

Social Gender Identities and Civil Liberties: The Law and Reality

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Human societies have all been created and they all operate with the nearly universal fact that they are composed of two elements: male and female. This fact is an obvious and everyday one for those two elements, which themselves no longer see it as very important, except in cases where the administrative formalities of life force them to. Though some of those formalities are satisfied with the gender identity, others require details of the individual's current matrimonial status – single, married, separated, divorced, widowed – in order to have more information about the person. These details have meaning in both public and private arenas, but the fact is that gender identity takes precedence over racial identity, social class, religion, etc. and it seems to be a primary fact that is evident and unavoidable in social life.

But given this obvious fact might we then say that the “great legal texts” are aligned with social reality? In other words, do the constitutions that are the basis for equality of rights, in accordance with the Universal Declaration of Human Rights, “on the absence of distinction as to sex, race, religion ...”, conform to social reality? Does the implementation of these constitutions not encourage an attitude contrary to the effective enjoyment of civil liberties? In other words, do women and men as citizens effectively enjoy equal civil liberties as granted by those who drew up the constitution?

Certainly not, since depending on whether it is a case of man or woman, we can see a gap between the law and the facts. Can we not say that this gap, shown by reality and experienced by human beings, is a kind of ambivalence in the social identities of gender? Is the real experience of human beings not situated between law and fact? In general the female human experiences this and not that, whereas the male human experiences everything and seems to embody the different elements of constitutions. So the question arises: is the universality of human rights translatable into real life without referring back to social gender identity?

This paper, which invites reflection on these issues, is structured in three parts: the first will be devoted to confirming social gender identity; the second will examine experience of gendered civil liberties; and finally the third will return to considering the issues involved in harmonizing the law and the facts.

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I. Gender identity

1.1 A clear fact: sexual identity

Let us use space and time to make our arguments concrete. Since the fourth International Conference on women, held in Beijing in 1995, the African countries, which are mainly democratic in nature, have shown considerable willingness to promote equality and equity between men and women.¹ This willingness, encouraged by their constitutions² and referring to the Universal Declaration of Human Rights, has been implemented through creation of the appropriate institutional and legal framework for supporting the development of programmes and projects aimed at reducing poverty. That is the case for Benin, a country in West Africa.

On the international level most countries in the sub-region of West Africa have supported the conclusions of several conventions in the United Nations and Africa. The majority of these instruments specifically target improvement in the legal status of women and children. To quote examples:

- The International Pact relating to economic, social and cultural rights, adopted on 16 December 1996;
- The Convention on the Elimination of all Forms of Discrimination against Women, adopted on 18 December 1979;
- The African Charter on the Rights of Individuals and Peoples, adopted on 27 June 1981, in which art. 18 deals with the protection of the family and especially the rights of women and children;
- The Convention relating to the Rights of the Child, adopted on 20 November 1989;
- The African Charter on the Rights and Wellbeing of Children, adopted in July 1990;
- The Protocol to the African Charter on the Rights of Individuals and Peoples relating to the rights of women, adopted on 11 July 2003;
- The solemn declaration of heads of state and member governments of the African Union on equality between men and women in Africa, 8 July 2004.

In various degrees the two agreements relating to Beijing + 5 and Beijing + 10 displayed significant progress in the areas of fair access for men and women to all sectors of development and improvement of legal status and of women's roles in the different societies. In most countries institutional arrangements have been adopted and various actions undertaken. In Benin we could mention:

- i. Adoption of a National Policy to Promote Women (2001) and its plan for multi-sector initiatives (2002);
- ii. Adoption of an Individual and Family Code (2004);
- iii. Adoption of national laws to promote reproductive health and combat female genital mutilation;
- iv. Adoption of the National Policy for Education and Training of Girls (2007);
- v. Adoption of the National Policy promoting gender (2009);
- vi. Initiative to set up the Institute for Women (2009), etc.

On the practical level recognition of equal rights for men and women underpins integration of the gender approach in developing and implementing programmes and projects aiming to reduce poverty and ensure sustainable development for the country. These programmes and projects, supported by local, national, inter-government and non-government bodies, are concerned with

meeting practical needs and also help to strengthen men's and women's strategic interests. But this picture does not go very far in eliminating disparities

Indeed, despite these efforts, disparities between men and women do persist, more often than not to women's disadvantage, particularly in the area of education, literacy,³ access to healthcare, economic resources and participation in decision-making. If cultural diversity seems to be a factor assisting or holding back, depending on the case, the impact of legal, institutional and practical provisions in these areas, it is above all because it is based on gender identity.

1.2 On the concept of identity

Identity is defined by André Lalande (1926) as follows:

- a) Character of what is identical [...].
- b) Character of an individual, or of a being similar in this respect to an individual which can be called identical to another or "the same" at different moments of its existence [...].
- c) Character of two objects of thought, distinct in time and space, but possessing all the same features [...].
- d) Relationship, in the logical sense, between two identical terms; formula setting out that relationship. In mathematics in particular identity is applied to an algebraic equality, whatever the values allotted to the letters composing it ...

It is meaning c) that forms the basis of our argument. Thus we can say the identity of the being arises on entering life and lasts until its end, that is, coming into and leaving the world.

Every society has a particular way of seeing relations between people and structures. In the cultural context of the West and Central African sub-region rights and powers are associated more with the collective than the individual. Similarly individual rights and interests, even those of men, are culturally perceived as secondary compared with collective rights and interests, in contrast therefore, to a certain extent, to the principles of human rights and regardless of the conventions signed and ratified to that effect.

By emphasizing relationships of equality and equity between men and women, and especially the individual's decision-making rights, human rights imply a reversal of the established social order and the cultural values underpinning it. When it is a question, for example, of rights in the area of reproductive health, problems arise in terms of equality of access to information and services in order to ensure a satisfying sexual life in conditions of optimal safety and choice of the timing, frequency and number of births. In general it is particularly victims or people at a distance from decision-making sites who are in fact concerned about disparities between the rights and the lived experiences of the sexes.

However legal equality between men and women is not a struggle by women for women, but a social issue, one of development, general well-being and in particular one of human rights. That is why it is necessary to examine the real, effective situation of civil liberties and social gender identity. What position should be given to women in constitutional structures aimed at promoting democratic values and fundamental rights, for instance equality, non-discrimination and human dignity?

1.3 The unavoidable fact: social gender identity

In my view social gender identity is the prime clear identity observable in individuals, who take it from their social classification. According to context it is capable of being valued or depreciated.

Thus social gender identity is experienced according to the architecture of the society in which an individual inhabits.

A society's structure is not an abstract entity; rather it is concrete and may be described in several ways, among them:

- i. the way the society classifies its members from birth;
- ii. the way each member of the society lives their "social being";
- iii. the way the society's members relate to one another;
- iv. the way the society evolves according to the historicity of the relationships experienced by its members and the solutions it provides for relations between its members.

All these methods show that social gender identity is transmitted by the society's structure and the individual's socialization. In this sense, far from being an abstraction, gender identity is part of concrete experience. It can be apprehended by thought only through concrete situations and entities, as indeed any social and political study is.

In this connexion the gender approach is essential for any reading of individual rights, since it implies a commitment to respect the rights of men and women as beings specifically situated and shaped by society. Those beings are thus the product of the socialization process, which allots different roles, responsibilities, behaviours and rights to men and women according to given cultural and historical contexts. That is why experience of effective rights, their translation into social and political life, in short fundamental civil liberties, should first ensure the effectiveness of rights. So, for my argument, civil liberties must be part of rights that are acquired, granted or taken away. But are they?

2. What civil liberties for social gender identities?

A reminder as to the legally constituted state and democracy as background: compliance with the law and social stability are essential markers of a democratic state. The indicators to measure these features are analysed in each political context. In general it is accepted that the goal of life in society is to ensure advantages for its members such as security, solidarity and so forth. But life in society is possible only if its members agree to obey its laws: for instance, respect for others' property, the right to work ... But a society's laws must be known to everyone, so they must be written down.⁴

In social practice respect for the law is seen in two ways:

- i. under an authoritarian regime, where the citizens obey the law because they are afraid;
- ii. by popular consensus, where the citizens obey the law and accept the organization of public bodies because they consider it to be in their interest. But this consensus is achieved when:
 - a. the country provides citizens with advantages such as security of property and persons, public services and an economy that allows them to earn a living;
 - b. the government respects the citizens, that is, it recognizes the existence of human rights and applies the rules of the legally constituted state.

We could pause here to ask whether, as regards social gender identities, the consensus of the parties involved, men and women, has been obtained. The answer would most likely be ambivalent.

But how and by what signs can we therefore recognize a government that obtains compliance with the law?

The issue is not one of the type or form of government in place. Whether a country's government is a dictatorship or a democracy, it must get citizens, male and female, to respect the law. Then everyone is obliged to agree that legality is a characteristic of any action conforming to the law and that legitimacy is the characteristic of a decision adopted according to the written law, pre-established and democratically voted upon. Through the fact of an independent judicial system, those laws have to be understood and applied. Government, administration, judiciary and every citizen must act legally. And usually the law makes provision for contesting in the law courts a decision the citizen might consider illegal.

So, by accepting that, in accordance with the principle of democracy, "the law is the expression of the general will" and, in accordance with the *principle of equality*, "the law is the same for everyone", we should expect to enjoy established rights equally. Where have we got to on equality of rights in Benin and what is the effectiveness of civil liberties for everyone?

Can we say that the configuration of representation in the national assembly or parliament in sub-Saharan countries, and in particular Benin, takes account of the principle of democracy? Here again the reply will be ambivalent, because we find a great numerical disproportion between the male and female components and a near-constant tendency to continue the system of representation focusing on the male population, which is given the power to vote in everyone's name (male and female). In this way, if laws express the society's values, democratic choices are taking some time to become effective.

Similarly, if democracy is the power of the people, from which come laws and which produces the government, if citizens in a democracy are equal in rights and duties and each person has one and only one vote in elections, can we say there is a true consensus? Certainly not. For example, in Benin, since the adoption of the democratic process in 1990, there have been four presidential elections, five elections to parliament and two local elections. At each of these electoral contests the presence of women has grown in both active and passive electorate. The position of women's representation is not brilliant in the executive⁵ or the legislature⁶ and even less so in the judiciary. The presence of women is also very low in district and city government. Benin has 77 town halls: from 2002 to 2008, out of 1119 elected councillors 46 were women. There are three women among the 77 mayors. At the 2008 elections the situation hardly improved: only one woman was elected mayor.

And so a look at the political arena in Benin shows a real imbalance between rights and realities. Between the lived experience of rights for society's two halves, men and women, we can easily say that on the one hand men can be both candidates and electors while, on the other hand, women are stuck in the situation of being electors rather than citizens able to stand for election. Men live out to the full the rights the constitution grants them, whereas women are still in the position of continually fighting for their rights. Because of their often marginalized social gender identity they still suffer many social, cultural, legal, economic, etc. constraints.

If we accept that democracy can neither become established nor be maintained in a country unless there is a consensus among the majority of its citizens on the fundamental points represented by the law, and that in a constitutional democracy it is essential to ensure representation of both male and female voters, there is no doubt that much remains to be done to take full account of social gender identities. Political life is organized according to male criteria and values, sometimes in accordance with their life style. That is why it is urgent to discuss social justice, the equity of human rights for men and women and compliance with the principles of democracy.

In general the three powers – legislative, executive and judicial – are interdependent as regards how they affect the experience of civil liberties as lived by men and women. So in a constitutionally established state where the executive is bound to comply with the laws and regulations passed by the legislature, we still find many examples of offences against the constitution. Though “the state ensures equality before the law for everyone regardless of origin, race, gender, religion, political opinion or social position” and though “men and women are equal in law”, that does not mean there are no barriers to enjoying those equal rights. On the contrary, such obstacles are always greater than those faced by a person’s origin, race or religion. This explains the context for the gendered revision and reinterpretation of constitutions.

Because of the popular debate on reconciling state and society hosted by the independent Algerian daily paper *El Watan* on 28 June 2008, it became clear once again that it is not enough for a constitution to lay down rights and liberties for it to be truly democratic. It must also allow a genuinely democratic culture to become established through active mechanisms of democratic organization at every level. A revision of the constitution should provide answers for identified failures in order to improve the running of public affairs by introducing increased equity, justice and transparency.

Such a revision would create a state in which citizens can force the authorities to take note of their concerns through peaceful channels for expression. Similarly the administration will be held to an obligation to engage in social dialogue through which all important decisions would result from prior agreement. In such a state public authorities would always be transparently accessible to any man and any woman. Arbitrary decisions by the administration would also be liable to review by independent mediation bodies. According to this constitutional revision, which would aim to align law and reality, compliance with the law and legal decisions would take precedence over orders from the hierarchy. Citizens should not be the ones who are monitored, checked and controlled. And the state should not be the entity that needs to be evaded and lied to and whose rules have to be bypassed or ignored for the simple reason that it does not take enough strong measures against rights violations. Confidence needs to be re-established and strengthened. There should be an obligation to engage in social dialogue, equality before public authorities, independent review bodies and direct participation by citizens.

Indeed the constitution ought to state more forcibly the rights and freedoms of citizens and redefine the state’s roles. The area of liberties cannot be restricted. Freedoms and rights should be recognized for women as well as men. The individual cannot be made subject to a superior will in the form of an individual or a group. It is the state that is subject to a general will, its goal being to uphold the rights of both male and female citizens.⁷ The fundamental rights and the duties of citizens are the basis for the unity of peoples. Those rights exist and should be capable of being enjoyed without the need to fight for them again and again.

Popular practices of access to the law and the issues they involve in African countries such as Benin display various forms of appropriation of the law. They create new actors in the legal sphere. Examples of these practices of access to the law involving men, women, children, young people, peasants, fisherfolk, school students, neighbourhood residents ... show that they all demand the right to understand the rules they are being asked to obey. They ask that those rules be implemented when they defend their basic rights, they demand to participate in changing them if they exclude or threaten them, they request that they be introduced and ask to participate in framing them when those rules do not exist.

Participants in these practices seek information on their rights and make themselves aware of those they lack. They learn how the mechanics of rights and obligations works so that they may also use it and avoid being manipulated by those who have mastered its tools. All these actions have something in common: those involved are reacting to a legitimate need for which the competent

public authority has not provided a solution. They are demanding their rights by creating a relationship of force and putting forward priorities such as the right to housing for everyone in opposition to property rights and their worst applications, among them expropriations and evictions.

In other cases the law grants rights which are not respected in practice. In Benin new laws allow women to share in inheriting their parents' estate, especially property. This right is often not applied because other interests stand in the way. By seeking information and education those women have taken advantage of the law and forced compliance. Indeed organization of a community through rules that are freely accepted and agreed by its members sometimes makes it possible to resolve conflicts more easily than official laws can on their own. The law does not always consider the social reality as lived by the group. That is so with the *tontiniers*, a system of peripatetic savings in Benin where certain occupational groups of men and women in the informal economy manage their savings among themselves and set the rules facilitating that management.⁸

By themselves drawing up the statutes of association and the framework of rights and obligations for the future of their project, these people are involved in creating law. On the basis of these initiatives, from the places where community life is run, from selling what they produce and from the rules for this activity, they force political leaders to adopt legal provisions in the area involved. Because they are thus the catalyst for these provisions it is easy to see that these women are a source for creating rights and are no longer simply their recipients.

Paralegals in the form of "peasant lawyers", "worker lawyers", "teacher lawyers" are also actors involved in creating law. Training of female legal advisers by female barristers and legal practitioners makes it possible to swell the numbers of actors and information activities around the law. These female paralegals provide the communities among whom they live with knowledge of the workings of the law, the way it can be used and defended. They act as teaching intermediaries able to form a link between the realities of daily life and the law.

That is how the celebration of the 60th anniversary of the Declaration of Human Rights allows us to remember that appropriation of the law, as well as responsibility, is no longer the province of legal practitioners, and legal research cannot ignore this. History, sociology, biology, philosophy are a source of ideas for the law.

3. Issues for the harmonization of law and reality

Here the central question comes down to issues of the different tools for legal and social improvement created to respond to the growing need to know and be able to use rights in different life contexts and in contexts of under-development, transition or development. Whether it is advice centres, training, education or retraining, civic and moral education, promoting gender with the aim of compliance with the law, equity and equality between men and women, it is in general with the goal of guaranteeing respect for the basic liberties of all that these bodies are set up. They have to operate in accordance with the country's legal and institutional framework and in line with the commitments made by the state in ratifying the conclusions of international conferences. In this regard familiarity with the national and international texts relating to human rights, and more specifically the legal texts in favour of the promotion of women, is a priority for certain structures or organizations.

It is also a matter of broader thinking, suggesting contexts for exchanges between thinkers and specialists in human rights issues, cultures, social sex or gender identities, in order to foster, thanks among other things to this World Philosophy Day, a worldwide debate around human rights and to encourage thinkers to discuss these issues at a national level. Indeed analysis of real-life experiences in the area of human rights, from a gendered perspective, would no doubt

make possible improvements in provisions and action aimed at ensuring a better fit between rights and reality. Thus men and women could get more involved and help to reduce the gap between established rights, lived rights and reality, according to national contexts and the corresponding political choices.

The context for this World Philosophy Day and the celebration of the 60th anniversary of the Universal Declaration of Human Rights is also part of the progress of the Millennium Development Goals, which in 2000 saw governments worldwide make a commitment. It also supports the implementation of the recommendations emerging from the International Conference on Population and Development and the Beijing International Conference. And finally it encourages women to take on responsibilities and participate in decision-making.

Another connection between social gender identity and poverty deserves to be questioned. Since Beijing it has been appearing in terms of the “feminization of poverty” to emphasize the widening gap separating men and women in the poverty cycle. In this regard the relationship between gender and culture structures the symbolic inequalities between men and women found at both institutional and individual level. Though that relationship appears to be central to the efforts to achieve the millennium goals, a mid-term evaluation seems to indicate that few countries, especially in Africa, will be in a position to reach those objectives. For that reason thinking needs to be carried forward on the question of human rights and social gender identity in order to encourage social and political thinkers to commit further to the debate on human rights and real and effective civil liberties. The argument for women’s rights to become universally established must continue to be made. In practical terms we could:

- i. draw up, with reference to genuine rights on the ground, a list of the actions carried out to promote equality and equity between men and women over a given period and in a precise context;
- ii. design coherent intervention strategies and define a new social contract with the aim of reducing inequalities in the enjoyment of rights and civil liberties;
- iii. evolve new medium- and long-term measures appropriate to the reality of established rights, taking account of social gender identity and according to country;
- iv. strengthen strategies of respect for women’s rights using the international instruments already ratified and make a further commitment to the fight against all forms of violence towards women.

Then we might expect to have policies aiming to make women more autonomous and to promote equality and equity between the sexes. That would lead to positive actions to facilitate women’s access to education and health services and to economic resources. With the recognition of women’s human rights their participation in social and political life would be understood as effective enjoyment of established rights. There could be a standard for defining violence towards women and development of coercive measures making it possible to achieve genuine coherence between reality and human rights in a democratic context. And this would at last help to implement the provisions of the Convention on the Elimination of all Forms of Discrimination against Women.

Conclusion

After this trip around the subject of the law and reality, what if we thought a bit about the gender of the law? Does the law have a gender? What would the legal concepts and practices be that

allowed us to express the gender of the law? Following up our argument, the universality of human rights would be better understood in a context of social gender identity. In that way the ambivalence between rights and real life would appear in terms of understanding or recognition of each person's actual effective rights. Because enjoying civil liberties should not be a matter of women fighting on behalf of women. It is a social issue of social wellbeing, development and above all human rights. If today many among the tribe of men are still slow to take this issue on board and acknowledge its relevance for the future of humankind, then the conclusions of the international conferences that have been taking place over the last few decades ought to be updated. Despite a few advances seen in this area action by politicians and governments to align rights with realities appears to be only a pious hope.

And so priority should be given to creating new laws encouraging people to stop being mere consumers of rights. Based on this analysis of the landscape of social gender identity, rights as experienced or difficult to access can be better identified. Then people would try to understand through the social gender identity how, in the situation they find themselves in, each individual or community can discover its legal capacity, both personal and collective, to act and change the course of events. Though experiments are springing up everywhere, each with its own particularity, all of them are asking for one and the same thing: to understand in order to participate, to act in order to stop suffering and to end this gulf between rights and reality.

Affirming or claiming people's rights without ignoring social gender identity therefore means helping to define them as active subjects, and stopping members of society from abandoning their basic rights and being excluded from the economic, social and cultural development states aspire to.

Translated from the French by Jean Burrell

Notes

1. In the history of the struggle for social sexual equality Beijing marks a stage that is henceforth unavoidable in debates about inequalities, and in particular those existing between men and women.
2. Article 26 of the Benin Constitution stipulates that: 'The State ensures for all equality before the law without distinction of origin, race, sex, religion, political opinion or social position. Men and women are equal in law. The State protects the family and especially the mother and child. It cares for the handicapped and the old.'
3. In sub-Saharan Africa 24 million girls were not attending school in 2002. Two-thirds of the world's 875 million illiterate adults are women.
4. In order that all his subjects should be aware of his laws and be judged according to the same laws, regardless of judge, place and date, around 1760 BCE King Hammourabi of Babylon had 282 laws carved on a stone column so that all those citizens who could read cuneiform characters could read and be obliged to respect them.
5. A glance at representation by gender in Benin's governments since the Democratic Renewal following the Conference of the Nation's Live Forces gives these results:
 - i. from 05-08-1989 to 02-03-1990 (Mathieu Kérékou's last revolutionary government) there were 15 ministers, 14 men and 1 woman (6.66%);
 - ii. from March 1990 to April 1991 (transitional government, Kérékou president, Nicéphore Soglo prime minister), there were 15 ministers, 13 men and 2 women (13.33%);
 - iii. from April 1991 to April 1996 (Nicéphore Soglo's government), there were 4 government reshuffles:
 - a) 15 ministers, 13 men and 2 women (13.33%)
 - b) 19 ministers, 17 men and 2 women (10.53%)
 - c) 20 ministers, 17 men and 3 women (15%)
 - d) 20 ministers, 16 men and 4 women (20%);

- iv. from April 1996 to April 2001 (Mathieu Kérékou's government), there were 5 reshuffles:
- 18 ministers, 17 men and 1 woman (5.55%)
 - 18 ministers, 14 men and 4 women (22.22%)
 - 18 ministers, 15 men and 3 women (16.66%)
 - 19 ministers, 17 men and 2 women (10.53%)
 - 19 ministers, 17 men and 2 women (10.53%);
- v. from April 2001 to April 2006 (Mathieu Kérékou's government), there were 4 reshuffles:
- 21 ministers, 19 men and 2 women (9.52%)
 - 21 ministers, 17 men and 4 women (19.05%)
 - 21 ministers, 16 men and 5 women (23.81%)
 - 21 ministers, 16 men and 5 women (23.81%);
- vi. from April 2006 to April 2011 (Boni Yayi's government) there have already been 7 reshuffles:
- 22 ministers, 17 men and 5 women (23.81%)
 - 22 ministers, 17 men and 5 women (23.81%)
 - 23 ministers, 17 men and 5 women (23.81%)
 - 23 ministers, 17 men and 5 women (23.81%)
 - 23 ministers, 17 men and 5 women (23.81%)
 - 26 ministers, 20 men and 6 women (23.08%)
 - 30 ministers, 26 men and 4 women (13.33%).
6. Numbers for Benin members of parliament from 1991 to 2011, broken down by gender, have been:
- 1991–1995: 64 members, 60 men and 4 women (4.69%)
 1995–1999: 82 members, 76 men and 6 women (7.32%)
 1999–2003: 83 members, 78 men and 5 women (6.02%)
 2003–2007: 83 members, 78 men and 5 women (7.23%)
 2007–2011: 89 members, 80 men and 9 women (10.84%).
7. The issue of the relationship between citizenship and gender is at the heart of current debates around the constitution. Many countries in West Africa have articles in their constitutions limiting children's access to automatic citizenship depending on whether their father or their mother is a native of the country. We might legitimately wonder about the gender of citizenship ...
8. According to their income-generating activities most women in Benin are enrolled in a tontine group and comply with its rules.

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