence of improvement of the quality of life through strong contraception programs and the "educational power of mass media." Robey et al., *supra* note 14, at 60. Using data compiled through surveys of over 300,000 women in developing countries, the authors claim that the presence of these factors allows the developing countries to reduce their birth rates without

population policy assumes state regulation, direct or indirect, of reproductive behavior, the very concept of a population program may be inconsistent with reproductive self-determination.

The aggressive anti-natalist policy of China is one of the most extreme modern examples. Coercion, both direct and indirect, is the cornerstone of China's "one-child policy." Couples are subject to significant community pressures to comply with the one-child mandate. Forced contraception, abortion, and sterilization may occur.¹³⁷ Government penalties concerning medical, educational, and housing benefits are imposed upon those individuals who fail to comply.¹³⁸

More typical are the abuses which occur in numerous countries in the distribution of contraceptives. The health risks accompanying most forms of contraception have too often been ignored by dispensers of family planning programs. As a result, failure to consider the medical profile of each contraceptive user, and failure to obtain informed consent are two of the most common abuses which occur in family planning programs. Family planning personnel, who are often required to solicit "acceptors" for family planning, obviously have little incentive or technical capability to fully investigate the appropriateness of a particular contraceptive for each individual.¹³⁹ In addition, it is often the husband who purchases the contraceptives and explains the process to his wife, thereby attenuating the connection to the woman's health even further.¹⁴⁰ Concerns with distribution of birth controls pills, IUDs, and injectable contraceptives such as Depo-Provera surface repeatedly in the assessment of family planning programs.¹⁴¹

The latest controversy involves the use of Norplant, which was widely heralded by many in the population community as the perfect contraceptive: long-acting, reversible, and not dependent upon regular individual responsibility for its use.¹⁴² But Norplant implantation and removal

waiting for economic growth to effect demographic change through improved health, education, and employment opportunities. The authors' research leads them to conclude that strong family planning programs which increase use of contraception are the single most important factor in reducing the birth rate. *Id.* at 65. Voluntary female sterilization emerged as the most common method of contraception. *Id.* at 63.

The authors therefore dispute that "development is the best contraceptive." However they use Bangladesh as one example of a success story in reduction of fertility rates without any consideration of the human rights implications of the methods employed to assure contraception use.

137. Boland, *Population Policies*, *supra* note 27, at 1260-61.

138. *Id.* at 1261.

139. HARTMANN, *supra* note 30, at 195.

140. *Id.*

141. *Id.* at 189-207; DIXON-MUELLER, *supra* note 7, at 209. See Anrudh Jain & Judith Bruce, *Quality: The Key to Success*, in *BEYOND THE NUMBERS* 171 (Laurie Ann Mazur ed., 1994).

142. See HARTMANN, *supra* note 30, at 207. Norplant consists of six encapsulated hormones which are inserted under the skin of the arm. Norplant can prevent pregnancy for approximately five years. The implants can be removed at any time or replaced after five years. Both insertion and removal require trained personnel capable of applying local anesthesia. *Id.* at 207-08.

requires a medical facility and trained medical personnel because of potential infection and unpleasant side effects.¹⁴³ Abuses associated with Norplant have been documented in Indonesia and other countries, including the absence of trained personnel, lack of informed consent, unsanitary conditions, and unwillingness of program personnel to remove the drug when women suffered adverse effects or no longer wanted it.¹⁴⁴

The dynamics of pro-natalist policies may be no less coercive and violative of rights. In Romania, Nicolae Ceausescu claimed "the fetus is the socialist property of the whole society. Giving birth is a patriotic duty Those who refuse to have children are deserters, escaping the law of natural continuity."¹⁴⁵ The Romanian government banned most abortions and contraception, mandated monthly gynecological examinations in the workplace, and tracked pregnancies to ensure they were carried to term.¹⁴⁶ Other countries continue to ban most contraception and abortion for pro-natalist or religious reasons.¹⁴⁷

The Cairo Programme of Action, negotiated by over 180 countries in 1994, explicitly links population policies to international human rights.¹⁴⁸ Reproductive health is designated as an essential right in the development of population policies which comply with international human rights standards.¹⁴⁹ The cornerstone of the Cairo Programme is the document's inclusive definition of reproductive health:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not

143. *Id.* at 209-10.

144. Boland, *Population Policies*, *supra* note 27, at 1261-62; HARTMANN, *supra* note 30, at 73-83, 209-13.

145. Hord et al., *supra* note 27, at 232.

146. The devastation resulting from these policies included the highest maternal and infant mortality rates in Europe, over 500 deaths annually due to unsafe abortions, thousands of women with serious medical complications, and sterility. The toll taken on many thousands of children included abandonment and institutionalization under inhumane conditions. Boland, *Population Policies*, *supra* note 27, at 1259.

147. *Id.* at 1260.

148. Cairo Programme, *supra* note 2, para. 1.15.

149. *Id.* para. 7.3.

merely counselling and care related to reproduction and sexually transmitted diseases.¹⁵⁰

Structuring international family planning maxims on the centerpiece of reproductive health and self-determination brings into play the myriad cultural and religious traditions which deny women autonomy, particularly reproductive autonomy. When this dynamic is coupled with the Malthusian legacy which emphasizes demographic ends rather than means, significant resistance is likely to a population policy which is built upon women's reproductive health. The perpetual tension between international human rights law and the sovereign rights of States is highlighted when a persistent pattern of action, *i.e.*, discrimination against women, is pervasive.

Part of the tension derives from the perception that human rights in international law are the product of a Western philosophical and political view incompatible with many non-Western cultures.¹⁵¹ The definition of rights as protection of the individual from interference by government is antithetical to more communally oriented societies.¹⁵² Communally oriented cultures tend to define individual interests in relation to group interests.¹⁵³ In these societies, individual interests are protected through the articulation of group values, without the direct adversarial relationship between individual and government familiar to Western political theory. Individual rights therefore may be defined in very different terms than in Western political doctrine.¹⁵⁴ As a result of these differing interpretations, an ongoing debate exists as to the universality of human rights.¹⁵⁵ Universality is disputed by those countries which argue for a qualified universality, an interpretation of human rights that incorporates cultural and

150. *Id.* para. 7.2.

151. The concepts of individuality, liberty, equality, and constitutional democracy originate in Western philosophy, particularly in the works of John Locke and John Stuart Mill. Non-Westerners are not the only proponents of this distinction. See Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22, 40.

Numerous Muslims have claimed that human rights norms, derived from Judeo-Christian principles, are inapplicable under Islamic law. See Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures, or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 315-22 (1994).

152. For example, many Asian societies emphasize the duties of individuals within a social community. See, *e.g.*, Manwoo Lee, *North Korea and the Western Notion of Human Rights*, in HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE 129, 133 (James C. Hsiung ed., 1985).

153. Two examples are consensual societies, such as Japan and South Korea, which are based on mutual accommodations, and communist societies, such as China and North Korea, where individual interests are subsumed to interests defined by the Party. James C. Hsiung, *Human Rights in an East Asian Perspective*, in HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE 1, 6-17 (James C. Hsiung ed., 1985).

154. The Saudi Arabian Basic Law, promulgated in 1992, recognizes human rights principles but only so far as they are "in accordance with the Islamic shari'a." Mayer, *supra* note 151, at 358.

155. See Donna J. Sullivan, *Current Developments, Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 157 (1994); Huntington, *supra* note 151, at 41.

religious limitations.¹⁵⁶

Qualified universality creates particular problems for women. Women's rights simply are inconsistent with many cultural traditions which deny women liberty and equality. Efforts to achieve universality with regard to women's rights meet with resistance in the name of cultural relativism. Cultural relativism becomes the justification for perpetuating systematic discrimination against women.

This conflict emerged as a central theme at the second World Conference on Human Rights held in Vienna in 1993. The United States, as a proponent of the universality principle, argued that "[w]e cannot let cultural relativism become the last refuge of repression."¹⁵⁷ Numerous developing countries, including Iran, Syria, Indonesia, China, Cuba, Vietnam, Singapore, Malaysia, Pakistan, and Yemen, argued against universality.¹⁵⁸ The argument for cultural relativism asks too much. Certainly, respect for non-Western cultural distinctions must be incorporated into interpretation of human rights. At the same time, systematic patterns of discrimination cannot be accepted in the name of cultural relativism. To do so negates any principled definition of human rights.

In many non-Western societies, cultural traditions define the role of the individual within the socio-political structure. The concept of individual rights conflicts with strictly delineated roles entrenched for hundreds, if not thousands, of years. These traditional roles tend to disadvantage women who historically have been denied the status, rights, and opportunities granted to men.¹⁵⁹ In addition, because the Western principle of separation of church and state is not an international norm and bears little relevance in non-Western societies, religious doctrines that define women by their reproductive roles may be directly incorporated into cultural and legal restrictions.¹⁶⁰ In these societies, assertion of women's individual

156. See Mayer, *supra* note 151, at 316-22; Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN 3, 7 (Rebecca J. Cook ed., 1994).

157. Elaine Sciolino, *U.S. Rejects Notion That Human Rights Vary With Culture*, N.Y. TIMES, June 15, 1993, at A1.

158. Roger Thurow, *U.N. Conference Plagued by Demands That Rights Must Bow to National Goals*, WALL ST. J., June 25, 1993, at A6. Some of these countries objected to universality on principles other than tradition, such as China, which has repeatedly asserted that human rights are internal affairs to be defined by the sovereign state. Chinese communist political theory also subordinates the interests of the individual to those of the state.

Not all non-Western leaders argued against universality. The Dalai Lama argued fervently for "freedom, equality and dignity" for all. Raymond Whitaker, *Vienna Gives Dalai Lama a Hero's Welcome*, THE INDEPENDENT (London), June 16, 1993, at 12.

159. For example, under *Shari'a*, a man may marry up to four wives and divorce them at will. A woman is allowed only one husband and may divorce only in very limited and restricted circumstances. See Abdullahi Ahmed An-Na'im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in ASIAN PERSPECTIVES ON HUMAN RIGHTS 31, 38 (Claude E. Welch, Jr. & Virginia A. Leary eds., 1990).

160. See Anika Rahman, Note, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473, 473-74 (1990); Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human*

rights is perceived as violative of the established social and religious order.¹⁶¹

The real source of tension in the recognition of women's reproductive rights is therefore more deeply embedded than conflicts in political theory. Traditional social structures, often religiously based and asserted as the sovereign imperative of many countries, in fact mask the continuation of the systematic disadvantage imposed upon women. Control over women by fathers, husbands, and the state is perpetuated in the name of sovereign authority. For example, although some Islamic laws may be interpreted to support the use of contraceptives and family planning, other Islamic laws denying women equality within the marriage relationship make it unlikely that a woman could exercise reproductive self-determination.¹⁶² The rise of fundamentalist religious political power has exacerbated these issues, by combining a restrictive view of women with distrust for Western influences. One fundamentalist commentator criticized the Cairo Convention, charging that the provisions protecting reproductive self-determination promote extramarital sex which, in turn, causes moral decline, disease, and crime. He concluded:

Does the UN Draft Programme then want to export these western social maladies to the Eastern and Muslim countries in the name of population control and development? As far as Bangladesh is concerned these offending clauses . . . offend our religious feelings, our culture and above all our civilization . . . to agree to such a proposal would be . . . unconstitutional.¹⁶³

At the Cairo Convention, Muslim fundamentalists joined with the Vatican to challenge provisions protecting women's reproductive health and autonomy.¹⁶⁴ These challenges were grounded in a valuation of woman as "mother," which allows for little, if any, consideration of reproductive self-determination.¹⁶⁵

Rights Law to Change Religious and Customary Laws, in HUMAN RIGHTS OF WOMEN 167, 176 (Rebecca J. Cook ed., 1994); Amin & Hossain, *supra* note 8, at 1335.

161. The 1990 Cairo Declaration on Human Rights in Islam, issued by the Organization of the Islamic Conference, carefully purports to guarantee equal "human dignity" to women, but the only rights guaranteed to women are (1) the right to enjoy legal personality, (2) the right to own and manage property, and (3) the right to retain name and lineage. Otherwise, the document preserves the marital dominance of husband over wife, including the husband's right to demand obedience from his wife. See Mayer, *supra* note 151, at 331.

162. Amin & Hossain, *supra* note 8, at 1333-35.

163. *Id.* at 1337-38 (citing Abdur Razzaq, Keynote Paper Presented at the Seminar on the Cairo Conference on Population and Development: Human Rights and Moral Issues 6, 8 (Sept. 9, 1994)).

164. See Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1025 (1995) (noting that the Vatican and certain Islamic groups opposed language recognizing single-parent households and the right of adolescents to family planning services and sex education).

165. In some Islamic countries, women—particularly single women—perceived as violating cultural roles have been accused of adultery or fornication and subjected to heinous punishments, including stoning, caning, and, once, burning at the stake. Amin & Hossain, *supra* note 8, at 1340.

Efforts to justify discriminatory policies in the name of tradition highlight the fallacy of relying upon cultural relativism to interpret human rights. These traditions were developed without the participation of women. If a large segment of society—women—resists the imposition of these traditions, or were foreclosed from participation in their development, the traditions lose their moral authority as cultural imperatives. They instead reflect denials of individual liberty and discrimination against a class, which are clear violations of international law. International law should not accommodate traditional norms which result in the systematic disadvantage of a segment of society. The pervasive character of this type of disadvantage presents a harm significantly greater than isolated traditional practices which may not accord with international maxims.¹⁶⁶

Tensions and ambivalence about women's self-determination are reflected in the 1993 Vienna Declaration and Programme of Action,¹⁶⁷ the final conference document which, overall, is strongly protective of women's rights. The Vienna Declaration reaffirms the universality of human rights by averring that "The universal nature of these rights and freedoms is beyond question."¹⁶⁸ Universality of human rights is explicitly emphasized numerous times in the document.¹⁶⁹ Paragraph I(5) rejects cultural relativism as a means of interpreting human rights: "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."¹⁷⁰ At the same time, the document equivocates on universality by asking States "to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence . . . including practices of discrimination against women"¹⁷¹

Most significantly, the Vienna Declaration recognizes that gender-based discrimination and violence are violations of "mainstream" human rights. Paragraph I(18) of the Declaration provides that "[t]he human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights [T]he eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."¹⁷² This language is intended to remove the perception that international women's rights are in a "special," and therefore inferior, category. The Declaration calls for "eradication of all forms of discrimination against women, both hidden and overt."¹⁷³ The Declaration further

166. Not surprisingly, women's groups at the Vienna Conference rejected cultural relativism in interpreting human rights. Sullivan, *supra* note 155, at 157.

167. Vienna Declaration, *supra* note 108.

168. *Id.* para. I(1).

169. See, e.g., *id.* pmb. *Id.* paras. I(5), I(6), I(8), I(18), I(32), I(34).

170. *Id.* para. I(5).

171. *Id.* para. II(22).

172. *Id.* para. I(18).

173. *Id.* para. II(39).

emphasizes that “[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice . . . are incompatible with the dignity and worth of the human person, and must be eliminated.”¹⁷⁴ The right to adequate and accessible health care and family planning services is specifically protected.¹⁷⁵

The Vienna Declaration specifically calls for “the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.”¹⁷⁶ The choice of the word “conflicts” creates some ambiguity because it mistakenly assumes that women in restrictive societies have sufficient power to create a “conflict.” Indeed, the struggle to recognize women’s rights is reflected throughout the document. For while it affirms women’s rights as human rights, the document repeatedly emphasizes freedom from gender-based discrimination and violence as human rights, with recurring references to the need for government action to protect women’s rights.¹⁷⁷

The relationship between cultural relativism and religious doctrine raises the potential of conflicts between women’s rights and religious freedom. Freedom of religion is protected by numerous international human rights documents.¹⁷⁸ Violations of gender equality in the name of religious freedom create some of the most intractable human rights conflicts. A state may not use religious law to justify violations of international human rights.¹⁷⁹ Further, limitations clauses in international human rights documents allow restrictions on religious beliefs or practices where “necessary to protect . . . the fundamental rights and freedoms of others.”¹⁸⁰ The conflict therefore lies not in the lack of protective language in human rights documents, but in the ambiguity associated with principles of equality and self-determination for women.

The traditional cultural roles of wife and mother bring with them attendant political, social, and economic disabilities. It is not surprising

174. *Id.* para. I(18).

175. *Id.* para. II(41).

176. *Id.* para. II(38).

177. The document urges ratification of the Convention on the Elimination of Discrimination Against Women and encourages action against the large number of reservations. *Id.* para. II(39). The Declaration “urges” governments “to intensify their efforts for the protection and promotion of human rights of women and the girl-child.” *Id.* para. I(18).

178. *E.g., Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1982); CERD, *supra* note 130, art. 5(d)(vii); Universal Declaration, *supra* note 67, art. 18.

179. The objections of numerous governments to reservations made to the Women’s Conventions because of conflict with *Shari’a* are representative. Many countries argued that these reservations were incompatible with the purpose of the Women’s Convention. Sullivan, *supra* note 116, at 807.

180. Political Covenant, *supra* note 70, art. 18(3); Universal Declaration, *supra* note 67, art. 29(2) (stating that the exercise of rights, including freedom of religion, is limited by “due recognition and respect for the rights and freedoms of others . . .”).

that many reservations to women's rights protected by international law center on rights of autonomy and equality within the domestic sphere.¹⁸¹ The roles of women in traditional cultures remain bound within the family structure where the hierarchy of male dominance is unyielding. The legal systems of many states reinforce the traditional interpretation of women's roles. Personal status law, derived directly from religious and cultural traditions, often governs the domestic sphere in areas of marriage, divorce and maintenance, child custody, and in some cases, inheritance. Thus, where civil law may define behavior in public life, women are relegated to the control of men under personal status laws. The result of this control, in most instances, is exclusion from public life.¹⁸² This exclusion occurs even in some countries where gender equity is protected by law, as a result of traditions perpetuating gender stereotypes which negate any legal change in women's status or opportunities.¹⁸³

The exclusion of women from public life highlights the inadequacy of the law in protecting women's self-determination. The discriminatory conduct remains inaccessible to legal norms. This occurs primarily in two situations. First, where legal norms govern conduct only between the state and the individual, women may be excluded from interaction with the state by traditions which relegate women to the private sphere. This can occur even where the law prohibits gender discrimination.¹⁸⁴ Second, even where the law reaches private sphere conduct, it generally functions to validate the existing power structure of male control under the auspices of traditional respect for the "family." The extension of human rights principles into private sphere activity therefore is essential to the protection of women's self-determination. The Women's Convention incorporates such an extension of state responsibility.¹⁸⁵ This expansion meets with resistance on two fronts, however. Cultural relativists object to the infusion of human rights principles into traditional practices. Classic liberal theorists may also reject regulation of the private sphere as an intrusion into areas which should be immune from state action.

181. For example, reservations taken on the grounds of conflict with *Shari'a* are based in part on the concept of "equivalent" marital rights which assign stereotypical roles to women and men under the guise of equality. Since women's domestic roles are valued economically less than men's roles as community leaders and financial controllers, they are inconsistent with social and economic equality protections guaranteed by the Women's Convention. See Cook, *supra* note 118, at 705.

182. In Thailand and Nepal, the law relies directly on religious law for resolution of personal status questions. In other countries, such as Morocco, separate legal systems exist for public and private issues; women's rights are perceived as private issues. See Lynn P. Freedman, *Women and the Law in Asia and the Near East* 17 (1991) (on file with author).

183. Mona Zulficar describes the implementation of Egyptian laws protecting equity in employment. Women remain underpaid, underrepresented in many professions, effectively prohibited from others, and hindered in their efforts to enter the work force by the lack of necessary services, such as child care, and a culture that tells them in no uncertain terms to remain in the home. Zulficar, *supra* note 164, at 1034-35.

184. See Freedman, *supra* note 182, at 17-18.

185. Women's Convention, *supra* note 73, arts. 5(a), 10(h), 12(2), 16.

Cultural ambiguity towards or resistance to women's basic rights of autonomy and self-determination permeates not only the political willingness of states to act to protect women's interests but also the very interpretation of rights themselves. Human rights principles prohibiting unjustified killing, slavery, or torture are fundamental and prevail when in conflict with other rights.¹⁸⁶ Yet numerous violations of these rights, specific to women only, are not perceived as violations precisely because they affect only women. Female circumcision, sex slavery, *sati* (the Hindu custom of burning a widow to death when her husband is cremated) are examples of gender-specific violations of human rights which are not treated with the same seriousness as the more traditional violations of these norms experienced primarily by men.¹⁸⁷

This ambiguity is highlighted particularly when the issue is reproductive self-determination. One may successfully argue that reproductive self-determination is another example of a right already secured by human rights documents but marginalized because it protects primarily women.¹⁸⁸ It is precisely this consistent pattern of marginalization, however, which underscores the transformations required to guarantee reproductive self-determination. A society that protects this right must reform not only its laws but also its judgments about women's roles and status.¹⁸⁹

In addition, whether the governmental interest has been anti-natalist or pro-natalist, States traditionally have perceived women's reproductive function as a legitimate matter of state control. The reinterpretation of reproductive behavior as individual right rather than state prerogative requires redefinition of the relationship between the woman and the State. This redefinition encompasses the full scope of political, economic, and social opportunities denied to women. Reproductive self-determination can occur, therefore, only through a paradigm shift in the state's relationship to women. In terms of state population policy, the recognition of reproductive self-determination means that population programs must become family planning programs. Voluntary family planning education

186. See Sullivan, *supra* note 116, at 817 (noting that certain core rights prevail over religious rights in all circumstances).

187. *Id.* at 818-20. See generally Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993) (analyzing how female circumcision violates various international human rights declarations and covenants); Robyn Cerny Smith, Note, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449 (1992) (examining established human rights violated by female circumcision); Carey Goldberg, *Sex Slavery, Thailand to New York*, N.Y. TIMES, Sept. 11, 1995, at B1.

188. Certainly men are entitled to reproductive self-determination and forced sterilization falls within these protections. Reproductive self-determination is of primary importance to women who bear children and often lack control over their own reproductive behavior.

189. In truth, women throughout history have sought, sometimes desperately, to control their fertility. For example, 40-50 million women obtain abortions annually, of which between 25-45% are illegal. DIXON-MUELLER, *supra* note 7, at 163. Estimates indicate that from 100,000 to 200,000 women die each year from the effects of these abortions. *Id.*; Jodi L. Jacobson, *Abortion and the Global Crisis in Women's Health*, in BEYOND THE NUMBERS 177, 180 (Laurie Ann Mazur ed., 1994).

and birth planning must replace coercive regulation. In the context of broader social policies, the incorporation of human rights principles into population policy requires the State to focus on changing the context in which reproductive decisions are made, rather than using its power to regulate directly reproductive behavior.

V. Population Policy and Women

The Cairo Programme is significant for its protection of women's reproductive self-determination through the concept of reproductive health. The designation of reproductive health as the cornerstone of population policy is an important advancement for several reasons. First, reproductive health encompasses far more than access to contraception. It includes the full spectrum of health needs associated with women's reproductive and sexual activities. Thus, reproductive health moves population policy away from the focus on women as "receptors" for contraceptive services and toward recognition of the integrity of women as autonomous individuals.

Second, the term "reproductive health" is broader than reproductive "rights." It encompasses not only self-determination but also the obligations of states to provide access to the health care and information necessary to make reproductive choices. This definition is an essential catalyst for change. Reproductive "choice" cannot be exercised in a vacuum. Access to information and health services is critical to the exercise of reproductive choice by women often denied access to educational, economic, and political opportunities offered to men. Reproductive self-determination thus extends beyond the Western construct of negative rights to encompass governmental responsibilities invoked by the principle of reproductive health. This expansion is important because in many countries women have difficulty accessing and obtaining reliable health care.¹⁹⁰

Finally, the Cairo Programme's emphasis on women's reproductive self-determination negates the validity of governmental control of women's reproductive lives for state purposes. The Cairo Programme specifies services such as pre- and post-natal care, safe delivery, and treatment of infertility, reproductive infections, and sexually transmitted diseases as necessary to reproductive health.¹⁹¹

190. Furthermore, medical research has overwhelmingly focused on male health. Vanessa Merton, *The Exclusion of Pregnant, Pregnable, and Once-Pregnable People (a.k.a. Women) from Biomedical Research*, 19 AM. J.L. & MED. 369, 370-71 (1993).

191. Cairo Programme, *supra* note 2, para. 7.6. The Programme further highlights women's reproductive health by encouraging "safe motherhood" programs. Paragraph 8.19 provides:

Maternal deaths have very serious consequences within the family, given the crucial role of the mother for her children's health and welfare Greater attention to the reproductive health needs of female adolescents and young women could prevent the major share of maternal morbidity and mortality through prevention of unwanted pregnancies and any subsequent poorly managed abortion

This provision, among others, was attacked by the Vatican as advocating abortion rights. However, the language was retained. *See id.* at 97-99.

The most significant aspect of the Cairo Programme is its unequivocal inclusion of reproductive health as a reproductive right entitled to full human rights protections. Paragraph 7.3 provides that

reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.¹⁹²

Although non-binding, this document provides a substantial foundation for furthering the legal protection of reproductive self-determination.

Finally, the Cairo Programme directs family planning programs to incorporate a human rights approach. Paragraph 7.12 emphasizes that

[t]he aim of family-planning programmes must be to enable couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so and to ensure informed choice and make available a full range of safe and effective methods.

* * *

The principle of informed free choice is essential to the long-term success of family planning programmes. Any form of coercion has no part to play.¹⁹³

This provision also criticizes family planning programs which emphasize utilitarian goals rather than human rights:

In every society there are many social and economic incentives and disincentives that affect individual decisions about child-bearing and family size.

* * *

Most such schemes have had only marginal impact on fertility and in some cases have been counterproductive. Governmental goals for family planning should be defined in terms of unmet needs for information and services. Demographic goals, while legitimately the subject of government development strategies, should not be imposed on family-planning providers in the form of targets or quotas for the recruitment of clients.¹⁹⁴

192. *Id.* para 7.3 The majority of the reservations to this paragraph focused on whether the terminology included the right to abortion. Numerous countries objected to "reproductive rights" as code words for abortion. Similarly "coded" terminology in other parts of the Programme were also the subject of intense debate and compromise. For example, all references to rights and access associated with "fertility regulation" were amended to read "regulation of fertility." The former phrase is one defined by the World Health Organization to include certain abortion-related services. The compromise language has no designated meaning. See *Summary of the International Conference on Population and Development*, EARTH NEGOTIATIONS BULL., Sept. 14, 1994, at 1, 6.

193. Cairo Programme, *supra* note 2, para. 7.12.

194. *Id.*

This language is notable because it directs population programs to focus on the specific needs of individuals making reproductive decisions. In this sense, the Cairo Programme rejects Malthusian theory.

The Cairo Programme also emphasizes the broader, more complex connections between women's reproductive self-determination, socio-economic change, and sustainable development. Paragraph 4.1 states, "[t]he empowerment and autonomy of women and the improvement of their political, social, economic and health status is a highly important end in itself. In addition, it is essential for the achievement of sustainable development."¹⁹⁵

The Cairo Programme is a consensus document and necessarily incorporates compromises in language and policy. These compromises, for the most part, exemplify resistance to women's reproductive self-determination that undermines the Cairo Programme and is inconsistent with the Women's Convention. The source of this resistance is primarily religiously derived traditions regarding women's roles. For example, the opening paragraph of the Programme's Principles requests States to implement the recommendations contained in the Programme "in conformity with universally recognized international human rights."¹⁹⁶ At the same time, the Cairo Programme accords "full respect for the various religious and ethical values and cultural backgrounds of its people . . ."¹⁹⁷ This "full respect" language provides little incentive for many countries to change their human rights or population policies. By recognizing both "universal human rights" and cultural relativism, the language provides an interpretive escape for countries which discriminate against women based on traditional practices. The protection of reproductive health, central to the entire document, is undermined by language requesting States "to meet changing reproductive health needs over the life cycle and to do so in ways sensitive to the diversity of circumstances of local communities."¹⁹⁸ Missing from this provision is language that limits accommodations of diversity to those practices which are not violative of human rights.

Chapter IV of the Cairo Programme focuses specifically on gender equity issues. It emphasizes the importance of improving the status of women in social, economic, and political spheres as a critical goal in itself,

195. *Id.* para. 4.1. The principle upon which this directive is based provides that "[a]dvancing gender equality and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes." *Id.* princ. 4.

196. *Id.* at 9.

197. *Id.* The full paragraph reads:

The implementation of the recommendations contained in the Programme of Action is the sovereign right of each country, consistent with national laws and development priorities, with full respect for the various religious and ethical values and cultural backgrounds of its people, and in conformity with universally recognized international human rights.

Id. Similar language regarding cultural relativism is included in paragraph 1.11.

198. *Id.* para. 7.5(c).

and as essential to changing reproductive behavior. The principle forming the basis for action in this chapter provides, in part, that

[t]he power relations that impede women's attainment of healthy and fulfilling lives operate at many levels of society, from the most personal to the highly public.

* * *

In addition, improving the status of women also enhances their decision-making capacity at all levels in all spheres of life, especially in the area of sexuality and reproduction. This, in turn, is essential for the long-term success of population programmes.¹⁹⁹

This paragraph captures the direct connections between gender equality, reproductive self-determination, and successful family planning. Numerous Islamic countries expressed reservations to this chapter to the extent it conflicted with *Shari'a*.²⁰⁰ Even where no reservations were taken, the language of equality was susceptible to different interpretations. For example, Iran claimed the Arabic text contained an "incorrect" translation of "equal rights" because it should translate into "men and women have equitable rights in different fields."²⁰¹ The Cairo Programme quite explicitly recognizes that men's attitudes are key to transformations of gender stereotypes because "men exercise preponderant power in nearly every sphere of life, ranging from personal decisions regarding the size of families to the policy and programme decisions taken at all levels of Government."²⁰²

The Cairo Programme affirms the family as the "basic unit of society."²⁰³ This principle also raises potential conflicts with the document's emphasis on individual rights.²⁰⁴ The definition of reproductive rights includes the "recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children . . ."²⁰⁵ While some states made reservations as to the entire chapter on reproductive health and rights, numerous countries took exception to according these rights to individuals rather than couples.²⁰⁶ Although this

199. *Id.* para. 4.1

200. Afghanistan, Jordan, Kuwait, Iran, Libya, Yemen, Djibouti, Brunei Darussalam, and the United Arab Emirates entered reservations as to any language in the document which is inconsistent with *Shari'a*. *Id.* at 136-41. Many of these reservations also took exception to any language or policies in conflict with national customs or traditions.

201. International Conference on Population and Development Department of Public Information, *International Conference on Population and Development Concludes in Cairo, 5-13 September*, Press Release POP/CAI/24, at 3 (Sept. 13, 1994) (on file with author).

202. Cairo Programme, *supra* note 2, para. 4.24.

203. *Id.* para. 5.1.

204. See, e.g., *id.* paras. 7.2-7.3, 7.14. The description of the family in chapter 5 also resulted in numerous reservations because of the language "various forms of the family." *Id.* para. 5.1. Countries making reservations as to this language were concerned it could be interpreted to mean support for family forms other than the heterosexual marriage of man and woman. See *id.* at 89-99 (reservations of El Salvador, Honduras, Nicaragua, and the Vatican).

205. *Id.* para. 7.3

206. The Vatican and Malta expressed reservations to the entire chapter. See *id.* at 147, 149. Several Islamic nations made reservations as to reproductive rights terminol-

reference to "couples and individuals" has been accepted language since the 1974 Population Conference in Budapest, the reservations demonstrate the unwillingness of many countries to view women as individuals capable of independent reproductive choices. The reservation of Egypt is illuminating, for it calls for the deletion of the term "individuals" based on its understanding that "all the questions dealt with by the Programme of Action in this regard relate to harmonious relations between couples united by the bond of marriage in the context of the concept of the family as the primary cell of society."²⁰⁷ In most States making reservations to this language, men are the decision-makers within the family. Reservations to the individual's right to make reproductive decisions directly affects women's ability to exercise reproductive self-determination.

The compromises reached at Cairo also demonstrate the international tension between those who view population policy primarily in utilitarian terms and those who insist that population programs be based upon human rights principles. Principle 5 of the Cairo Programme describes population programs as "integral parts of cultural, economic and social development, the principal aim of which is to improve the quality of life of all people."²⁰⁸ In fact, the Principles repeatedly emphasize human rights as the priority.²⁰⁹ Nonetheless, the primary population objective articulated, "to facilitate the demographic transition as soon as possible in countries where there is an imbalance between demographic rates and social, economic and environmental goals, while fully respecting human rights,"²¹⁰ presents a complex practical challenge even when a state wants to place human rights at the center of its population policy.

The articulation of reproductive rights is qualified several times by language requiring individuals, in exercise of their rights, to "take into account . . . their responsibilities towards the community."²¹¹ This language of responsibility to the community acknowledges those States which value the community over the individual. It also limits the legitimacy of the exercise of reproductive rights to those contexts in which the individual acts "responsibly" with regard to the larger social value of population

ogy deemed in conflict with the *Shari'a*. Several Latin American countries also made reservations as to this language to the extent it could be interpreted to include abortion rights.

207. *Id.* at 96. El Salvador, Libya, Jordan, Afghanistan, and the Dominican Republic also expressed similar reservations. *Id.* at 89-100.

208. *Id.* princ. 5.

209. Principle 1 recognizes that "Everyone has the right to life, liberty and security of person." *Id.* princ. 1. Principle 2 recommends that "Countries should ensure that all individuals are given the opportunity to make the most of their potential." *Id.* princ. 2. Principle 3 stresses "the human person is the central subject of development" and "the lack of development may not be invoked to justify the abridgement of human rights." *Id.* princ. 3.

210. *Id.* para. 6.3.

211. *Id.* para. 7.3. The paragraph continues by emphasizing that "The promotion of the responsible exercise of these rights for all people should be the fundamental basis for [population programs]." *Id.* The right of the individual is defined as the right to decide "freely and responsibly." *Id.*

objectives.²¹² In this regard, the Cairo Programme attempts to be too many things to too many interests. Population goals, while “legitimately the subject of government development strategies, should not be imposed on family-planning providers in the form of targets or quotas for the recruitment of clients.”²¹³ This language is ambivalent about many aspects of the relationship between governmental policy and the individual. For example, how does a government “legitimately” use demographic goals and at the same time allow individuals to “freely” decide the number and spacing of their children? The prohibition of targets and quotas in the recruitment of clients leaves open the possibility that targets and quotas may be used appropriately for other purposes.

The recent Beijing Declaration and Programme of Action, adopted by consensus at the Fourth United Nations Conference on Women in September, 1995, builds on the principles of reproductive self-determination first articulated at Cairo. The relationship between reproductive health and self-determination for women is emphasized throughout the document. The Beijing Declaration specifically asserts that “the neglect of women’s reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political empowerment. The ability of women to control their own fertility forms an important basis for the enjoyment of other rights.”²¹⁴ The provisions on women’s health address both private and public reforms necessary to assure reproductive health and protect “reproductive rights.”²¹⁵ The document recognizes how critical elimination of gender discrimination is to reproductive autonomy by calling on States to “take action to ensure the conditions necessary for women to exercise their reproductive rights”²¹⁶

The most notable provision in the Beijing Programme regarding reproductive rights includes sexual harm as an act of violence against women. Paragraph 115 explicitly notes that “violence against women include[s] violation of the human rights of women in situations of . . . forced pregnancy[,] forced sterilization . . . forced abortion, [and] coercive/forced use

212. See also *id.* para. 7.12 (“The aim of family-planning programmes must be to enable couples and individuals to decide freely and responsibly the number and spacing of their children . . .”).

213. *Id.*

214. Beijing Declaration, *supra* note 133, para. 98.

215. The Beijing Declaration asks States to

reinforce laws, reform institutions and promote norms and practices that eliminate discrimination against women and encourage both women and men to take responsibility for their sexual and reproductive behavior, ensure full respect for the physical integrity of the human body, and take action to ensure the conditions necessary for women to exercise their reproductive rights and eliminate, when possible, coercive laws and practices.

Id. para. 108(d).

216. *Id.* Several other provisions in the document address women’s reproductive health. See *id.* para. 110 (promoting research and dissemination of information on women’s health); *id.* paras. 111-12 (increased resources and monitoring).

of contraceptives"²¹⁷ This provision is important for two reasons. It is the first document to define specific reproductive behavior as protected rights. Second, it brings the violation of these rights squarely within the framework of human rights protections.²¹⁸

VI. The Role of Law in Population Planning

The utilitarian nature of population programs creates particular pressures to de-emphasize human rights. In States feeling severe pressure to moderate population growth, the blueprint of social, economic, and political development embodied in the Cairo Programme may require massive reorganization of society that States may be unwilling or unable to effect.²¹⁹ In particular, as these changes relate to improvement in the status of women, significant resistance may exist to the fundamental premises of the Cairo Programme. With regard to those States willing to improve the status of women and use human rights as the cornerstone of their population programs, many may believe that more utilitarian approaches must be implemented during lengthy transitions. Even if the State takes immediate legal and political actions to remove discriminatory practices, changes in educational, social, political, and economic opportunities cannot be realized at once.

Transitional States, therefore, should be evaluated far differently than States which evidence a systematic pattern of human rights violations. This pattern occurs primarily in two situations: States that allow Malthusian policies to dominate population policy at the expense of human rights, and States that systematically discriminate against women. Often the two overlap. If the international community is serious about population policies based on human rights principles, further steps should be taken to achieve this goal. First, reproductive rights as defined in the Cairo Programme should be explicitly defined in treaty form. These norms should be developed by reference to women's and men's reproductive needs and experiences. Codifying reproductive rights into treaty form likely will be met with significant international resistance. As described throughout this Article, reproductive self-determination is rejected by many States because it conflicts with religious or cultural traditions. Many States that subordinate women's interests to men's also will resist ceding to

217. *Id.* para. 115.

218. This provision builds on another U.N. declaration. See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item III, U.N. Doc. A/RES/48/104 (1994), reprinted in 33 I.L.M. 1049 (1994). Article 4(c) calls on states to "[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons[.]" *Id.* art. 4(c).

219. The overwhelming amount of foreign aid money in this area goes to family planning programs rather than reproductive health or improving the status of women. HARTMANN, *supra* note 30, at 114. Michael Marcus, Note, *United States Foreign Population Assistance Programs: Antiabortion Propaganda?*, 15 BROOK. J. INT'L L. 843, 851-54 (1989); Sharon L. Camp, *The Politics of U.S. Population Assistance*, in BEYOND THE NUMBERS 122, 122-34 (Laurie Ann Mazur ed., 1994).

women the decision-making authority inherent in reproductive self-determination.²²⁰ In the interim, human rights treaties that in fact protect the rights of self-determination incorporated in reproductive rights, including prohibitions against violence, should be interpreted to protect reproductive self-determination. Finally, the prohibitions on gender discrimination contained in the Women's Convention and other human rights treaties should not be undermined in the name of cultural relativism. The absence of a complaint procedure under the Women's Convention should be remedied immediately with an appropriate protocol.²²¹

Legal reform and enforcement can establish a framework for the more difficult task of changing traditions which devalue individual choice and disadvantage women. Population policy must ultimately address the reasons that women have many children. These reasons derive from patriarchal cultures and the reproductive role accorded women in these cultures. Reproductive roles are reinforced by the economic, political, and social structures created by patriarchal societies that leave women few alternatives to child-bearing. Law must function in this context to remove barriers to opportunities imposed on women and to assure enforcement and protection of rights where appropriate. This process also must redefine cultural expectations. The mere articulation of rights does little in a milieu where exercise of rights is neither understood nor encouraged. Law must function therefore to establish a context in which the meaningful exercise of rights can be secured.

The rights-based nature of this type of legal reform may have little credibility in states which are not modeled on Western rights theory. The value of universal international norms becomes critical at this point. The debate about universality versus cultural relativism is essentially a dispute over whether moral principles are universal. If morals are merely culturally derived, the principle of absolute universality is less persuasive. International human rights law, however, is premised on the perception that sufficient consensus exists on certain moral principles to support their

220. Some States will object to various aspects of reproductive self-determination, such as abortion rights or prohibitions on female genital mutilation. Elizabeth K. Spahn, *Waiting for Credentials: Feminist Theories of Enforcement of International Human Rights*, 44 AM. U. L. REV. 1053, 1058-59 (1995).

221. See *Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 44 AM. U. L. REV. 1419 (1995). Article 17 of the Women's Convention establishes the Committee on the Elimination of Discrimination Against Women. Women's Convention, *supra* note 73, art. 17. This committee is elected and charged with overseeing the implementation of the Women's Convention by States. It monitors compliance based primarily on reports submitted by States Parties. The Vienna Declaration and Programme of Action recommended that a complaint procedure be incorporated which would allow both individuals and other States to lodge complaints against a State for violation of the rights protected by the Women's Convention. Vienna Declaration, *supra* note 108, para. II(40). This optional protocol is a separate legal document which must be ratified specifically by States in order to be binding against them. A similar optional protocol already exists in connection with the International Covenant on Civil and Political Rights. Cook, *supra* note 84, at 1015.

transformation into international norms.²²² The widespread ratification of numerous international human rights treaties is evidence that this perception is not misconceived. Human rights law must be sensitive to cultural diversity in its interpretation of norms. But this sensitivity should not extend to acceptance of systematic disadvantage upon a designated group in the name of cultural relativism. Discrimination against women and denial of their status as autonomous individuals should be interpreted as clear violations of human rights norms. Enforcement of human rights obligations can function to secure change which otherwise would not occur.²²³

The effectiveness of a rights-based approach to securing reproductive self-determination for women also has been challenged by numerous feminist commentators.²²⁴ The absence of women's experiences in the formulation of international human rights norms certainly undermines the validity of those norms.²²⁵ If the law is gendered to reflect the interests of men, incorporation of women into its protections is inadequate to address the needs of women.²²⁶ The general restrictions of human rights norms to state action makes the system further suspect because women's experiences occur predominantly within the private sphere. While these observations are accurate, they do not necessarily lead to rejection of a rights-based approach to women's reproductive needs. Although the incorporation of women into the formulation and interpretation of rights discourse and social policy is the only real means of assuring a paradigm shift in relations between women and the state, human rights norms provide a powerful tool precisely because they are the dominant mode of change. The current effort to incorporate women's perspectives into rights discourse will further enhance the efficacy of such enforcement. In fact, the focus of human rights law on individual, as opposed to group, rights ultimately may favor the articulation and enforcement of women's reproductive rights. As feminists have noted, any legal emphasis on a collective standard, such as family or community, tends to validate both the male perspective and male control.²²⁷ A strong articulation of reproductive rights as personal to the individual will enhance, at least under law, women's authority and autonomy.

222. These norms include self-determination, equality, and liberty. See *supra* note 151.

223. For a discussion of the use of human rights norms in domestic courts, see Lisa C. Stratton, Note, *The Right to Have Rights: Gender Discrimination in Nationality Laws*, 77 MINN. L. REV. 195 (1992).

224. See, e.g., Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992); Fiona Beveridge & Siobhan Mullally, *International Human Rights and Body Politics*, in LAW AND BODY POLITICS 240 (Jo Bridgeman & Susan Millns eds., 1995).

225. See Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in ON HUMAN RIGHTS 83, 100 (Stephen Shute & Susan Hurley, eds., 1993) (concluding that sexual and reproductive harm to women "occurs in forms and settings and legal postures that overlap every recognized human rights convention but is addressed, effectively and as such, by none." "Abuses of women as women rarely seem to fit what these laws and their enforcing bodies have in mind . . .").

226. Beveridge & Mullally, *supra* note 224, at 261.

227. See *id.* at 248-51.

Conclusion

The role of law in population policy is two-fold. Human rights principles provide the basis for enforcement of reproductive self-determination. These principles should be strengthened through the specific incorporation of reproductive self-determination into treaties. Law must also, however, serve as an educator and motivator of social change to establish a context in which the meaningful exercise of rights can be secured. Only then can the rights protected by law be realized. Both functions must be successful for the law to effectively secure human rights norms as the foundation for population policies. The utilitarian nature of population control programs and their wide-ranging impact on a broad array of social policies make the application of human rights norms alone inadequate to assure protection.

This is particularly true in the context of reproductive self-determination for women. The full range of social and economic laws which leave women few options other than having children must be changed. Self-determination is the legal norm by which perceptions of women as womb should be challenged. At that point, reproductive self-determination will have a real value to the many women throughout the world who currently live without control of their lives or their bodies.

