



## UP School of Economics Discussion Papers

Discussion Paper No. 2014-04

April 2014

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from the Perspective of the Capabilities Approach**

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# **Rights and Capabilities: Reading the Philippines Magna Carta of Women from the Perspective of the Capabilities Approach**

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## *Abstract*

The Magna Carta of Women (R.A. 7910) is the Philippines comprehensive women's human rights law. The Magna Carta of Women is found to be consistent with Rawlsian notions of justice, particularly when it undertakes inequality evaluation in primary goods. Identity-based inequality evaluation is also present in the Magna Carta of Women as implied in its definition of discrimination and marginalization. With the state as the primary duty bearer, the Magna Carta of Women gives prominence to an instrumental view of agency since participation is mediated through state mechanisms and institutions. The Magna Carta of Women fails to acknowledge the contributions of care work and the implications of the gendered division of labor. The capabilities approach highlights the challenges attached to these observations. Where human rights are viewed as ethical demands, the MCW succeeds in giving attention to aspects of women's lives that require state support.

Keywords: gender equality, law and economics, human rights, capabilities  
JEL: K3, O01, J16, K00, D63, I31

# I. Introduction

In 2009, Republic Act No. 7910, otherwise known as the Magna Carta of Women (henceforth MCW), was passed by both houses of legislature of the Philippines as a comprehensive women's human rights law. The MCW affirms women's role in nation-building and gives special attention to those in marginalized sectors. Considered a landmark piece of legislation, this law brings the Philippines in line with international laws, especially in its adoption of the Convention on the Elimination of All Forms of Discrimination against Women's (CEDAW)'s definition of discrimination. It also recognizes human rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Child (CRC), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This paper is interested in using the capabilities approach to assess the MCW's potentials and limits to contributing to Philippine development, particularly the country's efforts at reducing poverty and inequality. The MCW not only defines gender equality in terms of the realization of full human potentials, it also places full realization within the particular context of development but without being clear on what constitutes development. This paper chooses to be specific by applying the capabilities approach such that "[d]evelopment can be seen, as it is argued here, as a process of expanding the real freedoms that people enjoy (Sen 1999: 3)."

Human rights language permeates the MCW in consonance with the international covenants mentioned above. Human rights addresses both discrimination and marginalization. The MCW is consistent with Rawlsian notions of justice that highlights as primary goods "rights, liberties and opportunities, income and wealth, and the social bases for self-respect." Furthermore, human rights in the MCW are seen as social goals in themselves rather than as "side constraints to goal promoting actions," to use Nussbaum (2000).

Inequality evaluation in the MCW has two aspects, one of discrimination against women and the other of marginalization due to the lack of access to resources. The discriminatory aspect considers barriers that women as a group experience while the marginalization aspect considers barriers that poor women as a social group experience. A key aspect of marginalization is the classification of women into sub-groups. There are occupation-based groups (small farmers and rural workers, fisherfolk, urban poor, workers in the formal economy, workers in the informal economy, and migrant workers); there are cultural groups (such as the Moro and indigenous people); and, demographic groups (such as children, the senior citizens, and persons with disability and solo parents). These identities compound the discriminatory experience of women. In addition, justice-based and welfare-based inequality evaluation are present in the MCW to varying degrees. In contrast, Sen (1992) has proposed that capabilities be the space of comparisons for inequality evaluation. Capabilities describe persons' states of being and, thus, capture development outcomes rather than the means to realizing development outcomes as resources and incomes would be. Identities as listed in the MCW, meanwhile, are proxies to development outcomes highly correlated with unequal and unjust outcomes.

The State is identified by law as the primary duty bearer. The MCW is also clear about the role of participation, representation, and access to information as a necessary elements of the rights-based approach. This is consistent with the Sen (2004, 1998) where persons are agents who can act upon her pursuit and realization of goals. Furthermore, the MCW values women's contributions to nation-building such that institutional mechanisms are specified in the law to operationalize the approach. Sen (2004) distinguishes between "realized agency success" that entails the broad realization of a goal from "instrumental agency success" that requires the individual's own efforts to realize her goal. The MCW's valuation of participation, especially through state mechanisms, is interpreted as an instrumental view of agency.

Finally, a note needs to be made regarding the absence of references in the law on care and the caring nature of society and the resulting gendered division of labor, which Nussbaum (2003) argues as essential to gender justice. While there are references in the MCW to work-life balance<sup>1</sup>, the provision relates only to work outside of the home. This is a different approach from, for example, the 1999 Venezuelan Constitution's Article 88 that recognizes women's work at home as an economic activity and is guaranteed a social security entitlement.

## II. Rawlsian Rights as Social Goals

In Section 3 of its General Provisions, the MCW lays down human rights principles as these apply to women. That rights are universal, inalienable, indivisible, interdependent and interrelated are declared. In this section, discrimination is an affront to the dignity of a person. Access to information and participation in decision-making processes are declared as requirements to a rights-based approach. The state as a duty-bearers has the responsibility to ensure the compliance with human rights instruments and is liable to aggrieved rights-holders following due process.

The relationship of two concepts is fundamental to the aims stated in the MCW: substantive equality, particularly gender equality, as a goal and discrimination as a nullification of the goal. In the declaration of policy of the MCW, the State has the duty to ensure that women and men have substantive equality (Chapter I, Section 2). It goes on to define substantive equality as "the full and equal enjoyment of rights and freedoms contemplated under this Act. It encompasses *de jure* and *de facto* equality and also equality in outcomes (Chapter II, Section 4, paragraph (e))." Furthermore, the MCW defines gender equality as the "principle asserting the equality of men and women and their right to enjoy equal conditions realizing their full human potentials to contribute to and benefit from the results of development, and with the State recognizing that all human beings are free and equal in dignity

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<sup>1</sup> MCW, Chapter V, Section 22, paragraph (b)(2).

and rights (Chapter II, Section 4, paragraph (f)).” In the definitions substantive equality does not distinguish between social groups while gender equality requires a comparison of relative positions of women against men.

Gender equality, can be appreciated in relation to “discrimination against women” that results in a diversion away from equality. Discrimination against women is defined as “any gender-based distinction, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field (Chapter II, Section 4, paragraph (b)).” Furthermore, discrimination that is “compounded by or intersecting with other grounds, status or condition, such as ethnicity, age, poverty, or religion shall be considered discrimination against women under this Act (Chapter II, Section 4, paragraph (b)).” Essential to the definition is that the primary source of discrimination is based on the gender identity while the other identities create aggravating circumstances.

Thus, in response to the question, “Equality of what?” raised in Sen (1992), the MCW seeks equality in human rights and fundamental freedoms in all aspects of life. There is, therefore, consistency with Rawls’ primary goods-- “rights, liberties and opportunities, income and wealth, and the social bases for self-respect”--that form part of his first principle. Sen (1992) recognizes Rawls contribution in shifting attention towards liberties and freedoms but argues that Rawls falls short by not looking at the extent of freedom. A comparison in the space of capabilities would require an assessment of all the alternative sets of realizable functionings, that is well-being freedom. It is not simply the existence of opportunities but the range of sets of functionings that opportunities offer, where one set might be smaller than another. Women as a social group might have a smaller capability set than men as a social group but at the level of individuals there will be many reasons why some individual women would have capabilities sets bigger than some individual men’s.

The definition of substantive equality points to three arenas of equality: in law<sup>2</sup>, in practice, and in outcomes. Potentially, these three arenas indicate that there is no automatic translation from the establishment of a law to behavioral change (or practice), which, in turn, leads to equality in outcomes. This recognition has a parallel in the reasoning in Sen (1992) that there is diversity among individuals in the ability to convert means into ends. In the case of the MCW the focus is the legislative framework rather than a broad set of resources. Despite the potential for non-convergence across the three arenas, the MCW insists in equality in all these spaces.

The definition of gender equality points to “equal conditions realizing their full human potentials to contribute to and benefit from the results of development” for the realization of human potential. In discussing conversion of means into ends, Sen (1999) noted a few conditions that can determine whether an individual can turn opportunities into achievements, or, in the case of the MCW, realizing full human potentials. The State as the primary duty bearer would have to secure these equal conditions. As far as the law is concerned it is those conditions that result in discrimination and marginalization that need to be addressed and these are covered by the provisions in Chapter IV and Chapter V that specify rights and empowerment of women and women who are marginalized respectively.

In differentiating between human rights and capabilities, Sen (2004, 1999) in response to questions about its nature and foundations argues that human rights are “ethical demands” that need not be tied to a legal characterization even it is recognized that many laws draw their inspiration from human rights. As ethical demands, human rights serve as reminders to pay particular attention to freedoms that are deemed valuable but the two are not interchangeable, to wit, “...while rights involve claims (specifically claims on others who are in a position to make a difference), freedoms, in contrast, are primarily descriptive characteristics of the conditions of persons (Sen 2004: 328).” Here lies an important difference between the freedoms in the

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<sup>2</sup> This is reinforced by the provision on equal treatment before the law in Chapter IV, Section 12.

capabilities sense, which reflect the achievement of goals and the realizable opportunity to achieve valuable goals, and freedoms as human rights that refer more often to a process that allows certain actions or a process that guarantees protection from certain actions. In other words, Sen (2004) distinguishes between freedom as opportunity and freedom as process. There are many references to fundamental freedoms in the MCW and it is attached to the phrase “human rights and fundamental freedoms<sup>3</sup>.” Following human rights language and tradition, the freedoms referred to in the MCW are less about opportunity and more about process. It is not possible to infer from the legal text that fundamental freedoms refer to the conditions of persons as argued in Sen (2004).

Note that there is a qualification in the definition in that realized human potentials are aimed at contributing to development results as well as benefiting from them. Implied in this qualification is an agency role for the Filipina. She is instrumental in delivering results of development. She is also the beneficiary. The key to understanding this qualification is the meaning of development, which is likely to be centered on rights and empowerment. The relationship between rights and freedom well-being is discussed in Section IV.

### **III. Inequality Evaluation through Identities and Resources**

Sen (1992) argues that theories of justice often include, explicitly or implicitly, a demand for “basal equality” that requires the identification of a basic feature or characteristic on which inequality in a society will be assessed. An informational base, thus, is needed to make such assessments possible, and this information base can cover a wide variety of features. At the same time, humans are inherently diverse individuals such that seeking equality in one feature across all members might preclude equality when comparing over a different feature. In other words, the combination of the variety of spaces for comparison with inherent diversity of individual humans

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<sup>3</sup> See Chapter 1, Section 2 and Chapter 2, Section 4, paragraph (b) and (e).



creates many possibilities of non-congruence. Ultimately, however, Sen (1993) argues that the choice of space for comparisons is defined by the purpose of the comparison.

As pointed out earlier, a two-tier classification is present in the MCW and this classification corresponds to sources of inequality found in the law. The first is a primary source of inequality, which is discrimination. A second source of inequality is marginalization that has a compounding effect on discrimination worsening the experience of inequality. The primary source is an identity-oriented inequality evaluation while the compounding source hews closely to what Sen (1992) calls justice-based inequality evaluation and welfare-based inequality evaluation. Sen (1992) is critical of these two approaches to inequality evaluation. He refers to the first as "justice-based inequality evaluation" that uses the Rawlsian approach of "justice as fairness." Attention is given to the idea of equality of opportunity that Sen (1992) argues to be the direction that Rawls takes when proposing the two principles for the distribution of primary goods--"rights, liberties and opportunities, income and wealth, and the social bases for self-respect." The first principle is the condition of liberty, which states that "each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all." The second principle, known as the difference principle, states that "social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and, second, they must be to the great benefit of the least advantaged members of society (Rawls 1999: 55)." The second approach Sen (1992) calls the "welfare-based inequality evaluation" that relies upon utilitarian approach of individual utility as a function of income and summing across individuals to determine the highest possible sum of utility for a given total of income. More simply, this approach argues that incomes determine social welfare.

While acknowledging that Rawls' principles take the analysis closer to the capabilities approach that emphasizes freedoms to achieve, Sen (1992) points out that primary goods are not constitutive of freedom, rather these are

means to freedoms that may be achieved. A similar argument is made when taking social welfare as a function of income. The social welfare function is narrow in that it does not include constitutive elements of well-being, which should be the basis of defining social welfare. In addition, a utilitarian approach ignores the adaptation and mental conditioning of an individual that affects the assignment of values to utility derived from a given income. The distinction between the means and the ends, which are the freedoms that an individual may enjoy as represented by capabilities, has serious consequences for inequality evaluation and, as a corollary, the attainment of equality. The first difficulty is associated with what Sen (1992) refers to as inter-end variation due to the differences people may have over which ends are valuable.

The second difficulty with both approaches to inequality evaluation is associated with inter-individual variation in the ability to convert means into ends. Sen (1999) identifies at least five sources of variation in conversion: personal (or biological); environmental; social conditions; relationship with one's society that dictate commodity requirements for accepted social behavior; and, intra-household distribution.

The concepts of the marginalized and marginalization place emphasis on grounds that compound discrimination. The MCW defines marginalization as "a condition where a whole category of people is excluded from useful and meaningful participation in political, economic, social, and cultural life" and marginalized "refers to the basic, disadvantaged, or vulnerable persons or groups who are mostly living in poverty and have little or no access to land and other resources, basic social and economic services such as health care, education, water and sanitation, employment and livelihood opportunities, housing, social security, physical infrastructure, and the justice system (Chapter II, Section 4, paragraphs (c) and (d))." The definition clearly shows that differential access to and control over resources and incomes are a source of disadvantage and may result in injustice.

The emphasis on resources and incomes is more prominent in Chapter V, which acknowledges that when discrimination combines with poverty, then the barriers to the full realization of human potential are even greater. Hence, the MCW adds a full section covering marginalized sectors. This Chapter also relies on the human rights framework and identifies a set of rights that need to be fulfilled so that the State may be able to respond to marginalization, namely Section 20, paragraph (a) Right to Food and paragraph (b) Right to Resources for Food Production, Section 21 Right to Housing, Section 22 Right to Decent Work, Section 23 Right to Livelihood, Credit, Capital and Technology, and Section 24 Right to Education and Training.

Along with the set of rights above Section 27 Social Protection repeats the general principle of Chapter V by requiring the State to “institute policies and programs that seek to reduce the poverty and vulnerability to risks and enhance the social status and rights of the marginalized women by promoting and protecting livelihood and employment, protecting against hazards and sudden loss of income, and improving people’s capacity to manage risks,” as specified in paragraph (b) of the aforementioned section. A possible explanation may come from the fact that provisions under Section 23 focus on access to resources in its paragraph (a)<sup>4</sup> and (b)<sup>5</sup> while paragraph (c)<sup>6</sup> focuses on employment opportunities of returning women migrant workers, hence, the need for a general provision. More important, however, is that social protection in MCW appears to be a response to vulnerability more than a response to causes of poverty. This adds an additional dimension to inequality evaluation. Differences are noted not only between individuals or social groups but also for the same individual whose states of being change over time as the person faces changes in circumstances. At least, according

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<sup>4</sup> Chapter V, Section 23, paragraph (a) Equal access to formal sources of credit and capital.

<sup>5</sup> Chapter V, Section 23, paragraph (b) Equal share to the produce of farms and aquatic resources

<sup>6</sup> Chapter V, Section 23, paragraph (c) Employment opportunities for returning women migrant workers taking to account their skills and qualifications. Corollarily, the State shall also promote skills and entrepreneurship development of returning women migrant workers.

to the MCW, the State is to provide insurance both by national institutions<sup>7</sup> and community-based schemes<sup>8</sup>. The components of social protection are identified as labor market programs, social insurance, social welfare, and social safety nets<sup>9</sup>. The recognition of vulnerability has potential in dealing with those who may not be poor but become poor after facing risks. It will be important to enable application of the MCW provision in this sense instead of interpreting social protection as applying only to the poor who become more poor in the face of risks.

Apart from the occupation-based groups typically associated with class analysis (small farmers and rural workers, fisherfolk, urban poor, workers in the formal economy, workers in the informal economy, and migrant workers), the list of marginalized groups include cultural groups (such as the Moro and indigenous peoples) as well as demographic groups (such as children, the senior citizens, and persons with disability and solo parents). This list of marginalized sectors is the result of decades of political organizing in the Philippines, particularly between 1972 and 1986 against the Marcos dictatorship. Major political movements employed class analysis that eventually expanded to include the identification of concerns of other sectors as the need to broaden the mass base intensified. In the words of Sobritchea (2004) writing about the Philippine women's movement and its relationship with the State, "[t]he leftist origin of the women's movement has determined, to a great extent, the contours of the discourse roots of women's subordination. Initially, militant women's groups addressed women's issues and concerns within the context of a nationalist agenda for genuine agrarian reform, nationalist industrialization, and peace with justice. Organizing of women followed class and occupational sectors (for example, peasant, labour, and indigenous communities); it focused on the role played by class

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<sup>7</sup> Chapter V, Section 27, paragraph (a). The Social Security System (SSS) and the Philippine Health Insurance Corporation (PhilHealth) shall support indigenous and community-based social protection schemes. Also, paragraph (d) The State shall establish a health insurance program for senior citizens and indigents. Note that "indigents" as a social group not defined in the MCW. This reference does not appear anywhere else in the law.

<sup>8</sup> In addition to paragraph (a), there is also Chapter V, Section 27, paragraph (e). The State shall support women with disabilities on a community-based social protection scheme.

<sup>9</sup> MCW Implementing Rules and Regulations, Chapter II, Section 7, paragraph S.

and ethnicity in intensifying patriarchal values and practices (Sobritchea 2004: 104).”

The Philippine women’s movement demanded and achieved political autonomy from broad social movements in the early 1980s. The women’s movement incorporated feminist political analysis into their organizing process by “going beyond class analysis (Sobritchea 2004: 103).” This has contributed to the expansion of group identities as well as the focus on key issues around sexuality and violence. Going beyond class analysis meant that women’s groups focused on women-specific issues criticizing women’s portrayal in the media, commercial sex work and prostitution, women’s reproductive health and rights, and sexual violence (Sobritchea 2004). The discourse covered different sites of patriarchy, including at the personal level as victims of sexual assault or inability to disengage from marriage relations. The women’s movement became a distinct political entity in the third phase of its history in the early 1980s during the peak of the anti-dictatorship struggle. Raquiza (1997) citing Reyes (1998) points to the following characteristics of this new phase: “the distinctiveness of the women’s movement from the comprehensive political struggle; the need to simultaneously address class and gender; and, the urgency of carrying both women’s practical needs (e.g., livelihood as well as health and other social services) and strategic interests (e.g., gender equality, self-determination, women’s empowerment) (p. 178).” These features, especially those that address the class and gender divide, continues to influence the politics of women’s movement today. These features found expression in the MCW as discrimination and marginalization.

When analyzing Chapter IV of the MCW, most of the provisions deal directly with discriminatory practices that can be claimed as specific to women as a social group. The provisions in Chapter IV, for example, covers protection from violence, especially gender-based offenses<sup>10</sup>. The provision

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<sup>10</sup> Chapter IV, Section 9. Protection from violence; Section 10. Women affected by disasters, calamities, and other crisis situations that mentions protection from sexual exploitation and other sexual and gender-based violence; Section 14. Women in sports that mentions ensuring

on the right to health<sup>11</sup> highlights the stages of a woman's life cycle ensuring access to services, particularly reproductive health<sup>12</sup>, geriatric health, and mental health. A related set of provisions refer to education<sup>13</sup> and the mass media<sup>14</sup> where one of the aims is to remove gender role stereotyping in the subject content of educational materials and curricula as well as in mass media (especially derogatory portrayals). A similar aim is present in the provisions for women in special circumstances, namely women in sports<sup>15</sup>, and women in the military<sup>16</sup>. Finally, Section 19 contains provisions for equal rights in all matters relating to marriage and family relations. These provisions cover entry and exit from relationships, joint decision making over children, choice of profession or occupation, property rights, and citizenship and nationality. These provisions illustrate the point raised earlier on feminist discourse going beyond class analysis and engaging with women-specific issues in different sites of patriarchy.

It is not only important to appreciate the historical value of class and gender analysis in Philippine politics. Class-based analysis highlights many worthwhile concerns.

The importance of this type of class-based classifications is obvious enough in most contexts. They also indicate why it is the case that equality in the space of, say, libertarian rights does not yield anything like equality of well-being, or equality of the overall freedoms to lead the lives that people may respectively value. They also draw attention to the importance of inequalities in wealth and income in generating unequal well-beings and living

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their safety and well-being; Section 17. Women's right to health, especially paragraph (8) mentioning cases of violence against women and children.

<sup>11</sup> Chapter IV, Section 17. Women's right to health.

<sup>12</sup> Chapter IV, Section 17, paragraphs (1) to (9).

<sup>13</sup> Chapter IV, Section 13. Equal access and elimination of discrimination in education, scholarships, and training.

<sup>14</sup> Chapter IV, Section 16. Nondiscriminatory and nonderogatory portrayal of women in media and film.

<sup>15</sup> Chapter IV, Section 14. Women in sports.

<sup>16</sup> Chapter IV, Section 15. Women in the military.

conditions, even when there is equality in *formal procedures* and in the allocation of some *specific facilities*--which are sometimes called, somewhat euphemistically, 'equality of opportunities'. The crucial relevance of such class-based classifications is altogether undeniable in the context of general political, social, and economic analysis. (Sen 1993: 118)

The multiplicity of identities found in the MCW beyond that of class is a reminder that there is diversity across individuals and that there is diversity in the qualities that may be assessed for each individual. For the latter, individuals carry several identities that enables them to belong to any number of categories. Which of these identities become primary is a function of that individual's immediate circumstances. The MCW attempts to move away from the extremes of "identity disregard" and "singular affiliation" to use terminology in Sen (2006). Indeed, the multiplicity of identities in the MCW provides ample space for Filipino women to choose any combination of rights that would correspond to her specific needs.

It should not be surprising that the MCW reflects debates in feminist politics as it is a byproduct of the history of the women's movement. Fraser (2007; 2004) refers to the debate as "recognition or redistribution?" insisting that neither as a singular approach is worthy of pursuit and that there is a need to look for an approach that combines concerns raised by both. A variation of this debate was discussed in Nussbaum (2000) as "sexual domination" versus "economic dependency."

As always, the vicissitudes of theory follow those of politics. The shift, over the last thirty years, from quasi-Marxist, labour-centred understandings of gender to culture and identity-based conceptions coincides with a parallel shift in feminist politics. Whereas the sixty-eight generation hoped, among other things, to restructure the political economy so as to abolish the gender division of labour, subsequent feminists formulated other, less material aims. Some, for example, sought recognition of sexual

difference, while others preferred to deconstruct the categorical opposition between masculine and feminine. The result was a shift in the center of gravity of feminist politics. Once centred on labour and violence, gender struggles have focused increasingly on identity and representation in recent years. The effect has been the subordination of social struggles to cultural struggles, the politics of redistribution to the politics of recognition – this was not, once again, the original intention. Cultural feminists and deconstructionists alike assumed that feminist cultural politics would synergize with struggles for social equality. But that assumption, too, has fallen prey to the larger Zeitgeist. In “the network society,” the feminist turn to recognition has dovetailed all too neatly with a hegemonic neoliberalism that wants nothing more than to repress socialist memory. (Fraser 2007: 24)

Nussbaum (2000) argues that a focus on the specific capabilities that contribute to overall well-being--in this case, sex-related capabilities and employment-related capabilities--shows that different responses are required depending on the capability being addressed but all of which contributes to the enhancement of well-being. Nussbaum (2000) ends with: “In short, the capabilities are an interlocking set; they support one another, and an impediment to one impedes others.”

When inequality evaluation is undertaken in the space of capabilities, attention is placed on the specific freedoms where an injustice may be expressed, that is: “A person’s position in a social arrangement can be judged in two different perspectives, viz. (1) the actual achievement, and (2) the freedom to achieve. Achievement is concerned with what we *manage* to accomplish, and freedom with the *real opportunity* that we have to accomplish what we value (Sen 1992: 31).” Thus, Sen (1992) argues that a comparison over freedom to achieve provides appropriate attention “to the nature and value of actual achievements, and inequalities in achievement can throw light on inequalities in the respective freedoms enjoyed (Sen 1992: 5).” It is this type of inequality evaluation that can provide the information base for public action. With the shift in focus from means to ends, the comparison of access



to or control over resources moves from an assessment of low or high levels towards the adequacy (or inadequacy) of the means to achieve.

Human rights is the framework used to respond to discrimination and marginalization. This follows from the CEDAW that the Philippines ratified in 1981 without reservations as well as the three other international human rights conventions mentioned in the introductory section. The structure of the MCW indicates that there is a separate set of rights that respond to discrimination (i.e., Chapter IV Rights and Empowerment) and another set of rights (i.e., Chapter V Rights and Empowerment of Marginalized Sectors) that respond to marginalization. The structure implies Chapter IV applies to all women and Chapter V applies only to the sub-category of marginalized women. It would appear that access to resources removes any need for the State to guarantee a variety of rights nor any need to mitigate sources of risk and vulnerability as these rights are meant for marginalized groups only. It diminishes the universal characteristic of the human rights framework.

## **IV. Instrumental Agency through State Mechanisms**

One of the functions that human rights language can play even when there is an overlap with the capabilities approach is the “emphasis it places on people’s choice and autonomy” that is central to capabilities (Nussbaum 2000: 101). Indeed, participation and access to information is considered by the MCW as integral to the application of a rights-based approach.

All people have the rights to participate in and access information relating to the decision-making processes that affect their lives and well-being. Rights-based approaches require a high degree of participation by communities, civil society, minorities, women, young people, indigenous peoples, and other identified groups. (Chapter 1, Section 2, MCW)

The MCW contains several provisions on participation and representation that can enhance democratization in the Philippines. Ferrer (1997) argues that the democratic project was of a magnitude that the Philippine government and the ruling elites was assessed as not having the capacity to deliver. In other words, with "the broadening of the parameters of democracy (the outcome) and the emphasis on democratization (the process), the role ascribed to civil society have also expanded (p. 6)." Having been enshrined in the 1987 Constitution, these groups are recognized in subsequent laws passed by the Philippine legislature. Republic Act 7160 known as The Local Government Code of the Philippines enacted in 1991 specifies the relationship between local government units and these groups<sup>17</sup>. Republic Act 7941 Party-list System Act of 1995 institutionalized recognition and participation of marginalized sectors and groups in the legislature<sup>18</sup>. The MCW is another one of those laws that views the participation and representation of marginalized groups as integral to rights-based approaches.

Chapter IV of the MCW contains a provision for temporary special measures and affirmative action mechanisms in participation and representation<sup>19</sup> of women in decision-making and policy-making processes in both public and private spheres. Chapter V, which focuses on marginalized sectors, also contains provisions for the Right to Representation and

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<sup>17</sup> The relevant provisions are: Section 34. Role of People's and Non-Government Organizations. Local government units shall promote the establishment and operation of people's and non-governmental organizations to become active partners in the pursuit of local autonomy; Section 35. Linkages with People's and Non-Governmental Organizations. Local government units may enter into joint ventures and such other cooperative arrangements with people's and non-governmental organizations to engage in the delivery of certain basic services, capability-building and livelihood projects, and to develop local enterprises designed to improve productivity and income, diversify agriculture, spur rural industrialization, promote ecological balance, and enhance the economic and social well-being of the people; and, Section 36. Assistance to People's and Non-Governmental Organizations. A local government unit may through its local chief executive and with the concurrence of the *sanggunian* [council] concerned, provide assistance, financial or otherwise, to such people's and non-governmental organizations for economic, socially-oriented, environmental, or cultural projects to be implemented within its territorial jurisdiction.

<sup>18</sup> These representatives, according to the law, should constitute 20 per cent of the total seats in the House of Representatives. In Section 5 of the law, the marginalized sectors are specified in the law as labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers and professionals.

<sup>19</sup> Chapter IV, Section 11. Participation and representation.

Participation<sup>20</sup> and the Right to Information<sup>21</sup>. It is important, therefore, to understand the relationship between the same provisions in different chapters of the MCW and whether this has implications in the way Philippine society and its women as a group are divided between those who are marginalized and those who are not. Chapter V also has a provision relating to peace and development. There appears a repetition of appeals to women's participation and their distinctive needs but applied in the context of conflict, conflict resolution and peace-building and reconstruction. In this setting, women as a marginalized group are divided according to the presence or absence of conflict in their immediate socio-political setting. There is a reinforcement of this provision in cases that result in the functional incapacitation of women, described as "women in especially difficult circumstances" in Chapter V, Section 30. In Chapter IV, this division was not explicit although Section 10 contains a general reference to crisis situations, in addition to disasters and calamities.

Democratization is not the only objective for enhancing participation and representation. The MCW in its general provisions emphasizes women's contributions to nation-building.

The State shall provide the necessary mechanisms to enforce women's rights and adopt and undertake all legal measures necessary to foster and promote the equal opportunity for women to participate in and contribute to the development of the political, economic, social, and cultural realms. The State, in ensuring the full integration of women's concerns in the mainstream of development, shall provide ample opportunities to enhance and develop their skills, acquire productive employment and contribute to their families and communities to the fullest of their capabilities. (Chapter 1, Section 2, MCW)

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<sup>20</sup> Chapter V, Section 25. Right to representation and participation.

<sup>21</sup> Chapter V, Section 26. Right to information.

Key to the implementation of the MCW is an institutional mechanism referred to in the law as “gender and development (GAD).” Chapter II, Section 4, paragraph (h) defines GAD as:

...the development perspective and process that are participatory and empowering, free from violence, respectful of human rights, supportive of self-determination and actualization of human potentials. It seeks to achieve gender equality as a fundamental value that should be reflected in development choices; seeks to transform society’s social, economic, and political structures and questions the validity of the gender roles they ascribed to women and men; contends that women are active agents of development and not just passive recipients of development assistance; and stresses the need to women to organize themselves and participate in political processes to strengthen their legal rights.  
(Chapter II, Section 4, paragraph (h), MCW)

From a capabilities perspective, these provisions for participation and representation appear to reflect an instrumental view of agency combined with a recognition of disempowerment, particularly in relation with State protection especially for victims of discriminatory behavior. The law recognizes barriers to self-realization at the same time that it values women’s contribution to development results and nation-building. GAD’s definition emphasizes women’s role in society and in society’s pursuit of development. There is less attention given to personal choice and a woman’s agency in realizing her personal goals and other goals that she values. There is also less attention given to actions that pursue development, including substantive equality, outside of state institutions and mechanisms.

The argument regarding instrumentality is further bolstered when noting that GAD is referred to in the MCW mainly in Chapter VI Institutional Mechanisms. This chapter identifies the state institutions responsible for the

implementation of the MCW. It also specifies that gender mainstreaming be used as the strategy for promoting women's human rights and eliminating gender-based discrimination. It specifies the institutional mechanism that will "catalyze and accelerate gender mainstreaming" within the government unit as well as across the entire bureaucracy and that is the gender focal points in each agency and the gender focal point network. Furthermore, the MCW assigns the role of Gender and Development Ombud to the Commission on Human Rights to ensure compliance and provide assistance for redress.

In particular, Chapter VI, Section 36, paragraph (a) outlines planning, budgeting, monitoring and evaluation for GAD as a feature of gender mainstreaming to be followed by state institutions. Future programs are to be designed on the basis of a gender audit of the implementing institutions and a gender analysis of respective policies, plans, and programs. These activities are to be undertaken "in consultation with gender/women's rights advocates and agency/women clientele." "Gender equity measures" are then required in all plans produced by state institutions in response to issues found in the gender audit and the gender analysis. Chapter II, Section 4, paragraph (g) defines gender equity as "the policies, instruments, programs, services, and actions that address the disadvantaged position of women in society by providing preferential treatment and affirmative action," which may alternatively be called temporary special measures. Thus, in the MCW gender equity is not to be mistaken for a social goal because it is defined in the law as a set of measures.

Funding for these types of activities should come from the 5 per cent appropriation of the agency or local government unit pursuant to provisions stated in Republic Act 7192 Women in Development and Nation Building Act. The expectation is that this allocation is to be used to influence the remainder of the budget to become gender-responsive.

Pursuant to Republic Act No. 7192, otherwise known as the Women in Development and Nation Building Act, which allocates five per cent (5%) to thirty per cent (30%)

of overseas development assistance to GAD, government agencies receiving official development assistance should ensure the allocation and proper utilization of such funds to gender-responsive programs that complement the government GAD funds and annually report accomplishments thereof to the National Economic and Development Authority (NEDA) and Philippine Commission on Women (PCW). The utilization and outcome of the GAD budget shall be annually monitored and evaluated in terms of its success in influencing the gender-responsive implementation of agency programs funded by the remaining ninety-five per cent (95%) budget. (Chapter VI, Section 36, paragraph (a), MCW)

Hence, while gender and development is defined in broad terms to include self-actualization of human potential, the use of GAD is tied to institutional mechanisms and the use of gender audits and gender analysis. In effect, therefore, gender and development in the MCW is a specific expression of the gender mainstreaming strategy.

It is not attached to the substantive set of rights specified in Chapter IV and Chapter V, except indirectly through gender audits and gender analysis. Presumably, gender audits and gender analysis would refer to the substantive content of Chapter IV and Chapter V as the basis of inequality evaluation. If, indeed, this is the case, then gender and development as the label attached to the institutional mechanism coincides with the use of the term in feminist development literature, which refers to gender and development an analytical approach to the study of social hierarchies and the construction of status and privilege associated with each hierarchical level, most prominently between male and female gender roles, as well as the social relationships among them (Barker 1999). The consultation process specified as a requirement of gender audits and gender analysis is explicitly an instrumental approach to agency.

A question remains. How can the definition of gender and development that refers to self-actualization and realization of human potential be

supported given the existing specification of institutional mechanisms and processes? Thus far, GAD is a state-centered approach and that is due to the identification in the MCW of the State as the primary duty-bearer.

Objective-setting is key to an understanding of agency in the MCW from a capabilities perspective. Sen (1992) distinguishes between “realized agency success” and “instrumental agency success.” There is a difference, he argues, between the realization an objective against the realization of an objective through one’s own efforts. The MCW appears to have a strong preference for the second aspect of agency through the GAD institutional mechanisms. Sen (1992) considers this latter to a more limited form of the former, which success does not require some form of direct control by the individual as long as the goal, valued by that individual and others, as achieved.

## **V. Note on the Caring Society**

The provisions against discrimination in Chapter IV reflect to some extent some of the concerns of feminist cultural politics, especially on provisions dealing with sexual harassment and violence and gender-role stereotyping in education and mass media. Interestingly enough, no reference is made to the gendered division of labor that assigns the “housewife and mother” identity to women as these roles are socially-ascribed and influence women’s preference formation as well as those with whom women relate. There is no mention in the MCW about changing these patterns and certainly nothing about any valuation attached to this role in contributing to societal well-being. This is unlike Article 88 in the 1999 Constitution of the Bolivarian Republic of Venezuela that recognizes housework as an economic activity and specifically states that housewives are entitled to social security<sup>22</sup>.

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<sup>22</sup> Article 88: The State guarantees the equality and equitable treatment of men and women in the exercise of the right to work. The state recognizes work at home as an economic activity that creates added value and produces social welfare and wealth. Housewives are entitled to Social Security in accordance with law. 1999 Constitution of the Bolivarian Republic of Venezuela. (<http://www1.umn.edu/humanrts/research/venezuela-constitution.html>, accessed 27 March 2014)

The significance of this omission is highlighted by Nussbaum (2003) when she discusses how the capabilities approach would be quick to recognize such shortcomings. The capabilities approach presupposes that human societies are structured in a way that responds to neediness and its corresponding dependency that often entails the provision of caring services for its fulfillment. This assumption stands in contrast to many social contract theories that assume contracting parties to be free and equal without being dependent on others permitting a contract of mutual advantage to be negotiated (Nussbaum 2003).

In short any real society is a caregiving and care receiving society, and must therefore discover ways of coping with these facts of human neediness and dependency that are compatible with the self-respect of the recipients and do not exploit the caregivers. This, as I have said, is a central issue for gender justice.

(Nussbaum 2003: 51)

Feminist writing in the Philippines recognizes this gendered division of labor and its varied implications (e.g. Rodriguez 2012, Parreñas 2000, Eviota 1992). Among the implications is that the performance of care work by women prevents these women from functioning in ways that they value even when their societies give them the freedom to do so (Nussbaum 2003). The paper only wishes to note the absence of a reference in the MCW and does not attempt to explain why. One possibility is that there must have been a perceived resistance against this recognition in the legislature.

## **VI. Conclusion: Working towards a Re-interpretation**

The MCW is a landmark law for the women's movement in the Philippines. It captures the political discourse of class and gender analysis and the prominence of human rights as the approach to remedies. Given these foundations, the capabilities perspective reveals challenges in guaranteeing that the law's provisions enhances the well-being of both



women and men. The challenges follow from the conceptual differences between human rights and capabilities in the areas of inequality evaluation, agency, and care as essential to gender justice.

This paper has pointed out that the human rights articulated in the MCW are closely related with Rawlsian primary goods. The MCW applies human rights from a strongly resource-based conception despite acknowledging that translating law into changes in behavioral practice and improvements in outcomes are subjected to many factors, several of which are not recognized by the MCW. The capabilities approach avoids the intervening factors by going directly into well-being outcomes.

There may be confusion created by the two-tier classification of women into a resource-based definition of poor and non-poor and the corresponding disempowerment caused by discrimination and marginalization such that human rights provisions appear segmented. This segmentation needs to be interpreted against the recognition in the law that rights are indivisible and interdependent. The role of social protection as a response to risks is an additional source of confusion because it is not clear how it accounts for changes in classification from non-poor to poor. The capabilities approach avoids confusion when well-being freedom is the basis for inequality evaluation regardless of classification.

Political participation and representation are appropriately given emphasis consistent with human rights approaches. However, the MCW appears to have an instrumental view of agency, particularly with development as a trajectory, and there is less attention paid to the more general conception of realized agency success. This would mean that the pursuit of equality outside of state mechanisms is given less importance.

The equalization of rights and opportunities as required by substantive equality is difficult to measure and it will be the gender audits and gender analysis that will identify methodologies. If capabilities were the basis for

comparison, measurement would likely follow the mapping between functionings and capabilities given clear conceptual definitions.

Finally, this paper has noted that the MCW has not directly confronted the gendered division of labor and the social assignments for caring. The neglect implies that there are no provisions to address a fundamental reason behind gender-based inequality, which undermines the theoretical basis for social contracting for mutual advantage.

Amendments to the law need to not be the direction. The implementing rules and regulations can be amended through the Philippine Commission on Women. Since gender audits and gender analysis are the instruments for evaluation, then the frameworks for such audits and analysis can benefit from the capabilities approach so that the confusions raised above are reduced. Possibilities for taking this direction exist in the MCW in the areas of health, education, and employment. This is, however, a technocratic solution.

It is not a political solution that would require social movements for its promotion. A political solution certainly strengthens or provides legitimacy to the capabilities that might be used as a basis for inequality evaluation in gender audits and gender analysis. Only a political exercise can identify a universal (or national) set of capabilities that becomes the basis for gender audits and gender analysis eventually to be used by state mechanisms. Barring such possibilities, at the very least, where human rights are viewed as ethical demands, the MCW succeeds in giving attention to aspects of women's lives that require state support.

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