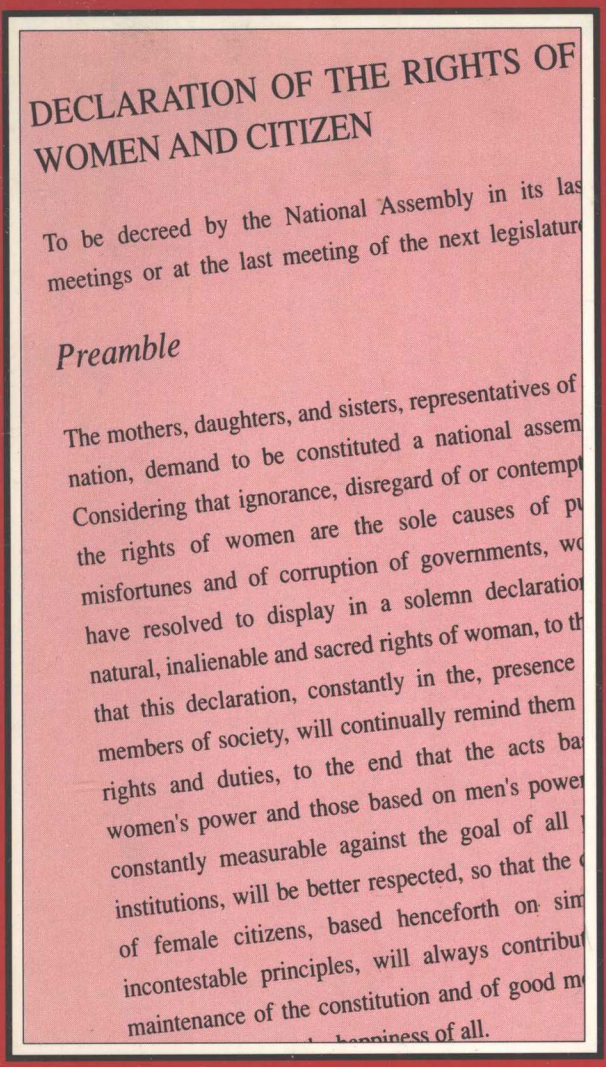
ELIZABETH F. KINGDOM


DECLARATION OF THE RIGHTS OF WOMEN AND CITIZEN

To be decreed by the National Assembly in its las
meetings or at the last meeting of the next legislatur

Preamble

The mothers, daughters, and sisters, representatives of
nation, demand to be constituted a national assem
Considering that ignorance, disregard of or contempt
the rights of women are the sole causes of pu
misfortunes and of corruption of governments, wo
have resolved to display in a solemn declaratio
natural, inalienable and sacred rights of woman, to th
that this declaration, constantly in the, presence
members of society, will continually remind them
rights and duties, to the end that the acts ba
women's power and those based on men's power
constantly measurable against the goal of all
institutions, will be better respected, so that the
of female citizens, based henceforth on sim
incontestable principles, will always contribut
maintenance of the constitution and of good m
happiness of all.

EDINBURGH LAW & SOCIETY SERIES

WHAT'S WRONG WITH RIGHTS?

Problems for Feminist Politics of Law

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ELIZABETH KINGDOM

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The Edinburgh Law and Society Series promotes scholarship that makes a significant contribution to exploring the inter-relations between legal and social spheres. It publishes empirical and theoretical work informed by classical traditions and contemporary developments in the social sciences, philosophy and political theory.

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A Note from the Series Editors

We are very pleased that Elizabeth Kingdom's *What's Wrong with Rights?* will launch the Edinburgh Law and Society series. Elizabeth Kingdom's contributions to British debates on feminist use of rights are increasingly cited, not only for what she has to say on rights discourse as such, but also because of the high standard of theoretical analysis she has long brought to feminist accounts of law. Further, in the present context of debate about feminist jurisprudence, her views offer a quite different perspective from those of Catherine MacKinnon and Carol Gilligan.

This volume brings together much of Elizabeth Kingdom's work on the subject, together with some previously unpublished pieces. Many of the pieces are on the subject of reproductive rights, an area often overshadowed by the focus on discrimination, or considered solely in relation to abortion. The issues, specific and general, are rigorously stated and argued, and legal matters are dealt with in ways that, we believe, will be accessible to lawyers and non-lawyers alike. We feel this is an important book.

Beverley Brown
Peter Young
Series Editors

Preface

The first of the pieces appearing in this collection was published in 1980, and the last was completed in 1990. For the greater part of those ten years, pointing out the dangers and limitations of essentialist theories of law and the pitfalls of rights discourse did not attract feminist, socialist or popular, never mind academic support. Indeed, the very use of terms such as essentialism and rights discourse, even its seemingly less theoretically contentious equivalent, rights talk, could attract hostile comment. It was clear to me, however, that adherence to the familiar discourse of rights was less of a help than a hindrance in the articulation of feminist objectives. Happily, in the latter part of the 1980s, some feminist academics and activists involved in legal and political struggles recognised the strength of this position and became increasingly alert to the need for caution in the use of rights talk.

This change in feminist politics of law is welcome. But rights discourse flourishes in legal and political debates and disputes. It is ironic, then, that just at the time when some feminists are becoming aware of the need to identify alternative ways of constructing feminist politics in relation to law, so they have to analyse how feminists can respond to political initiatives which are ineluctably framed in terms of rights. It would be a crude mistake, therefore, to suppose that feminists should now implement a mechanical search-and-destroy strategy for instances of rights discourse. Although the term rights discourse is a singular noun and may on that account suggest that it refers to a homogeneous legal–political vocabulary, it is used in this book in its proper sense – to insist that the discourse of rights is neither univocal nor unified, and that it refers to diverse formulations and practices. Feminists must acknowledge that diversity in their vigilance for the anti-feminist potential of rights discourse. Indeed, the specific and complex nature of appeals to rights constitutes a recurring theme of the essays in this book.

All the essays were produced either for publication or for a conference and can therefore be read on their own, but they do comprise a coherent collection. The opening essays show how essentialist theories of law and

general concepts of rights are theoretically flawed and constitute an obstacle to working out feminist policies and objectives. This theme is further substantiated by scrutiny of the inauspicious career of rights talk in the essays dealing with the specific issues of abortion, sterilisation and cohabitation. In the course of these essays, strategies for the reconceptualisation of rights are offered for consideration, with particular regard for how formal declarations of rights pose special problems for feminists.

These essays all address legal issues of importance to feminists, but it will be apparent that the collection is neither a legal textbook nor a feminist handbook. Some of the essays are, of course, law-dependent, but none of them pretends to be a comprehensive account of the current state of the law in a particular field. For this reason, I have not attempted to bring up to date every aspect of law which I have touched on since 1980. I have changed legal references where they are blatantly out of date and where my argument accordingly needs fresh support, and sometimes I have replaced the original examples with more topical illustrations. But the book is primarily intended to exhibit some of the specific ways in which feminist interventions in legal politics have been hampered by inadequate theories of law and of women's position in relation to law. Accordingly, feminists will be disappointed if they hope for a primer on feminist legal struggles or for instruction in how to criticise law if you are a feminist. In that respect, the collection is not a book of feminist dogma. On the contrary, my aim is to show that it is certain types of dogma – some feminist, others not – that have delayed recognition of the fact that appeals to rights cannot be assumed to advance the cause of feminist politics in relation to law and that their use may be serious tactical error.

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Table of Cases

Table of Statutes

Contents

Introduction

The title of this collection of essays sets up the paradox that there is something wrong with rights. This is more than a verbal paradox. To put the paradox in terms of strategy, this book addresses the question of whether the invocation of rights should continue to be a feature of feminist politics of law. The question constitutes an immediate dilemma for feminists. On the one hand, feminists have traditionally made their political demands in terms of rights, and their achievements have formed the basis for much contemporary feminist politics of law. Furthermore, other radical and progressive thinkers have recently intensified campaigns for rights, for example in their support for Charter 88 and for a UK Bill of Rights. On the other hand, feminist academics and activists are becoming sceptical about the usefulness of traditional appeals to rights for the achievement of feminist goals in relation to law (cf. Smart 1989: 138–59; Women's Reproductive Rights Campaign (WRRC) 1990: 4)

The essays in this collection give reasons why feminists should hesitate before expressing their political strategies in terms of rights. Appeals to rights, however attractive at first sight, frequently conceal inadequate theories of law in relation to women's social position. Typically, these theories are essentialist. In this book, essentialism has a very simple meaning, and it is best explained initially through a conventional feminist understanding of essentialism.

Rosemary Pringle has provided a brief but useful account of the type of feminist essentialism 'which takes for granted the unity of both gender categories and the law'; this essentialism 'pits masculine law against the unity of women and of feminist law' (1990: 229). One example is the theory that law systematically oppresses women by giving expression to male interests. This type of feminist legal essentialism would certainly be included in the meaning of essentialism used in this book, but it would not exhaust it. Here essentialism refers to any theory of law which seeks to identify the essential feature or features of law. For example, it would refer to theories of law which claim it to be the revealed word of God or the embodiment of liberal moral values, and it would refer to theories of law

which claim it to be essentially rational, and to theories of law which claim it to be essentially neutral. Quite simply, it refers to theories of law which claim it to be *essentially* anything. In this book, it refers in particular to all those theories of law which are reductionist in that they attempt to reduce law to non-legal elements. The main examples considered here are classical Marxism, where law is reduced to economic relations, and feminist theories according to which women's oppression by law is attributed to some general principle, such as patriarchy or male bias.

Chapters 1 and 2 exhibit the main problems of these essentialist theories, both in relation to the Marxist reduction of law to economic relations and in relation to the analogous feminist reduction of law to patriarchy or to male bias, theories which have been of great importance for socialist feminists in particular. First, the references to economy, to patriarchy and to male bias are so abstract and general that far from explaining specific events and outcomes in legal contexts, they explain them away by reference to non-legal elements. In the feminist theories, the logic of these essentialist theories is an opening tirade against patriarchy or male bias followed by a catalogue of legal specimens. By diverting attention from the specific workings of the law, the generality of these theories becomes an obstacle to working out the direction and detail of those feminist policies and objectives which have to engage with legal mechanisms. A further effect of the generality of these theories is that they cannot prevent the appeals to rights which they generate from being used in ways which run counter to those feminist objectives.

Substance to this last problem of essentialist theories is afforded by scrutiny of the inauspicious career of rights talk in the chapters on specific legal–political issues: abortion, sterilisation, cohabitation, the use of the distinction between equal and special rights in the context of the legal regulation of human reproduction, and formal declarations of rights. Chapter 3 shows how feminists' demand for a woman's right to choose has been situated in the essentialist frameworks of Marxist and feminist theories of reform and revolution, so that the demand cannot operate in the sphere of practical feminist politics of law. In the Note to Chapter 3, an analysis of 'the Bobigny affair' is an object lesson on the problems of relying on rights discourse. The burden of this Note is what I call 'the attraction of opposite rights', the phenomenon whereby the invocation of one right attracts the invocation of another – irreconcilable – right, occasioning interminable rights wrangles. Feminists are increasingly alarmed at the way in which the politically powerful slogan of a woman's right to choose has facilitated the placing of the abortion issue squarely on the territory of women's rights *versus* men's (fathers') rights and fetal rights. Chapter 4 and the Note to Chapter 4 provide another salutary warning against the careless use of rights discourse. Here, in the context

of legal attitudes towards sterilisation for contraceptive and eugenic purposes, I follow the vicissitudes of what might appear to be the feminist-friendly human right to reproduce and reveal how its invocation harks back to some less than friendly, indeed, atavistic rights.

Chapters 5 and 6 are about socialist and feminist politics of cohabitation. In Chapter 5, my main purpose is to argue for the legal recognition of cohabitation contracts. In keeping with the rubric of this book, I am more concerned to identify the complex legal materials which have to be assembled to develop a socialist feminist politics of cohabitation than to pitch into the game of moral claim and counter-claim for and against cohabitation contracts. Indeed, I conclude that, contrary to what might be expected, there are positive dangers in arguing for cohabitation contracts in terms of the moral value of equality, in terms of equal rights. Problems with equality, and specifically with equal rights claims, emerge in Chapter 7. This chapter is concerned with some of the rights which are claimed in the context of birth, pregnancy and parenthood. I examine the way in which feminist disillusion with demands for equal rights in the context of American constitutional politics has produced a strategy which focuses on the claim that differences between men and women warrant not equal rights but special rights. My argument is that this strategy, far from being a remedy for the problem of equal rights, is its redescription, and that feminists should look elsewhere for ways to enter feminist policies into formal declarations of rights.

Different problems for feminists in connection with formal statements of rights are discussed in Chapters 6 and 8. Chapter 6 makes the key point that in English law rights are not given, not directly conferred, but constructed. Accordingly, I review some of the different ways in which 'cohabitation rights' – a bogus term, really, since there is no clearly defined set of such rights in English law – are constructed. With its critique of the distinction between rights and discretion and its argument for minimising the scope for judicial discretion, it paves the way for Chapter 8. Chapter 8 deals with feminist responses to formal declarations of rights. It reviews some powerful arguments for why feminists should not become embroiled in the legal politics of formal declarations of rights, not least the experience of feminists in other countries. But the chapter ends on the suggestion that there may be political arguments for supporting the campaign for a UK Bill of Rights which override the dangers of rights discourse in this context.

Now, it might seem that the conclusion to Chapter 8 flatly contradicts my argument in the preceding chapters. My constantly reiterated warnings to feminists about using rights discourse now look like crying wolf. For of course it would be an example of essentialism to claim that rights talk necessarily obstructs the advancement of feminist politics, and that it

should on that account be abandoned. But none of the essays proposes a total embargo on appeals to rights. All the essays commend caution in the use of rights talk and thorough analysis of how rights have featured – their past and present excursions and pathologies – in the legal–political contexts of importance to feminists. Chapter 8 is important, then, not only because it deals with a neglected area of feminist politics of law in the UK, but also because its conclusion draws attention to the fact that feminists cannot always choose the political ground of their struggles. Depending on the legal–political contexts, feminists may have more or less room for flexibility with respect to the terms in which they present their policies. For example, they would find it much easier to abandon their appeal to a woman's right to choose than to persuade nation states and international lawyers of the shortcomings of rights discourse in the context of formal declarations and conventions of rights.

There is no snap answer, then, to the question of whether rights should continue to be used in feminist politics of law. Rights may well feature ineluctably in certain legal-political contexts, and it is so convenient to use the phrase 'women's rights' that it will probably withstand any amount of feminist theorising and disillusion. In Chapter 2, however, I argue for the reconceptualisation of 'women's rights' in terms of the discourse of women's capabilities, capacities and competences, and Chapter 7 shows how that type of reconceptualisation would work in the context of birthrights. I should stress that the proposal to reconceptualise women's rights is not a philosophical exercise. First, it is not to be understood as the decree that henceforth the phrase 'women's rights' and all entries of the words 'right' and 'rights' be removed from feminists' legal-political thesaurus. Nor is it to be understood as a philosophical proposition of the formal equivalence of the two discourses, as if women's rights were ontological entities whose properties could be transferred in a philosophical experiment to the different ontological entities of capabilities, capacities and competences. In that respect, Michael Freeman is mistaken when he attributes to me an interest in finding out if the right to reproduce exists (Freeman 1988: 70–1). In this book. I am concerned not with whether rights exist, whatever that may mean, but with how rights are constructed, with what transpires when they are claimed, countered or refused, and with whether feminists should continue to employ them as a matter of strategy and tactics. The proposal to reconceptualise women's rights is one means – and there may well be others – by which feminists can turn their attention away from abstract and moralistic rights and so formulate their policies in realistic terms. In this way, the proposal has the status of a heuristic, a sort of intellectual and political knee-jerk, for resisting the attractions of rights discourse and for working out tactics in less risky terms.

In saying that there may be other ways in which women's rights could be reconceptualised, I must guard against another, more serious misinterpretation. This is that when I argue for a heuristic to help feminists to correct the looseness of the phrase 'women's rights', and when I argue for caution in the use of rights discourse, I am one of the 'fem-crits'. This unattractive term has been used to describe not only those feminists who have allied themselves to the critical legal studies movement but also the work of radical feminists such as Carol Gilligan and Catherine MacKinnon (Stark 1990: 56). Although I cannot do justice to their work here, a brief description of it is necessary in order to distance myself from it.

Gilligan and MacKinnon have argued, in their different ways, that emphasis on rights reflects male values and male power (Gilligan 1982: 164; MacKinnon 1983: 644). In Gilligan's critique of the presumptions of the psychology of moral discourse, the ethic of rights and the ethic of justice comprise the male voice, whereas the female voice is the ethic of care. Her research leads her to the conclusion not that the male voice should be suppressed to make way for the muted female voice, but that properly adult moral conceptions integrate both ethics (1982: 105). Gilligan's work has generated much debate and criticism in feminist politics of law (cf. Daly 1989). For example, Ann Scales comments that Gilligan's work 'tempts one to suggest that the different voices of women can somehow be grafted onto our right- and rule-based legal system' (1986: 1374). Scales is opposed to what she sees as the facile idea that the incorporation of the female voice into a rights-based system could be anything other than mere incorporation, arguing that the inevitable result is the further repression of the contradictions between the two voices (1986: 1373 n. 37, 1391–2).

For similar reasons, MacKinnon has no time for equal but different voices. For her, preoccupation with equality as a matter of what differences between men and women are reasonable or unreasonable is 'part of the way male dominance is expressed in law' (MacKinnon 1987: 44). More seriously, as Scales has paraphrased MacKinnon, 'from such viewpoints we cannot see that male supremacy is a complete social system for the advantage of one sex over another' (1986: 1382). For MacKinnon, it is sexuality that creates the social beings defined as women and men (1982: 516) and it is sexuality that is the form of power which institutionalises male dominance and female subordination (1986: 533). A key mechanism for the institutionalisation of this male power is the law's claim to gender-neutrality and objectivity, epitomised in the appeal to abstract rights (MacKinnon 1983: 658).

Even from this sketch of their views, the essentialisms of Gilligan and MacKinnon will be apparent. For Gilligan and MacKinnon, legal politics