

VI. EFFECTS OF THE "WOMEN'S CONVENTION"

The Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) has been fully introduced above (see Chapter I, E), and has provided a pervasive reference point to this Report. Because of the Convention's wide support among both more and less populated Commonwealth Member States (see Appendix to Chapter I) and women's special interests in reproductive health care, the Report is obliged to conclude by giving further consideration to its provisions and spirit.

It may be apprehended that a legal system or an international Convention that emphasizes rights of women does so by relegating the rights of others, such as men, children or families. The competition of interests may be real; institutions claiming to be "pro-family" or "pro-child" often promote their philosophies at the cost of women's status and legal autonomy in their communities. Modern world-wide evidence shows, however, that many of the world's families are led economically, educationally and morally by women. Mothers' loss of health or of life itself through reproductive accidents or the cumulative burdens of regular childbearing endangers the welfare of their children and families. In parts of rural Africa such as Zimbabwe, over a half of households are headed by women (Women of the World: Sub-Saharan Africa (1984) U.S. Bureau of the census and U.S. Agency for International Development (A.I.D.) at p. 114). In Jamaica, for instance, about one in three households in both urban and rural areas is run by a woman (Women of the World: Latin America and the Caribbean (1984), ibid. at p. 123). Accordingly, protection of women's health protects their dependents and families.

The goal of the Women's Convention is to promote women's interests only to the point of equality with men. Men face relatively few hazards to health associated with reproduction. Both fertility control, through contraception or vasectomy, and fertility promotion through sperm donation place men at little risk. In contrast, the health risks women take through pregnancy and childbirth, chemical and mechanical contraception, sterilization, abortion and preparation for artificial conception are considerable. The law cannot change the biological facts of reproductive life, of course, but it can maintain hazards at no more than the purely biological, and not add to these through legal obstacles to access to safe services designed to afford the same degree of reproductive control to women that men exercise.

The Women's Convention defines the duties binding upon States Parties, and making more concrete the measures that such Parties need to take by the year 2000 to achieve equality between men and women are the lengthily named Forward Looking Strategies of Implementation for the Advancement of Women and Concrete Measures to Overcome Obstacles to the Achievement of the Goals and Objectives of the United Nations Decade for Women

for the Period 1986 to the Year 2000: Equality, Development, Peace (the Strategies), prepared by the U.N. Secretariat's Branch for the Advancement of Women. The Strategies were endorsed by the U.N. General Assembly in December 1985 and the U.N. Commission on the Status of Women is responsible for monitoring their implementation.

It has been seen above that Article 12(1) of the Women's Convention requires that States Parties act to eliminate discrimination against women in the field of health care:

"... in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

Article 14(2)(b) similarly requires that women particularly in rural areas:

"... have access to adequate health care facilities, including information, counselling and services in family planning."

The Strategies provide the detail in paragraph 155 that:

"Appropriate health facilities should be planned, designed, constructed and equipped to be readily accessible and acceptable. Services should be in harmony with the timing and patterns of women's work, as well as of women's needs and family planning services should be within easy reach of all women Considering the unacceptably high levels of maternal mortality in many developing countries, the reduction of maternal mortality from now to the year 2000 to a minimum reducible level should be a key target for Governments and non-governmental organizations including professional organizations."

Examples of practices that inhibit equal access to family planning services include permitting husbands but not wives to obtain contraceptive agents or devices without spousal consent, permitting unmarried men but not unmarried women to obtain contraceptive services, conditioning the availability of sterilization on the number of caesarian section deliveries a woman has experienced and on such rules as the rule of 80 (sometimes the rule of 100) that makes female sterilization available only when the number of a woman's living children multiplied by her age exceeds 80 (or 100).

These requirements are discriminatory on their face when they make distinctions on the basis of sex that impair women's rights to equal access to family planning services. It has been

seen that Article 1 of the Women's Convention defines discrimination 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 ... of human rights and fundamental freedoms ..." (emphasis added).

It might be argued that these provisions would be satisfied by denial of access to contraceptive means to both married and unmarried men and women. This policy may appear nondiscriminatory on its face, but it would in fact discriminate against women because it would imperil their health more than that of men. Its general denial of basic human rights recognized in general international conventions and in national constitutions of very many Commonwealth Member States would be more easily evaded by men, and in any event would leave their general health relatively unaffected.

Conditioning female sterilization on the number of prior caesarian deliveries a woman has had makes women's autonomy dependent upon surgical history in a manner not applicable to men, whose entitlement to vasectomy is not made legally or otherwise dependent upon the reproductive history of their wives or of other mothers of their children. Underlying the condition in some cases is a legal duty to satisfy a health reason for the procedure. In Ghana only medical reasons justify sterilization, and in Malaysia medical or socioeconomic reasons are needed. (See J.A. Ross, S. Hong and D.H. Huber, Voluntary Sterilization: An International Factbook (1985) at p. 19). So-called rules of 80 or 100 are more paternalistic, being based on the view that, unless a woman has a number of children, she will be more distressed if, after sterilization, she suffers loss of a child. While the intention may be benign particularly in areas with high rates of child mortality, it responds to a crude stereotype that women must be protected against the consequences of their own considered choices. Tolerance of this stereotype may violate Article 5(a) of the Women's Convention, which condemns practices based on stereotyped roles for men and women.

Another offensively stereotypical provision, with seriously adverse implications for women's reproductive health, is that permitting female marriage at an age, usually of two years, lower than that permitted for males. This may reflect physiological differences in that females mature to reproductive capacity earlier than males. It also indicates, however, that women do not require the additional time that men receive for training to earn a livelihood outside the home and to prepare for parenthood. This reinforces a vision of an inferior, dependent

and servile role for women. Further, adolescent pregnancy and childbirth pose increased risk of death and poor health with the prospect of being pregnant frequently. The harmful effects on mothers of early pregnancy and close birth spacing have been noted above (see Chapter I, B). The cost of ill health and of limited opportunities to women's "full development and advancement" (Women's Convention, Article 3) is self-evident.

Limited educational opportunities for women are also recognized by the Women's Convention to affect reproductive and infant and child health. Lower literacy rates in women impair their ability to learn through reading, and therefore to acquire knowledge in the privacy of their own homes at times of their own choosing, governed perhaps by demands of their young children. Their dependency upon attending school in their early or mid-teenage years in order to learn to read is frustrated where school policies exist that expel unmarried students found to be pregnant, and where school authorities do not expect or require married students to attend. Experience in Swaziland may be generalized that "schoolgirls who get pregnant at school now get to be expelled and usually no punishment is given to the schoolboy anymore" (V. Dlamini, "Women and The Law and Health" in R. T. Nhlapo, Women and the Law, Report of Two Seminars in Swaziland, 1983, 66 at p. 75). Article 10 of the Women's Convention requires elimination of discrimination against women in the field of education, and in paragraph (f) mandates "The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely." Paragraph (h) of Article 10 expressly requires States Parties to ensure:

"Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."

This may be taken to refer not only to negative family planning information and advice, but also to planning when to have children in order to maximize the potential for maternal and infant survival and good health. Basic data education authorities may use to fashion educational policies are presented in the Strategies, which urge governments to "develop policies to encourage delay in the commencement of child-bearing" (para. 158). Equal marriage ages for males and females and requirements for equal school attendance and for appropriateness of the school syllabus might seem to be minimum conditions of such policies.

States Parties to the Convention are obliged to submit reports for consideration by the Committee on the Elimination of Discrimination Against Women "on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the ... Covenant and on the

progress made in this respect" (Article 18). A report shall be submitted within the first year after the State Party becomes bound by the Convention, and thereafter at least every four years, and further upon request of the Committee. Reports are expected to identify progress towards achievement of the Convention's goals, but may also indicate factors and difficulties affecting the degree of fulfilment of obligations the State Party has encountered. The Committee's view is that, in order for women to be equal to men in law and in fact, women must have convenient access to all methods of family planning. Of the Commonwealth countries that were required to report by May, 1986 (see Appendix, Chapter I), only Canada has submitted a report that the Committee has addressed (see Government of Canada, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Reference Document (1985)). The Committee asked questions on family planning, pre-natal and post-natal counselling and expressed concern about the legal provision of abortion services particularly in the case of contraceptive failure (see ibid. at pp. 189-193).

A special challenge under national anti-discrimination laws compatible with the Women's Convention that centrally affects reproductive health concerns safety in the work-place. A number of occupational health and safety laws provide that pregnant women in jobs presenting congenital risk to the unborn may be required to work elsewhere, and some employers may screen out women from positions believed to present teratogenic and mutagenic risks, or dangers to infants workers are breast-feeding. Evidence increasingly shows men also to be at risk from employment hazards to reproduction. The inspiration to protect unborn and unconceived children often results in women being denied employment opportunities, promotions and employment in better paid work. The best approach, of course, is to make the work-place safe for both sexes and their future children. It appears that, in order to maintain jobs and enhance employment prospects, some women have undertaken voluntary sterilization. A just balance between competing interests of employed women and unborn children may be to ensure that, when a woman is denied an employment opening due to reproduction risk, or is given a "protective re-assignment", she is offered an alternative position with equivalent status, pay and prospects (see K. Swinton, "Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health" (1983), 33 Univ. Toronto Law J. 45). How fairly this balance operates can be monitored under the Women's Convention, particularly when the Committee is perceptive in its reading and questioning of States Parties' reports.

As a Convention governed by principles of international treaty law, and as an instrument of councils of the United Nation's Organization, the Women's Convention is to be interpreted and applied in light of settled principles of law and practice.

Many of its problems are not specific to its subject-matter. Its purpose fashions a number of its problems, however, because it is designed to affect quite fundamental and deeply felt values in many jurisdictions. Where discrimination against women is intuitive in a country and/or rationalized in terms of divine revelation or of custom basic to survival of an historic and treasured culture, effects of the Convention are likely at best to be postponed. In order to accommodate national peculiarities, international treaties often invoke the legal feature of permitting ratifying or acceding States to make explicit reservations. That is, they may agree to be bound by the general provisions and purpose of a Convention, but add the reservation that their agreement excludes a particular obligation otherwise arising under the Convention.

Many Conventions expressly permit reservations to be made when new member States purport to join them. Article 28 of the Women's Convention provides that the U.N. Secretary-General shall receive and circulate reservations made at the time of ratification or accession, and, compatibly with the general law of treaties, sub-section 2 of the Article provides that:

"A reservation incompatible with the object and purpose of the present Convention shall not be permitted."

One State Party may make a reservation to which another objects, thereby raising difficult issues to be legally resolved according to principles of both settled and evolving jurisprudence. A difficulty in operation of the Women's Convention lies in determining whether a reservation that excludes a State Party's obligation to apply the Convention in the area of family law or, for instance, reproductive health, is compatible or incompatible with the Convention. In the absence of an authoritative judicial ruling or recognized custom, no reliable answer can be given in the abstract. Evolving practice must be prospectively monitored to see how a States Party proposing such a reservation is regarded and treated by other States Parties. The future operation of the Convention will in due course define its elasticity.

The Commonwealth Secretariat's commitment to the terms, machinery and spirit of the Women's Convention is evidenced in its preparation of an accession kit. This is designed to assist Member States which have not already ratified, acceded to or signed the Convention to learn its provisions, and to make their sovereign legal commitment to the Convention, and thereby to the equal rights of women with men in their own populations. Further, the kit will serve as an educational instrument through which interested groups in Commonwealth countries may learn of the Convention's goals and procedures. Written in non-legal language, the kit offers an introduction to the Women's Convention's procedures by which Commonwealth

Member States may make and show their dedication to women's welfare, and thereby to welfare of children and families dependent on women.