

RIGHTS, RESERVATIONS, AND RELIGION;  
INTERNATIONAL HUMAN RIGHTS LAW AND THE STATUS OF WOMEN

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ABSTRACT

*While human rights law in its current form is less than fifty years old, the issues that it grapples with are much, much older. People oftentimes dismiss religion or religious norms as being out of date, close-minded, or old-fashioned, and label religious views as discriminatory in theory or even in practice. In reality, religions have been dealing with human rights issues since ancient times, and in some ways have laid the groundwork for the very modern discussions that have supplanted them. The answers that religions give, therefore, deserve at the very least a careful and respectful analysis before they are callously or carelessly cast aside or labeled as one-dimensional and discriminatory towards any particular group. As an example, this article examines the State of Israel's controversial and oft-challenged qualifications to CEDAW (the Convention on the Elimination of All Forms of Discrimination against Women), and attempts to cast them in a new light of understanding, i.e. in light of feminist critiques of the very structure of CEDAW itself.*

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## INTRODUCTION

*“We hold these truths to be self-evident, that all **men** are created equal, that they are endowed by their **Creator** with certain unalienable **Rights...**”*

-THE DECLARATION OF INDEPENDENCE<sup>1</sup>

Does God hate women?

Scholars such as Ophelia Benson and Jeremy Stangroom have asked this somewhat disturbing question<sup>2</sup> in light of religious practices that seem to infringe on women’s basic human rights, whether they be nationality laws, property laws, marriage laws, or laws that limit women's economic opportunities. Before we can attempt to answer that question though, we have to establish a somewhat more basic premise, namely the idea that God believes in human rights in general.<sup>3</sup>

Various faith groups have argued that human rights themselves are ‘ineliminably religious’ in nature, since the idea of the human person as “sacred”—foundational to human rights thinking—is itself inescapably religiously based.<sup>4</sup> The worth and dignity of the human being is fundamental to the Jewish, Christian, and Muslim traditions and could be illustrated in hundreds of ways, of which the pre-eminent one is the sense (and Scripturally supported assertion) that human beings are made in the image of God, endowed with rationality, choice, a capacity to pray, a capacity to love, and a moral consciousness.<sup>5</sup> When asked to formulate the main principle behind all of Judaic law, Rabbi Akiba famously said that it is to “Love (and respect) your neighbor as you do yourself.”<sup>6</sup> Challenged to sum up all of Jewish Law in just one sentence, Hillel the Elder confidently replied: “That which is hateful to you, do not do to your fellow. That is the whole of Jewish law, the rest is explanation.”<sup>7</sup> Christianity’s positive formulation of the Golden Rule,<sup>8</sup> as well as Islam’s, “Hurt no one so that none may hurt you,”<sup>9</sup> all share the same assumption, namely the idea that human beings are endowed with a set of natural and reciprocal rights, and that those rights deserve to be respected and protected. Assuming then that religion does believe in at least the most basic of human rights,<sup>10</sup> we can now return to our original query in regard to the rights of women in particular, asking whether or not they are respected by God as depicted in the most common religious understandings of His word.

<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>2</sup> See OPHELIA BENSON & JEREMY STANGROOM, DOES GOD HATE WOMEN? (2009).

<sup>3</sup> This paper will assume that there is in fact a God to believe in human rights.

<sup>4</sup> See MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS, 11–41 (Oxford University Press, 1998).

<sup>5</sup> Richard Harries *The Complementarity Between Secular And Religious Perspective of Human Rights*, in DOES GOD BELIEVE IN HUMAN RIGHTS? ESSAYS ON RELIGION AND HUMAN RIGHTS 19, 20 (Nazila Ghanea-Hercock, Alan Stephens, & Ralph Walden eds., 2007).

<sup>6</sup> *Midrash Bereishit Rabbah* 24:7.

<sup>7</sup> BABYLONIAN TALMUD, *Shabbat* 31a (Vilna Edition).

<sup>8</sup> *Luke* 6:31 (King James).

<sup>9</sup> SAHIH AL-BUKHARI, *Hadith* 1623.

<sup>10</sup> *I.e.*, the rights to life, freedom from aggression and persecution, and any other rights that an individual would want for their own selves.

## I. A SHORT HISTORY OF WOMEN'S HUMAN RIGHTS IN RELIGION

Although international human rights law in its current form is less than fifty years old, the issues that it grapples with are much older. Taking the Judeo-Christian approach for example, the Bible was an extremely progressive document for its era, and rabbinic Jewish Law followed suit in creatively reinterpreting difficult Biblical passages and enacting new religious legislation to improve the condition of women.<sup>11</sup> Some of the grand advances that can be attributed to this legal system include the concept of divorce, the prohibition of marital rape, female property ownership, and mandatory prenuptial agreements specifying a large alimony in the event of divorce. For hundreds if not thousands of years religious convictions were at the forefront of the development of human rights for women.<sup>12</sup>

Despite this proud history, it must be acknowledged that religious thought cannot currently be considered at the forefront of the academic, advocacy, and policy discussions of women's rights. Without the tremendous groundwork that religion laid, however, it is very possible that these debates would not exist at all. Any conflicts between religious practice and women's human rights should be approached with a sense of humility, giving the benefit of the doubt to the ultimately progressive nature of religious morality instead of immediately labeling particular practices discriminatory. When religious mores conflict with modern understandings, we must decide to what extent human rights are culturally and historically contextual, and therefore to what extent they should be culturally and historically imperialistic; that is, in what situations should modern ideas of human rights prevail over existing religious ideas.

## II. MODERN HUMAN RIGHTS OF WOMEN AND CRITICISM OF CEDAW

Having established the idea that, at least in principle, religions are not all inherently opposed to the idea of women's rights, we can now examine some of the relevant questions that are troubling for feminist human rights thinkers today. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>13</sup> defines 'discrimination against women' as:

[A]ny 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 the political, economic, social, cultural, civil or any other field.

While CEDAW is perhaps still "the most prominent international normative instrument recognizing the special concerns of women"<sup>14</sup> (insofar as it goes further than simply requiring equality of opportunity by also demanding equality of result), there are several major criticisms

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<sup>11</sup> See Babylonian Talmud, Vilna Edition, Kesubot 47a, giving married women additional rights.

<sup>12</sup> See RACHEL BIALE, *WOMEN & JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES* (1984).

<sup>13</sup> GA Res. 34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981). See also Declaration on the Elimination of Discrimination against Women, GA Res. 2263 (XXII) (Nov. 7, 1967).

<sup>14</sup> H. Charlesworth, C. Chinkin, & S. Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 631 (1991).

of the Convention, both in terms of its foundational theory and in the way that it has been implemented. This paper will attempt to look at two such criticisms in light of one another.

Scholars of feminist theory and law, such as Catharine Mackinnon, have openly expressed concern about the underlying premises of CEDAW.<sup>15</sup> They claim that the Convention takes the easy way out in defining the equality it strives for by simply requiring the removal of barriers to the rise of women to the same status as men. This ignores the social and legal structures that have given rise to those barriers in the first place. They argue that what CEDAW actually does is accept the general applicability of a male standard and promise a very limited form of equality—equality defined as the ability for women to be just like their male counterparts. Women, for instance, are given maternal leave if they want to take it, but should they exercise that right they are then still forced to watch as their male coworkers advance without them. What we should really be striving for, says Mackinnon, is a separately defined equality wherein women are given the ability to fully express themselves solely as *women*, without having to *also* compete for status in a male-centric structure.<sup>16</sup>

What Mackinnon is saying is that naïve theoretical ideas about equality may often be quite unequal in realistic application. While the phrase, “separate but equal” may not be politically correct in a post-segregation society, when Mackinnon and others ask for a standard that is *different*,<sup>17</sup> they are by definition asking for a standard that is in some ways *separate*. And yet, phrased differently, the application of a separate but equal doctrine in regards to gender is far from controversial. We might wish for a race-blind world, but we do not really want an entirely gender-blind world. Race separate restrooms, for instance, are of course taboo, but gender separate are *de rigueur*. On a practical legal front, family court judges consistently make custody decisions that favor mothers over fathers.<sup>18</sup> The mere fact that a practice discriminates in some way between the sexes does not always have to imply inequality; it can sometimes be simple recognition of legitimate and appropriate difference.

The second critique of CEDAW that this article will address stems from how states have reacted, and have been allowed to react, to and during the Convention’s implementation process. Article 28(1) permits states to ratify CEDAW “subject to reservations, provided [that] the reservations are not ‘incompatible with the object and purpose of the present Convention (Article 28(2)).’”<sup>19</sup> “Over 40 of the 105 parties to the Convention have made a total of almost a hundred reservations to its terms.”<sup>20</sup> Even a cursory investigation of the reasoning behind these reservations would reveal that they are often motivated by the conflict between various religious and secular notions of gender roles and sexual equality. Many reservations, for instance, have taken the form of limiting the reserving state’s obligations under the Convention in order to make their responsibilities towards women compatible with religious law and customs.<sup>21</sup>

Due to the fact that “no criteria are given for the determination of incompatibility,”<sup>22</sup> state parties have made both general reservations and reservations to specific provisions that have

<sup>15</sup> See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 38–39 (1987) (as quoted in Charlesworth, *supra* note 14, at 632).

<sup>16</sup> See CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS (2005).

<sup>17</sup> E.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1993).

<sup>18</sup> See Richard A. Warshak, *Gender Bias in Child Custody Decisions*, 34 FAM. CT. REV. 3, 396–409 (1996).

<sup>19</sup> Charlesworth, *supra* note 14, at 632–33.

<sup>20</sup> *Id.* at 633.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

been accepted by the Human Rights Committee yet are regarded by other state parties as incompatible with the overall object and purpose of the Convention. Critics such as Hillary Charlesworth, Christine Chinkin, and Shelley Wright<sup>23</sup> see these reservations as indicative of the inadequacy of the structure of present normative international law. Additionally, they argue that the easy acceptance and general tolerance of such reservations underscore the fact that discrimination against women is somehow regarded as more natural and acceptable than other forms of discrimination, such as race. (Mackinnon, of course, might argue in return that *difference* when applied to men and women may sometimes be desirable, which is unlikely to ever be the case when applied to race.)

### III. RIGHTS AND RECONCILIATION; A NEW LOOK AT RELIGIOUS RESERVATIONS

Where exactly does religion fit into this framework? Recall that we have already established that religious thought should not be dismissed as necessarily inherently opposed to women's rights. What Charlesworth et al. have ignored is the possibility that religious reservations, rather than just resisting a single canonical form of gender equality (the naive form that Mackinnon criticizes), may instead be expressing alternate visions of equality. It is even possible that these religious ways of thinking could include ideas that the general CEDAW community could benefit from incorporating or at least considering.<sup>24</sup> As a caveat, I am not making the claim that *all* or even *most* religious reservations are expressing alternate versions of equality, just that some are. For the scope and purposes of this paper I will explore the specific example of one such reservation, the State of Israel's first reservation to CEDAW.

Article 7 of CEDAW states that:

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

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

Israel reacted to that section by stating that:

The State of Israel hereby expresses its reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel. Otherwise, the said article is fully implemented in Israel, in view of the fact that women take a prominent part in all aspect of public life.<sup>25</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Although I suspect that it may be the case, I am not claiming that all or even most such religious reservations are capable of doing so, just that there are definitely some.

<sup>25</sup> Declarations and reservations by Israel made upon ratification, accession or succession of the CEDAW, available at <http://sim.law.uu.nl/SIM/Library/RATIF.nsf/f8bbb7ac2d00a38141256bf00342a3f/3ac792b859724e94c12568b90046152f?OpenDocument>.

At first glance, this reservation will make any women's rights activist uncomfortable. It appears to endorse a fundamentalist outlook that views women as functionally unfit to hold positions of religious authority. However, closer examination of the reasoning behind the reservation may result in a more nuanced response. This article will attempt to demonstrate that underlying the text of the reservation is a sincere attempt to assuage Catharine Mackinnon's very genuine concerns. When read in the proper context, it is meant to ensure that in being handed their equality women are being valued as *women*, not simply being given the permission and ability to go out and act like men. It will also demonstrate how such an apparently discriminative reservation may actually be in consonance with the spirit of the Convention. Article V of the Women's Convention reads as follows:

States Parties [shall take all appropriate measures]:

- (a) To 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 superiority of either of the sexes or on stereotyped roles for men and women;
- (b) They are also required to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.<sup>26</sup>

The reason that Article V desperately needed to be written is because the idea that there are specific definitions for each sex has been deeply engrained in Western society for so long that there are specific gender role definitions for each sex. It is fair to say that, at least until recently, it was a commonly held sentiment that a woman's ideal place was in the home and as a mother. Even Mackinnon must begrudgingly admit that in some areas, such as maternity, in order to combat discriminatory practices the Convention does not just ignore the difference between men and women, thereby allowing women to simply act the same as men. Here, the Convention must ask men to make a positive change in how they think and how they act (albeit in a weak manner with little structural guidelines to follow while attempting to change years of deep-rooted behavior). The Convention tells men that giving birth and rearing children are not just the responsibility of the mother; society should recognize that common responsibility and, to the greatest extent possible, share in that task while compensating instead of subtly punishing (and/or holding back) women for the time and the work that they put in.

Jewish law has recognized the tremendous importance of Article V for well over two-thousand years. One particularly striking aspect of Jewish law (as defined by the Torah, the Talmud, and the Shulkhan Arukh—the normatively binding codification still followed by Orthodox and Conservative Judaism—is the very noticeable and deliberate absence of a specific role definition for women. Had the Law intended to preclude from women all roles but that of mother, it could easily have done so. The Law clearly prescribes the obligations of a husband to his wife and vice-versa, and the obligations of parents to children and vice-versa. It could have made mandatory for women not only marriage and procreation but also the entire range of household duties which would have defined an exclusive role for them. The law as it stands

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<sup>26</sup> GA Res. 34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981). *See also* Declaration on the Elimination of Discrimination against Women, GA Res. 2263 (XXII) (Nov. 7, 1967).

though is that women are *not* obligated to marry or procreate,<sup>27</sup> nor to perform any household duties if they choose not to do so.<sup>28</sup>

On the other hand, while Jewish law does not then define a “proper” or “necessary” role for women, it does assume that the continuation of a people depends upon the voluntary selection by at least some women of that role of mother. Recognizing that women could easily be disadvantaged by that position, the Law attempts to even the playing field somewhat and encourage the exercise of that choice. It does so by religiously incentivizing motherhood, making sure that women who choose to enter motherhood are societally appreciated and socially compensated to the greatest extent possible, just like Article 5(b) would have it. In practice the civil and religious demands made upon Jewish women by Jewish law are relaxed in order to assure that no legal obligation could possibly interfere with a domestic role; if a woman does in fact elect to discover some aspects of her own personal fulfillment in the act of becoming a mother, no law or policy will stand in the way of her performance of that sacred trust.

The primary category of commandments from which women were exempted for this reason were those which would either require or make urgently preferable a communal appearance on their part.<sup>29</sup> As noted, the underlying motive of exemption is not the attempt to unjustly deprive women of the opportunity to achieve religious fulfillment. Rather, these exemptions are a tool used by the Law to achieve a particular social goal, to assure that no legal or social *obligations* would interfere with the selection by Jewish women of a role which was at least temporarily centered in the home. Male members of the community are required to pick up the slack by ensuring that there are in fact quorums that regularly meet, and that the communal responsibilities in general are constantly being fulfilled. It is vital to emphasize that despite the exemptions discussed above, the mother role, although a protected role, is not the mandated or exclusively proper role, and that women are also free to participate communally if they choose to do so.

What leads us back to the uncomfortable situation of Israel’s reservation are the technicalities of dealing with an internally consistent system of law. In Jewish law, any exemption (male or female) from religious obligation necessitates a balancing loss in religious power.<sup>30</sup> The exemption that women have from the commandment to participate in certain forms of communal service, for example, results in their disqualification from being counted towards the quorum necessary to engage in such worship.<sup>31</sup> Similarly, in civil matters, the fact that women are relieved in certain situations of the obligation to testify<sup>32</sup> results in their inability to be part of the pair or team of witnesses who bind the fact-finding process of the court.<sup>33</sup> Such

<sup>27</sup> Mishna Yevamot 6:6.

<sup>28</sup> Maimonides, Code, Laws of Marriage 12:4 *cf. Keset Mishna, Ibid.*, 21:10; and Tur, Even HaEzer, ch. 80.

<sup>29</sup> Saul Berman, *The Status of Women in Halakhic Judaism*, 14:2 TRADITION 5–28 (1973).

<sup>30</sup> See Babylonian Talmud, Kiddushin 31a. “Greater is the one who is commanded and fulfills than the one who fulfills without having been commanded.”

<sup>31</sup> Jewish Law mandates that for certain rituals each member of the quorum must stand equal in obligation and capable of fulfilling the obligation on behalf of the entire quorum. See Babylonian Talmud, Berakhot 20b. The absence of such mutuality, or equality of obligation, prevents the constitution of an ‘obligated community,’ and prevents the individual with lesser obligation from fulfilling the commandment on behalf of one with a different and greater degree of obligation.

<sup>32</sup> Lev. 5:1, Sifre to Lev., ch. 11 law 3, Sefer Hachinuch, 122, indicating exemption from obligation. *cf.* Minchat Chinuch ad. loco.

<sup>33</sup> Tosfeta Shavuot 3:5. Maimonides, code, Law of Witnesses 5:1-3 and 9:1–2, indicating emphasis on disqualification from the “kat” (pair or team) rather than general loss of reliability.

exemptions and disqualifications are not limited to women; for example a Jewish king may not participate in judicial proceedings since he is exempt from being prosecuted by a religious court.<sup>34</sup> The exemptions that women are given from religious obligations are meant to foster women's ability to productively choose their roles and to spread responsibility more evenly as opposed to simply telling them (as Mackinnon would hate) to be men *as well as* women, to give birth *and* not miss a day of work or worship. However, whatever the motivations, an internally consistent Jewish law system cannot avoid the technical legal consequences of exemption. The inability of the court to compel a woman's presence results in the correlative loss on the part of the woman (in certain situations) of the power to compel the court to find the facts in accordance with her testimony, or to serve as a judge and compel others to appear.

Seen in this light, the religious rules that lead to Israel's reservation to Article 7(b) are not intended to discriminate against women. On the contrary, these rules arise from a particular religious vision of separate but equal gender norms—a vision that allows women the freedom to be fully effeminate and not just occupy male space with identical male communal responsibilities. This is a vision that is likely different than that of the authors of CEDAW, but it cannot be called inherently biased. As Mackinnon explains, and as the necessity of having Article 5 makes clear, it is practically impossible to construct a realistically gender-neutral society. Gender equality, unlike race equality, must inherently involve some aspects that are separate and unequal, and which must then be balanced carefully against each other. As we noted above, almost everyone agrees to some level of gender discrimination in our society. People should have the right to draw that line for themselves, and what the law can and should do is support people's right to draw that line wherever they think it should be rather than enforce a canonical vision of equality.

#### CONCLUSION

In practical application, we must admit that Israel's reservation does, in fact, discriminate against women. Any attempt to foster a particular social goal through class legislation, lumping together and defining the status of an entire segment of the community universally and extrinsically by law rather than by contractual agreement, is going to be unduly restrictive of individual self-expression. The spirit of total equality would say that this should be an individual choice. Every woman should have the right to decide that she will participate in society in any way that she wants, and forcing her out of an option based solely on gender provides neither equality of opportunity nor equality of result. However, the problem with Israel's law is not that the underlying religious ideas are discriminative, but that religion itself should be an opt-in choice. The problem is that the lack of a separation between church and state in Israel precludes that from happening. No country tells the Catholic Church that they must have female priests, because any woman who wants to can decide for herself whether or not she believes in the Catholic vision of separate but equal gender roles. The existence of conflicting religious and secular visions does not discriminate against women if religion is a matter of personal choice. Israel's problem is not that it discriminates against women. Israel's problem is that it has a state religion, and makes what should be a matter of personal choice into a matter of secular law.

The conclusion that I would like draw is that simply labeling God, religion, or particular reservations as automatically discriminatory towards women may miss the subtleties of well-

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<sup>34</sup> Mishna Sanhedrin 2:2.

reasoned religious analysis, especially in light of the feminist critiques of CEDAW (and international human rights instruments in general) proposed by Mackinnon. If we do not want women to simply become men then we need to offer them the option (not imposed) of a different path and a different balance. I would also like to suggest that Charlesworth Chinkin and Wright might embrace at least some of the reservations for what they are—imperfect attempts to draw a line and find a balance wherein men and women are both able to live their lives to the fullest. In response to our original set of questions, God and religion do not hate women or human rights; they simply offer alternate visions of equality which individual men and women should be free to adopt or discard.

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