

Are Women's Rights Human Rights?

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ROSIE WALTERS, JUL 20 2013

Are Women's Rights Human Rights? Critically Evaluate the Tensions Between Feminist and Non-Feminist Approaches to Contemporary Human Rights Issues and Debates.

Introduction

For many feminist scholars, in spite of a concerted effort by the international community towards international legislation on women's rights as human rights, including the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (Women's Convention), the only matter for contention surrounding human rights is not whether they are gender equal, but rather, whether the entire concept of human rights is "gender-biased and/or gender-blind" (Guerrina & Zalewski, 2007: 9). Drawing on the work of feminist lawyers and analysts, as well as human rights groups, this essay will argue that a non-feminist approach to women's human rights all too often sees them as separate or in some way secondary to other human rights concerns, does not take women's lives and daily experiences into account, and sees women's human rights as conflicting with other rights such as religious practices, the rights of men or the (perceived) rights of the unborn child from the moment of conception. While there are overwhelming numbers of examples of violations of all aspects of women's human rights – including their political, social and economic rights – this essay will focus on women's reproductive rights as a prime example of how the law's male-centeredness, lack of consideration for women's experiences and woolly language, jeopardises women's most fundamental right: their right to life. By examining the concept of and legal backing for women's reproductive rights, then considering the cases of three countries that have signed and ratified the Women's Convention, this essay will show that a lack of clarity, resources and power of enforcement mean that human rights law actually undermines the feminist approach to women's human rights by giving legitimacy to states who have no intention of removing discriminatory and life-threatening practices and legislation against women.

Human Rights or the Rights of Man?

The Universal Declaration of Human Rights of 1948 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as [...] sex" (United Nations, date unknown(a)). However, feminist lawyers and scholars have convincingly shown that this is not the case and the very treaties and principles upon which the human rights framework was created defend the rights of man and, in particular, male household heads (Moller Okin, 1998: 18). Not only does the declaration refer repeatedly to "man" and "his" rights, but it also deals only with the public realm, protecting the rights of the family from outside intrusion. In particular, Article 12 declares: "No one shall be subjected to arbitrary interference with *his* privacy, family, home or correspondence, nor to attacks upon *his* honour or reputation" (United Nations, date unknown(a), emphasis added). For feminists, this is the ultimate example of the public/private dichotomy in which domestic matters, and those which most often concern the lives of women, are seen as private and of no concern to the state. Human rights law has evolved since 1948 and there have been three so-called "generations" of human rights treaties (civil and political rights; social and cultural rights; the rights of groups or peoples), yet for Hilary Charlesworth they all share the same flaw: "they are built on typically male life experiences and in their current form do not respond to the most pressing risks women face" (1994: 58 – 59). For the many women around the world whose greatest risk is the one they face at home, a list of political, economic and above all public rights will mean very little. Whereas, the very real dangers faced by women inside or outside of the home are often seen as "too specific to women to be seen as human or too

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generic to human beings to be seen as specific to women" (MacKinnon, 1994: 10): in other words, the law shows gender-bias or gender-blindness. Women have distinctive rights, which are also human rights, and which require seeing the human as not only male (Maya, 2007: 97).

An effort has been made more recently to redress these imbalances and inequalities and to assert the human rights of women, most noticeably through the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol, and through international conferences such as the Beijing Platform for Action. These were no doubt born out of feminist activism; however their feminism has been tempered by non-feminist and oppressive states refusing to subscribe to principles that could greatly limit them (MacKinnon, 1994: 6), and their activism has been restricted by the enduring patriarchy of the United Nations. The resulting Women's Convention is largely one that protects women's rights to the same rights stated for men in existing treaties, in other words an "approach of adding women and stirring them into existing first generation human rights categories" (Bunch, 1990: 494), rather than acknowledging women's specific experiences and rights. States were also allowed to sign and ratify the Women's Convention whilst stating reservations, many of which are completely contrary to the aim of non-discrimination. For example, in response to Article 16 on equal marriage rights, Algeria entered a reservation that these should not contradict the Algerian Family Code. Several European countries exercised their right under article 29(1) to dispute this reservation, however Algeria had already entered a reservation declaring that it did not consider itself to be bound by article 29(1) and so little could be done (Neuwirth, 2005: 28). As Jessica Neuwirth points out, "[i]n effect, Algeria stated its willingness to implement CEDAW so long as nothing needed to be done to implement CEDAW" (ibid: 29).

Feminist lawyers working in this field have been quick to point out the multiple other ways in which CEDAW and the process of incorporating a gender perspective in human rights processes have not been given the same priority or resources as other human rights treaties. These include, but are not limited to: the fact that the Commission on the Status of Women has fewer staff, less budget and less effective mechanisms for implementation than the Human Rights Commission (Bunch, 1990: 492); while women make up 74% of membership of the committees on CEDAW and the Rights of the Child, they are just 15% of the members of the other human rights committees (Charlesworth, 2005: 7); the Human Rights Committee is able to reject reservations to treaties if they are deemed to be against the entire purpose of the law, yet the CEDAW Committee cannot do the same (Neuwirth, 2005: 26); states only report to the Committee every four years on their implementation of the Convention, and there is no mechanism to hold them accountable at any other time (Charlesworth & Chinkin, 2000: 220); and during the 1993 World Conference on Human Rights, governments called for measures to assist the Committee on the Rights of the Child in its mandate, yet no such request was made for CEDAW (Sullivan, 1994: 160). While there is clearly still an overwhelming gender-bias and/or gender-blindness in the field of human rights, the very existence of CEDAW and the policy of gender mainstreaming at the UN have been used to justify reducing the resources available to initiatives for women within UN agencies. As Hilary Charlesworth puts it, "[g]ender has been defanged" (2005: 16).

Where are Women's Reproductive Rights?

Perhaps one of the best examples of the lack of acknowledgement of women's lives and experiences in international human rights law can be seen in the scant provision for women's reproductive rights. The Convention makes no reference at all to women's sexual rights, such as freedom to choose whether or not to have sex, freedom to have consensual sex and sex not linked to reproduction (Amnesty International, 2010: 14), there is some limited mention of women's reproductive rights. They are entitled to access to information, advice and services for family planning, as well as the information, education and means to decide on the number and spacing of their children (United Nations, date unknown(b)). This seems woefully inadequate when "[m]aternity is ranked as the primary health problem in young women (ages 15 – 44) in developing countries, accounting for 18 per cent of the total disease burden" (Cook, Dickens & Fathalla, 2003: 9-10), and "pregnancy related deaths are the leading cause of mortality for 15 to 19-year-old girls worldwide" (Amnesty International, 2009: 10). The language of the Convention is too weak, the terms used too vague, and once again the greatest threats to women worldwide escape the boundaries of international law.

For the most part, those wishing to make a human rights claim on a violation of their reproductive rights, must use the terminology of other, "mainstream" rights to do so. This in itself may be a very difficult thing for a woman to do; as

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Sally Engle Merry argues, “[h]uman rights are difficult for individuals to adopt as a self-definition in the absence of institutions that will take these rights seriously” (2003: 281). Some lawyers have learned to interpret the law in favour of women, “[looking] at women’s lives first and [holding] human rights law accountable to what we need” (MacKinnon, 1994: 6), and Amnesty International has created a table of women’s sexual and reproductive rights based on the assertion that these require respect for rights such as the rights to life, freedom from torture and to physical and mental integrity (2010: 14).

However, just as the inexplicit language of the law can be interpreted in a feminist way, so too can it be interpreted by states in a non-feminist way, and the content of treaties can send out mixed messages. Looking at a table of conventions and declarations related to reproductive rights (see Cook, Bernard & Fathalla, 2008: 438 – 443), the most startling observation is that the Women’s Convention does not mention the right to life. This right is protected for all human beings, with no distinction according to sex, in the Declaration of Human Rights, however the international community still felt the need to reiterate it in the Convention on the Rights of the Child (CRC) and not CEDAW. During the drafting on the CRC, there was considerable disagreement among states on the stage at which a child has rights, with some states arguing for the rights of the unborn child from the moment of conception. This was rejected, however no lower age limit was set, leaving the interpretation of the word “child” to individual states. Eventually, to avoid a recurrence of the same debate, it was suggested by Italy and accepted by states that the “right to survival” should be augmented and linked to the “right to life” (Alston, 1990: 164). And so, the right to life was included in the Convention on the Rights of the Child while it is absent from CEDAW, and was left sufficiently vague in terms of starting point, so that it could be interpreted by states to protect the right to life or the right to be born of an unborn child, even when to do so would endanger the right to life of an adult woman.

Much has been made of the tensions between feminists and non-feminists, and even within feminisms, in terms of advocacy, women’s rights and cultural relativity. While cultural relativity is often cited as a reservation in human rights law and debates, this is done most of all when it comes to issues concerning women’s rights, sexuality and reproduction, even in contexts where the traditions or practices raised as objections are ignored in other aspects of society (Charlesworth & Chinkin, 2000: 222; Moller Okin, 1998: 36). While not all claims to humanity are universal and no one context, culture or continent can truly represent all peoples, the following three examples from very different contexts, cultures and continents show that some violations of women’s human rights are universal. In particular, it is still the case the world over that a woman’s reproductive rights, which impact on her right to life, are still seen as secondary or conflicting with men’s rights, religious freedoms, the rights of the unborn child, or even financial concerns and budgeting.

Marital Status Discrimination in Indonesia

Indonesia ratified the Convention on the Elimination of All Forms of Discrimination Against Women on 9 July 1993. The only reservation it entered was to say that it does not consider itself bound by the provisions of article 29, paragraph 1: the dispute process by which another state may bring the application, or lack thereof, of the Convention of a state to the attention of the International Court of Justice (United Nations, date unknown(c)). In other words, with this reservation the government of Indonesia has ensured that it does not need to apply the Convention in any future legislation nor indeed address the existing discriminatory legislation in Indonesia that defines a wife’s responsibility as “taking care of the household to the best of her ability” and has yet to criminalise marital rape (Amnesty International, 2010: 16 & 19).

In terms of reproductive rights, the government in Indonesia has shown a total disregard for what limited provisions are stated within the Convention to which it is party. For example, while the Convention clearly states that women have a right to information, education and means to control the number of children they conceive, the Indonesian Criminal Code states that it is a criminal offence to provide information to anyone on means of preventing or interrupting pregnancy (ibid: 30). While CEDAW states that women have a right to access this information, the Political Covenant does contain exceptions under which states may restrict people’s right to impart information. Contained within Article 19(3)(b), one such exception is “for the protection of national security or of public order, or of public health or morals” (Cook, Dickens & Fathalla, 2003: 209-210). Until human rights law explicitly states which rights take priority, and what constitutes or does not constitute public morals, states will be able to interpret the rules

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in a way that is fitting to their pre-existing legislation and Conventions like CEDAW become almost meaningless to the women of Indonesia.

In spite of Article 1 of the Convention, which states that women must enjoy these rights “irrespective of their marital status” (United Nations, date unknown(b)), the Population and Family Development Law and the Health Law in Indonesia state that only married couples have a right to access sexual health and reproductive health services (Amnesty International 2010: 23). Furthermore, some contraceptives require that a woman obtains permission from her husband to be able to access them (ibid: 27). This explicitly denies the rights of all women, irrespective of their marital status, to decide the number and spacing of their children. Within a marriage, it also completely denies bodily autonomy by giving priority to a husband’s right to decide whether to have children over a wife’s.

Finally, and perhaps most worryingly of all, is the fact that abortion is completely illegal unless in cases of rape or complications in the pregnancy that are particularly life-threatening to the woman. In these cases, there are still strict criteria to apply that leave women’s fates very much in the hands of medical professionals, and in the case of life-threatening complications a woman still requires her husband’s consent to go ahead with an abortion (ibid: 33-34). Not only does this mean that an unmarried woman or girl with life-threatening complications has no choice but to continue with a pregnancy, but it also means that a married woman’s health is entirely determined by whether her husband thinks it is worth risking. Unsurprisingly, perhaps, the maternal mortality rate in Indonesia is 470 per 100,000 live births – 47 times that of the United Kingdom (Cook, Dickens & Fathalla, 2003: 406-417) – and 11 per cent of those deaths are attributed to unsafe abortions (Amnesty International, 2010: 24). In the case of countries like Indonesia, CEDAW clearly serves only to make them appear more legitimate to other states in the international arena. There is little or no evidence to show that they subscribe to the principles of the Convention, or have any intention of implementing them in law or practice.

One in Eight: Maternal Mortality in Sierra Leone

In Sierra Leone, a woman has a one in eight chance of dying as a result of pregnancy or childbirth in her lifetime (Amnesty International, 2009: 1), with one in 50 births resulting in death and an average of 6.5 births per woman (Cook, Dickens & Fathalla, 2003: 414). There are currently no emergency obstetric facilities able to provide life-saving caesarean sections and blood transfusions in six of the country’s 13 districts, and while the World Health Organisation estimates that between five and 15 per cent of deliveries will need caesarean sections, they make up just one percent of births in Sierra Leone (Amnesty International, 2009: 2 & 20).

The civil war that devastated the country and the severe levels of poverty and deprivation are significant factors in a country where at the onset of war the government employed 300 doctors, and by mid-2009 this number had dropped to 78 (ibid: 8). However, to attribute high levels of maternal mortality entirely to financial factors is to ignore the gender-bias and/or gender-blindness of the Sierra Leonean government, and its complicity in a situation in which maternal mortality is so frequent that it is perceived to be “‘normal’, or inevitable, rather than preventable” (ibid: 12).

An Amnesty International report in 2009 found that less than half of the money the government allocates to health services reaches its intended destination each year (ibid: 4). One of the many results of this is that government health officers are not being paid and so decide to charge for the services and drugs they offer, many of which should be provided free to pregnant women by law (ibid: 18). In a culture in which men are permitted to take as many wives as they feel they can afford to keep, and in which men control a household’s money, some 68 per cent of the mothers Amnesty interviewed stated that it was their husband’s decision where they gave birth and whether they had enough money to pay for emergency obstetric care (ibid: 11).

For Cook, Dickens and Fathalla, there is no financial justification for such appalling levels of maternal mortality: “[t]here is no country that is so poor that it cannot do something to improve the reproductive health of its people” (2003: 55), and in fact services such as family planning and maternal health are “the most cost-effective health interventions” in terms of long-term benefits to communities (ibid: 191). Education is perhaps one of the most cheap and effective ways to address the fact that 94 per cent of women in Sierra Leone undergo female genital mutilation practices that could increase the risks to them in childbirth (ibid: 10), or to address the commonly held belief that

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women have an obstructed labour because they have been unfaithful to their husband and must confess before they can be given emergency health care (ibid: 12).

The fact that a baby girl in Sierra Leone faces a one in eight chance of dying during her lifetime because of pregnancy or childbirth is not an inevitable consequence of severe economic deprivation: it is a violation of women's reproductive rights and hence their right to life. Until the government in Sierra Leone and the international community begin to see it as such however, it is difficult to see how the situation can improve.

“She Had a Heartbeat Too”: The Death of Savita Halappanavar

The Republic of Ireland ratified CEDAW on 23 December 1985 with no reservations, and it even disputed the reservations of Saudi Arabia, Oman, Brunei and Qatar to certain articles of the Convention on the grounds that references to religious laws “may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention” (United Nations, date unknown(c)). Nonetheless, due to the enduring influence of the Catholic Church in Ireland, the state has continually failed to clarify its position on abortion in cases where a mother's life is in danger. Tragically, in October 2012, this lack of clarity led to the death of Savita Halappanavar when she was refused an abortion by medical staff in a hospital. Her husband claims that they were told that they would definitely lose the foetus, yet were repeatedly refused the abortion because doctors could still detect a foetal heartbeat and “this is a Catholic country” (McDonald, 2012b).

Article 40(3)(3) of the Irish Constitution protects the “right to life of the unborn”, although it does also recognise the “equal right to life of the mother” (Mullaly, 2005: 89-90). The CEDAW Committee has in the past expressed concern over women's reproductive rights in Ireland and the influence that the Catholic Church has over these (ibid: 79), the European Court of Human Rights ruled two years ago that Ireland was failing mothers whose lives were at risk during pregnancy by not providing abortion (Houstan, 2012), and in 1992 the Irish population voted in favour of legalising abortion in life-threatening cases in a referendum (Mullaly, 2005: 95). In spite of all of this, no clarification has yet been given on the meaning of Article 40(3)(3), and the resulting uncertainty led the doctors in the case of Savita Halappanavar to refuse a medical procedure that would have saved her life, in favour of not ending the life of a foetus that they already knew she would lose. As Cook, Bernard and Fathalla state,

“[l]aws that prohibit medical procedures but that do not have clearly stated or indeed any exceptions where women's lives [...] are at risk can be shown to violate human rights requirements” (2003: 51).

Savita's mother's reaction to her death sums up the way in which the Irish state views women: “In an attempt to save a 4-month-old foetus they killed my [...] daughter. How is that fair you tell me?” (McDonald, 2012a). Similarly, one protestor in a vigil held after Savita's death, held a picture of Savita with a caption reading “she had a heartbeat too” (McDonald, 2012b). While the media coverage of the event refers regularly to women's rights and human rights, there is no mention of Ireland's commitments as a state party to CEDAW or other human rights instruments. The government has now promised to bring in legislation in 2013 to legalise abortion in life-threatening cases (BBC, 2013), however only time will tell whether it succeeds in clarifying the issue. Given its track record, it would seem that this limited and glacial progress is linked more to public protests and pressure than any sense of being bound by its commitment to CEDAW. Whatever happens in the future, it is certain that the state's inaction on an issue that has been brought to its attention over decades, violated Savita Halappanavar's right to life.

Conclusions

Why is it so important that women's reproductive rights be recognised and fully acknowledged as human rights, not because they touch on other aspects of human rights, but in their own right? To do so would empower women around the world to challenge their own states' oppressive and discriminatory laws, and would open up their rights to claim asylum in other countries, which in turn would be a considerable incentive for other states to take an interest in the treatment of women within the ‘privacy’ of their own states (Moller Okin, 1998: 39). The non-feminist hijacking of CEDAW has resulted in a convention that does not reflect the lives of women and still seems to see some issues as too personal to be political, and some dangers as inevitable and inherent to the condition of being female. Feminists

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must continue fighting to rescue women's human rights and to gain international recognition for the fact that when a woman dies from a preventable situation, her government is complicit in that violation of her most basic right, the right to life.

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