

A sexed Bill of Rights for New Zealand?

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This essay starts with the notion that male and female views of life, self and morality differ. It explores some of the implications of this for the concept of rights and, hence, for the proposed Bill of Rights for New Zealand, and attempts to relate the issues to the thoughts of some of the main writers on this topic. The conclusion is that the proposed Bill — and, indeed, the whole concept of a Bill of Rights — is “sexed” and that it must be changed if it is to provide a foundation for New Zealand law with which both sexes can identify.

I. INTRODUCTION

It has been suggested that women and men develop differently, come to think differently and have different, resulting world views. The male¹ world view produces a morality of rights² and abstract rules of justice. This is the view which governs (at least) Western democracies. If the female³ view of the world is completely different and does not lead to such a system of rights then this view is not being catered for in the existing legal and political models. If this is so then the things said to be at the base of such systems, such as documents espousing individual rights, also do not cater for the female world view and hence, may be of little significance to women.

This paper outlines the male and female modes of development and reasoning which have been identified by various researchers. It discusses the implications of these modes for views on rights and for views on the proposed Bill of Rights for New Zealand. It argues that the Bill of Rights reflects the male viewpoint and needs to be changed if it is to accommodate the views of the female half of the population. It concludes with the

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1 The words “male” and “female” are used throughout this essay to denote the predominant views of the sex. It does not mean that all men or all women think any particular way, just the majority. It is not a judgement on how they ought to think but the result of the empirical studies discussed.

2 Note that some authors — for example, Loudon — think that the words “morality” and “rights” do not fit together. Loudon blames an excessive reliance on rights for the “impoverishment of moral theory”. The use of the two in this essay is due to the fact that so many do see rights as part of morality.

3 See n.1.

proposition that this change cannot be merely an addition or subtraction to some of the rights in the Bill. Instead, if both the male and female views are to be accommodated, it will have to be a fundamental transformation of the whole way of thinking about society and of the concept of a Bill of Rights.

This essay is not concerned with whether or not New Zealand should implement a Bill of Rights or what its specific provisions should be. It is concerned with the conceptual underpinnings of such a Bill. It is an attempt to encourage debate over the very concept of rights.

II. MALE AND FEMALE WORLD VIEWS

Dorothy Dinnerstein and Nancy Chodorow both studied the development of girls and boys and came to very similar conclusions.⁴ Their view is that childrearing involves sex role identification with the respective parent. One aspect of this is learning that different behaviour is acceptable for the different sexes (socialisation).⁵ The other is due to the fact that childrearing is based on mothering — in finding their sex role identities a boy needs to physically and emotionally detach himself from his mother, whereas a girl need not. Consequently, boys grow up to be separate individuals, “different from (m)other”⁶ whereas girls identify themselves through connection to their mother and subsequently through their personal relationships.

Carol Gilligan⁷ and Lawrence Kohlberg⁸ have studied the moral development of women and men.⁹ Their conclusions show that the two sexes reason differently and have very different views on interpersonal relationships. Discussing Chodorow’s findings Gilligan notes that boys’ games tend to be competitive, with set rules and procedures (especially for determining disputes), which tend to abstract relationships.¹⁰ In contrast, girls play more cooperatively, fostering relationships and empathy for others. Gilligan comments that “men’s social orientation is positional, while women’s is personal”.¹¹ With respect to interpersonal relationships Gilligan concludes that intimacy generally threatens males (the possible loss of their separate, individual

4 D Dinnerstein, *The Mermaid and the Minotaur* (Harper and Row, New York, 1976).

N Chodorow, *The Reproduction of Mothering* (University of California, Berkeley, 1978).

5 For example, boys go out and do something active, perhaps help Daddy in the yard. Girls are encouraged to stay and help Mummy in the house.

6 C Menkel-Meadow “Portia in a Different Voice: Speculations on a Woman’s Lawyering Process” 1986 *Berkeley Women’s L. J.* 39,44.

7 C Gilligan *In a Different Voice* (Harvard University Press, Cambridge, Mass., 1982).

8 L Kohlberg, *The Philosophy of Moral Development* (1981).

L Kohlberg, J Tapp “Developing Senses of Law and Legal Justice” (1971) 27(2) *Jnl of Social Issues* 65.

9 Kohlberg studied men and boys only. Gilligan studied women and girls only for some purposes (abortion dilemma), and both men and women for others (Heinz’s dilemma, intimacy/competition essays).

10 K Karst, “Woman’s Constitution”, 1984 *Duke L. J.* 447,461.

11 Gilligan, *supra* n.7, 16.

identity) while it reassures females. Competition threatens females (the possible isolation and/or loss of personal connection) but reassures males.¹²

Gilligan and Kohlberg found that, when solving hypothetical moral dilemmas¹³ the men (and boys) would typically follow a set procedure, seeing it as a mathematical problem involving humans. They would take ‘universal’ abstract principles such as justice and rights, balance them (solve the equation) and conclude one way or the other. According to Kohlberg this is the highest stage of moral development. In contrast, Gilligan found that women (and girls) tend to look at the actual interests of all the parties and the relationships involved and try to (help them) find a solution that would satisfy as many needs as possible. According to Kohlberg’s scale this is ‘only’ achievement at level three.¹⁴ If principles such as justice and rights help this process then they may be used, but the women tended to think that universal rules may be impossible.

The result is that the male view of the world is atomistic and hierarchical — human interactions are seen as individuals seeking positions in a hierarchy. Thus, life for men is a ladder which all (men) compete to climb. Women, on the other hand, see the world as a web of relationships. They are not concerned with climbing but with keeping the web intact, balancing everyone on it. It is the “view from the ladder [which] tends to produce a morality of rights”.¹⁵ Rights and procedural rules form the basis of the (social) contract which helps ensure that competition is fair.

12 C Gilligan, “Why Should A Woman Be More Like A Man?” June 1982 *Psychology Today* 68,70-71.

These conclusions were derived from an analysis of brief stories written by a sample of Harvard undergraduates in response to a series of pictures. The findings were (inter alia) that the men projected violence into stories about pictures showing affiliation or intimacy. The women projected violence into stories where they perceived competition or possible isolation in the picture.

13 The dilemma posed is one known as Heinz’s dilemma. It posits a man, Heinz, whose wife is dying. Heinz cannot afford the price the chemist places on the drug which will save her. The question posed is “should Heinz steal the drug?” Kohlberg selected a sample of males and presented them with this dilemma at different stages of their lives. From an analysis of the answers given Kohlberg developed a scale of moral development which was assumed to be universal.

The stages of moral reasoning begin with an egocentric focus on satisfying moral problems based on individual needs (stages one and two) and move to a more other/social identified focus on rules of obedience for public order and predictability and approval based on customs and understandings of social norms (stages three and four) and conclude with the use of principles, abstractions and universal, free-standing logic (stages five and six). (Menkel-Meadow, supra n.6, p.45, n.37).

From a selection of interviews with pregnant women facing the question of whether or not to have an abortion Gilligan discovered what she called “a different voice” (Infra n.47,38). This was not the voice of moral reasoning thought to be universal. Her conclusion was that a study of moral development (such as Kohlberg’s) based solely on males was flawed in its design (Infra n.47,39). So one of Gilligan’s studies included posing the Heinz dilemma to a mixed group — one of both females and males.

14 See n.13 for a description of this scale.

15 Karst, supra n.10, 462.

The female view has been assumed to be the same. According to individualistic thought “occupational striving is inherent in human nature and in society and is not a social construct subject to change”.¹⁶ For example, “equal rights for women” has usually meant equal rights to compete, to adopt the male point of view and position in the world. But, as Gilligan shows empirically, women prefer to shy away from competition and therefore one would not expect women to want the rights and rules to regulate it.

Yet it is the view of rights and competition — society held together with a contract, life as a struggle to climb the ladder — which prevails in at least all Western societies. This view is enshrined in the political and legal systems of Western European origin. As Kenneth Karst says (of the USA) “law is predominantly a system of the ladder, by the ladder and for the ladder”.¹⁷ In this sense of following objective rules, male individualistic thought embraces the concept of “legalism”.¹⁸ The rights and freedoms involved in this concept are essentially freedom from interference by others. Karst suggests that this is a very male conception. He further suggests that the values in the American Constitution and Bill of Rights are based on this conception. For example, the rights of liberty and equality (being fundamental terms of the contract) are designed to protect the individual from interference by the government and others, to enable all individuals to compete for a place on the ladder on equal terms. On the basis of the data they evidence a (male) desire for separation and autonomy.

These are exactly the values expressed in the proposed Bill of Rights for New Zealand. Article 2

guarantees the rights and freedoms contained in [the Bill] against acts done

(a) by the . . . government; or

(b) in the performance of any public function . . . [by] any person or body.

The rights to liberty,¹⁹ freedom of expression²⁰ and due process under the law²¹ are the rights Karst refers to as being male and individualistic. But this is the view of only the male half of the population. Does it mean that women’s experiences are not catered for in the New Zealand, contract-based legal and political system? The underpinnings of the system are²²

16 Powers, *infra* n.17, 97.

17 Karst, *supra* n.10, 462.

18 This has been defined as -

the ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules.

(K Powers, “Sex Segregation and the Ambivalent Directions of Sex Discrimination Law”, 1979 *Wisc. L. R.* 55,90, quoting J. Shklar *Legalism* (Harvard University Press, Cambridge, 1964).

19 Article 15.

20 Article 7.

21 Articles 16-21.

22 F Olsen, “Statutory Rape: A Feminist Critique of Rights Analysis” (1984) 63 *Tex. L.R.* 387, p.400, n.62, quoting K Klare, “Law Making as Praxis” *Telos* (1979) 123, 132 n.28.

the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

It is this concept of society that rights are designed to facilitate. But the view from the web actually produces a morality with an emphasis on responsibilities rather than rights. These are responsibilities to particular people in particular situations, primarily to keep the web and everyone on it equally balanced. This is very different from the emphasis on rights and what individuals possess. A major constitutional document such as the Bill of Rights should take into account “a view of life, self and morality that is the dominant mode among the female half of the nation’s population”²³ but, at the moment, it does not.

III. CRITIQUE OF INDIVIDUALISM AND RIGHTS

The idea that society consists of a collection of autonomous individuals, each with their own interests, even as they live “in association with others”, E. Wolgast calls “social atomism” and argues that it is a “myth”.²⁴ Her argument is that the idea is internally inconsistent. The view that individuals take part in society on equal terms “cannot accommodate the composition of a human family”.²⁵ Children, mothers and fathers, in their traditional roles, do not have the same interests and they are not generally in competition with each other — “their interests are joined, intertwined, in ways that individualistic society cannot account for”.²⁶ The only way to reconcile this with social atomism is to treat the family as a single individual. To avoid conflict between the individuals and the family as a unit a spokesperson is deemed to be appointed. This is generally the male ‘because’ he already has a public role with his job. But this means that two individual adults are treated as one, which means that they are not really separate individuals, which negates the basic premise of individualism. Men are still able to act in the public sphere like complete individuals but women do not — their interests within the family are put on a par with the children’s. This has two consequences. First, it does not resolve the inconsistency produced by the tension between people as individuals and people as members of groups. Second, this individualistic model of society excludes the female view.

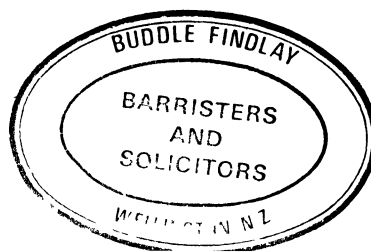
Following this analysis, Frances Olsen argues that the concept of individual rights is internally inconsistent and/or incoherent. As outlined by Wolgast, individualism involves a fundamental conflict of values between the individual and the group (either the smaller family or the larger society). Olsen argues that rights rhetoric does not solve the problem of which value should be chosen in any given situation. In theory, liberty is given priority. But it does not specify whose liberty and, in practice, it has come to mean

23 Karst, *supra* n.10, 463.

24 E H Wolgast, *Equality and the Rights of Woman*, (Cornell University Press, London, 1980) at p.138.

25 *Ibid*, 146.

26 *Idem*.



the liberty of men to compete on the public ladder and it has suppressed the liberty of women. The concept that women have rights seems like a powerful tool but it cannot resolve the conflict between, for example, the right of all to freedom of action and a right to security. The result is that “[b]ecause it cannot transcend this fundamental conflict of values, rights theory does not offer an adequate basis for legal decisions”.²⁷

An important aspect of this conflict in values is exemplified in the debate over the right to equality. The right to substantive equality conflicts with the right to formal equality and appeals to rights or the priority of liberty cannot solve this.²⁸ Male individualism favours the right to formal equality, not allowing consideration of some of the differences among people which the female view considers important. This does not allow women to be considered equal unless their special needs (namely those relating to their sexuality — particularly pregnancy) are ignored. This encourages women, in the name of equality, to assimilate with men and adopt a position of autonomy and self-interest. But this is only attainable in so far as they adopt life patterns similar to males.²⁹ Ultimately, it means that women’s interests are not represented by the male concept of rights and equal rights.³⁰

To argue for the conditions women need using the concepts of rights — concepts such as equality and freedom — “is like trying to dig a garden with a brush and comb. The

27 F Olsen, *supra* n.21, 388.

28 Colin Turnbull elaborates on the inconsistencies involved in the concept of equality which have their roots in our ideals and the concepts associated with those ideals. We vociferously hold to the ideal of equality, yet not only does our society tolerate grotesque inequalities, it even encourages them . . . our very emphasis on and aspirations towards equality of opportunity legitimize ultimate inequality. We talk, sincerely, about social responsibility, cooperation, harmony, brotherhood and love; yet in the same breath we honour the antithetical ideals of independence, individual initiative, and competition, and we acclaim as an American folk hero the “self-made man”.

(“The Individual Community and Society”, (1984) 41 *Wash and Lee L. R.* 77,85.

29 The Mundugumor tribe raises children to be —

independent, hostile, vigorous, producing boys and girls with similar personalities . . . In such a society, women are handicapped by their womanly qualities. KPregnancy and nursing are hated and avoided if possible, and men detest their wives for being pregnant . . . Women are masculinized to a point where every feminine feature is a drawback except their highly specific genital sexuality, . . . [even] to a point where any aspect of their personalities that might hold an echo of the feminine or maternal is a vulnerability and a liability.

(Wolgast, *supra* n.23, 107 quoting Mead, *Male and Female* (Morrow, New York, 1975) at p.100.

30 There are a number of writers who discuss sexuality, pregnancy and equality in detail. For example:

A E Freedman “Sex Equality, Sex Differences and the Supreme Court” (1983) 92 *Yale L.J.* 913;

S A Law, “Rethinking Sex and the Constitution”, (1984) 132 *U. Pa. L. R.* 955;

F Olsen, “Statutory Rape” (*supra* n.21);

A C Scales, “Towards Feminist Jurisprudence” (1981) 56 *Ind. L. J.* 375.

tools are totally unsuitable”.³¹ Instead of trying to fit women into the concepts of liberalism and abstract rights the model has to be adapted to take account of women’s experiences of the world. As Wolgast says³²

to do otherwise is to imitate Procrustes, who invited guests to spend the night and then cut them down or stretched them to fit his bed.

According to the female view a model for society should acknowledge differences and treat them with respect.³³ A more rational model would allow for “organic connection . . . among people, connections of dependency and interdependency of many kinds”.³⁴ Such a model should allow for the many kinds of relations between people and the various social roles possible and, particularly, other kinds of interest besides self interest.³⁴ A model which did this would be one which takes account of the female view of the world.

IV. WHAT HAPPENS TO RIGHTS?

Olsen’s implication is that the very concept of rights should be discarded — it is the wrong tool for the job. A variation on this argument is that offered by Turnbull,³⁶ that if the emphasis of the model changes, the concept of rights may not be needed or even be appropriate. Others, for example Lynd³⁷ and Garet,³⁸ argue that it is just the emphasis on individual rights which produces the problems. Their argument is that the present rhetoric of rights is deficient but that it could probably be modified and/or transformed favourably.³⁹

Lynd believes that the present rhetoric of rights “necessarily conflicts with the attempt to create a more cooperative society”.⁴⁰ The main cause of this is the way rights are seen as the property of individuals, as a scarce commodity. A zero sum game is assumed with “separated owners of . . . bundles of rights”.⁴¹ This, he argues, “stands as an obstacle” to a community where people “genuinely care for each other’s needs”.⁴²

31 Wolgast, *supra* n.23, 15, quoting Midgley, *Beast and Man*, Cornell University Press, New York, 1978) p.33.

32 Wolgast, *supra* n.23, 15.

33 Scales argues that -

Society needs to take responsibility for facilitating the experiences of motherhood and fatherhood and with providing a healthy environment for children.
(*supra* n.29, 444).

34 Wolgast, *supra* n.23, 147.

35 *Ibid*, 156.

36 *Supra* n.27.

37 S Lynd, “Communal Rights” (1984) 62 *Tex. L. R.* 1417.

38 R R Garet, “Communal Rights and Existence: The Rights of Groups” (1983) 56 *S. Cal. L. R.* 1001.

39 Note that these are authors who ally themselves with the Critical Legal Studies movement, not feminism. But, as Menkel-Meadow points out (*supra* n.6, 61, n.108) the two are linked by their mutual criticisms of the individualistic nature of rights.

40 Lynd, *supra* n.36, 1417.

41 *Ibid*, 1419.

42 *Idem*.

But it does not mean that all rights talk should be discarded. Lynd further argues that, first, to discard rights talk would deprive dissenters of such protection they do now have under the Constitution.⁴³ Second, the concept of rights can still affirm the positive possibility of a new society.⁴⁴ Thirdly, even dissidents use the rhetoric of rights — for example, in the courtroom — and to not use it in private or other ‘battlegrounds’ would appear as an inconsistency. Thus the “dissenters” would be discredited as would suggestions for reform.⁴⁵ Lynd’s solution is to “work at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it”.⁴⁶

Colin Turnbull’s solution appears not to need the rhetoric of rights at all. His solution is defined in terms of social responsibility. Note that there are two interpretations of “responsibility”. The traditional, male interpretation is “personal commitment and contractual obligation”.⁴⁷ The female definition involves response. This still encompasses the concept of autonomy but, as it was put by one young woman in Gilligan’s study, it is “taking charge of yourself by looking at others around you”. Gilligan says that this⁴⁸

does not mean taking charge of yourself by separating yourself. Rather it means taking charge of yourself by looking at others around you, seeing what you need, seeing what they need, and taking the initiative to respond.

The social responsibility referred to in this essay and by Turnbull is of this latter interpretation.

As part of an anthropological study Turnbull compared our Western society with the African Bira tribe. The Bira stress community and social responsibility. The concept of individual rights is alien to them. Turnbull argues that⁴⁹

one of the major problems with our system is the value we place on the individual and independence, rather than society and interdependence.

He implies that many of our problems (such as violent crime) could be solved by an increased sense of community and responsibility. To compare the Western, individualistic attitude to the community attitude of the Bira he posited the situation of someone who stole food from another. The Bira would treat it as a prod to the neighbour, who should have realised that the thief was hungry and offered some food.⁵⁰ “The crucial difference . . . is that what is at stake is not individual guilt or innocence . . . but rather the

43 *Idem*.

44 *Idem*.

45 Lynd’s comparison is with the radicals in the 1930-s who were ridiculed for being inconsistent, such that no-one took them or what they said seriously (p. 1420).

46 Quoting D. Kennedy “Critical Labour Law Theory” 4 *Industrial Relations L. J.* 503, 506.

47 Gilligan in The 1984 James McCormick Mitchell Lecture: “Feminist Discourse, Moral Values and the Law — A Conversation” (1985) 34 *Buffalo L. R.* 11, 44.

48 *Ibid*, 44.

49 Turnbull, *supra* n.27, 83.

50 Note that we do not steal merely for hunger but also, for example, for greed. This does not seem to be contemplated among the Bira.

social and communal good” and this “involves the recognition of reciprocal obligations for each other’s welfare, material and spiritual”.⁵¹

To obtain the alternative model suggested above⁵² the best strategy would involve a combination of these approaches — both Lynd’s rethinking of rights and Turnbull’s emphasis on responsibility. This is because responsibility is an important tool for fostering connection, interdependency and care for others. Yet, at the moment, it would not be wise to abandon rights completely — principally because rights rhetoric is too enshrined in our way of thinking about the world. Women use the rhetoric at present (for example, in the courtroom and debating chamber and in relation to such issues as abortion and employment) to explain what they want in terms the (male oriented) world can understand. To suddenly abandon it is to invite the criticism Lynd envisages. The difficulty is that the language of rights has fashioned, and constrained, the epistemology of political discourse; this essay argues for a different form of discourse.

Rights would also be instrumental in a society envisaged as being based on mutual responsibilities.⁵³ If someone wants to enforce a responsibility they will claim that it is owed to them and/or the community. What this amounts to is a claim that they have a right to see that responsibility upheld.⁵⁴ Thus, even if the emphasis is on responsibilities, rights rhetoric would still be employed.⁵⁵

The method of argument may be very similar but the content of the rights will not. At present, the American Constitution and Bill of Rights are regarded as the base from which to ground an argument on rights. The New Zealand Bill of Rights is envisaged as providing a similar foundation in the future. As these documents enshrine rights that are very individualistic — indeed, Gareth argues that the American documents only recognise rights of individuals and not groups⁵⁶ — then these documents will not form a base for, or even fit into, an alternative model of society — one which takes the female view into account. Thus, they will need to be modified and/or transformed.

One aspect of transformation may be that talk of individuals having their rights will be replaced by collective or communal rights (to keep the balance of the societal web). This would, for example, entail a different view of equality than at present. Rather than

51 Turnbull, *supra* n.27, 88. See also the definition of responsibility, *supra* n.47 and accompanying text. Turnbull states that what makes the community is its self-perception as a “family” (at p.121), where the members are “bound together tightly in an effective network of reciprocal obligations” (p.113).

52 Part III.

53 For example, Turnbull’s desired society.

54 This is an emphasis on what people do when they use the rhetoric of rights. It is an analysis similar to that used by Speech Act theorists. For example, HLA Hart was concerned with what people do when they invoke the language of rights, although he used it to answer a completely different ultimate question.

55 At least in the transition, given that western society is presently “rights infatuated”.

56 Gareth, *supra* n.37, 1007 — groups only have rights “in those senses that are reducible to individual-right or social-right meanings”.

the supposed equality of opportunity the more substantive equality would be invoked.⁵⁷ Menkel-Meadow suggests that⁵⁸

[r]eciprocity connoting separable obligations may be replaced by interdependence connoting mutuality of need. Citizens could have a “right” to be connected, to belong, to be affiliated, to be cared for (an expanded social welfare program?), at the same time that they have the right to be free from coercion.

One trap that should be avoided is the conclusion that the male view of the world should be discarded in one fell swoop (for being inconsistent and destructive⁵⁹) and replaced by the female view. Responsibility might replace individualistic rights in importance and priority, but it should not comprise the whole theory. It should cater for and not alienate the male half of the population.

Another possible pitfall is that the modification be merely along a linear scale — a zero-sum game whereby a movement in one direction cancels the effect of a movement in the other. Such a linear adjustment could be the retaining of the present Bill of Rights but adding some of the rights that the female view feels are important; for example, communal rights, economic and social rights.⁶⁰ Instead the solution should be an all-inclusive, genuine transformation. An illustration of an inclusive transformation is given by Gilligan when discussing the different attitudes shown by children while playing:⁶¹

The girl said “Let’s play next door neighbours”. The boy said “I want to play pirates”. “Okay”, said the girl, “then you be the pirate who lives next door.”

The girl has reached an inclusive solution. The linear solution would be one where they both play one game and then the other, each learning about each other’s world for a short time. But, as Gilligan points out, this way⁶²

neither game would change — the pirate game would stay the pirate game, and the neighbour game would stay the neighbour game.

The inclusive solution produces a new game out of their relationship, “a game that neither of them had separately imagined”.⁶³

57 The notion that all should be substantively equal might be the closest that those holding the female view get to a ‘universal’ principle to apply.

58 *Supra* n.6, 62.

59 Destructive both of the community, the mental environment, and the physical environment of the Earth.

60 This also seems like a linear solution without a fair division in the time allocated to each game — all of the male view is kept while only adding the secondary half of the female view.

Note also the argument against the inclusion of economic and social rights in the Bill. It is thought that conceptions of these rights change in different social climates. The Bill is intended to be a fundamental constitutional document which transcends such (supposedly minor) changes. But it cannot be such a fundamental constitutional document if half the population does not place its principles high among their priorities. Therefore this argument is not very good. Either the Bill must change or the female half of the population must change to fit it (or just live with it). This essay argues for the former.

61 Mitchell Lecture, *supra* n.47, 45.

62 *Idem.*

63 *Idem.*

V. AN INTERESTING DEVELOPMENT

In an interview four years after the initial posing of Heinz's dilemma, Carol Gilligan found in the answers of Jake (one of her subjects) consideration of the feelings of the people involved. This was in addition to his focus on justice — the same focus he had previously. Not only does this mean that Jake did not advance on Kohlberg's scale between the ages of eleven and fifteen, but he considered aspects which are said to be symptomatic of lower levels of reasoning. This raises the possibility that Kohlberg's scale of moral development distorts not only the female experience but also the male experience.

Gilligan later found that Jake was not alone in his perception of the problem. In other studies undertaken it was confirmed that the different sexes focussed on different 'voices'. The men focussed on justice and only minimally considered caring. The women, vice versa.⁶⁴ Yet it was also shown that men and women alike represented both voices. Previously it was only women who "confus[ed] morality with care or interpersonal relationships".⁶⁵ Gilligan's findings now shift the criticism to men and the question becomes⁶⁶

Why are men not representing in their formal decision making procedures what is a fact present in their thinking — the realisation that there is another dimension to moral problems, a dimension which has to do with issues of care, responsibility and interdependence.

Thus one might conclude that abstract and objective rationality, that central quality of the legal system, is something nobody possesses. Theories which embody this quality distort the male experience as well as the female.

VI. CONCLUSION

What are now called human rights used to be called the Rights of Man. Eleanor Roosevelt prompted the change when she realised that they were not equally applicable to women — she wanted to rectify that.⁶⁷ The argument presented here has been that this change was primarily in name. It did not affect the substance of these rights or their application. First, women do not generally embrace these rights, so to become human rights they need a substantive change. Second, those women who do embrace them must ignore their inherent differences from men. To become rights applicable to all humans (rather than only those humans who act like the hypothetical male) there must be a substantive change. The proposed Bill of Rights for New Zealand embraces these so-called human rights — it is "sexed". It too needs to be changed.

This essay has argued that this change needs to be more than just a reinterpretation of existing rights, such as the replacement of liberty as the priority, or the change from

64 Gilligan, *supra* n.47, 48.

65 *Ibid*, 49.

66 *Idem*.

67 M. Cranston, "Are There Any Human Rights?" *Daedalus* Fall, 1983: 1.

procedural fairness to substantive equality. The change has to incorporate a completely different way of looking at the world — what has been called the female view.⁶⁸

Thomas Kuhn talks about paradigms, or ways of thinking about the world.⁶⁹ Using his terminology, the present legal paradigm is the contract. Notions of liberty, equality and individualism are seen to lie at the heart of law and the legal system. The contract has also been elevated from the base of law to the base of society.⁷⁰ This essay suggests that the contractual paradigm should be overturned.⁷¹ The concept of individual rights is an(other) anomaly in the system. There is a need to invent a new paradigm, a different way of looking at our world — one which can incorporate both the present male and female paradigms. The writer's suggestion is that notions of responsibility, interdependence and substantive equality and liberty should lie at the heart of this paradigm.⁷² Annette Baier suggests that trust will also lie at the heart of any moral theory which incorporates the female view.⁷³ New Zealand may not be ready for the near submersion of the individual to the community, as in the Bira. But if the aggressive and arrogant individualism is not modified then the struggle for equal rights for women may produce the situation of the Mundugumer,⁷⁴ and that is not wanted either.

Based on the studies of Gilligan, and others, this paper has illustrated the sorts of considerations which must be taken into account when developing a new paradigm.⁷⁵ Perhaps a Bill of Rights can be developed on the basis of the suggestions in this paper, as well as the many others that would come out of an effort to develop an equivalent of the "pirate who lives next door". What should emerge is a view of life, self and morality in which all can share.

68 This is still the case when one is referring to the predominant views of the sexes. Yet it must be remembered that Gilligan's studies have also shown these different views to be shared to a degree (supra notes 64-66 and accompanying text).

69 *The Structure of Scientific Revolution* (Univ. of Chicago Press, Chicago, 1962).

70 Where discussions of the social contract are encountered.

71 Any particular paradigm is not necessarily correct and can be subject to change (for example, was not the earth flat once?). One method of change is the gradual perception of anomalies within that paradigm. Eventually these anomalies will trigger a perceptual flip and a new paradigm will form.

72 Perhaps with a strong emphasis on community there will not be the need to keep inventing new ways to reconcile the (present) inconsistencies between the state and the individual.

73 "What do Women Want in a Moral Theory" *Nous* XIX, no1 (Mar 85) 53.

74 See supra n.29.

75 Note that some causes of the holding of female and male views have been offered by Dinnerstein and Chodorow. If the present conditions change and the relative positions of women and men in society change then the female and male views may also change, becoming less polarised. The result will be that the "considerations" to be taken into account will also change.