

INTRODUCTION

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This symposium issue presents the outcome of a joint effort by the Women in the Law Project of the International Human Rights Law Group and the Washington College of Law to provide a forum for advocates to explore approaches to elaborating women's reproductive rights within an international human rights framework. Our joint Conference on the International Protection of Reproductive Rights, held November 10-11, 1994 at the Washington College of Law, presented an opportunity for advocates to assess the implications of the International Conference on Population and Development (ICPD), which recognized the human rights dimensions of women's reproductive and sexual health.

Political developments following the ICPD make clear that legal strategies for advancing women's reproductive rights must be linked to political strategies for ensuring that the concepts of women's reproductive and sexual health and rights accepted by governments in Cairo are translated into action and are carried forward to the Fourth World Conference on Women in Beijing. Deliberations at the World Summit for Social Development and in the preparatory meetings for the Beijing Conference indicate that the formulations of reproductive and sexual rights agreed upon by the ICPD are likely to be subject to repeated challenge because they rest on conceptualizations of women's full participation in civil society and their equality within the family that are still contested by political and religious forces in all regions. The political debate on women's reproductive and sexual rights is ultimately a debate about the construction of gender in the family and in society.

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Ideologies of gender are similarly reflected in, and reinforced by, theoretical approaches to the development of the law. Participants in the November 10-11 Conference suggested elements of a broad theoretical framework within which the content of reproductive rights in international law might be amplified. Professor Rebecca Cook outlines a framework for identifying and elaborating clusters of rights that constitute various aspects of women's reproductive rights. As she points out, the clustering of rights around particular aspects of reproductive health and rights is not static and the rights are interrelated.

The realization of women's reproductive rights and health therefore implicates an array of rights, each of which has a distinct normative content and may include a range of legal obligations. The content of these norms, however, has not been uniformly detailed, and in some cases their content is overlapping. Aspects of some of these related rights may be considered not merely enabling rights, which create the preconditions for the realization of reproductive rights (such as the right to information or the right to equality before the law), but constituent elements of women's reproductive rights and health (such as the right to integrity of the person or the right to health services). Because reproductive rights and health are conditioned both by specific discriminatory laws or practices and by systemic discrimination in the family and in public life, the prohibition of gender discrimination is a norm of cross-cutting significance. In applying a nondiscrimination approach to particular aspects of reproductive rights, we should explore distinctions between the nondiscrimination standard in general international law and the nondiscrimination standard established in the Convention on the Elimination of All Forms of Discrimination Against Women.¹

Reproductive rights should be viewed as an aggregate of rights greater than the sum of its parts, however, because women's subordination within the gender relations of power lies at the heart of the denials of reproductive rights. Various rights, such as those relating to equality in marriage and education and the rights associated with the prohibition of various forms of violence against women, are therefore intertwined with the realization of reproductive rights. The interrelationship among these rights does not mean, however, that specific government obligations cannot be identified with regard to particular rights for purposes of determining whether the government has breached its international duties.

1. See Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975 (1995).

The nature of government obligations regarding reproductive rights must be examined in the context of the specific rights concerned. In considering the nature of those obligations broadly, it is useful to refer to the framework that Aart Hendriks describes for characterizing obligations relating to economic and social rights.² Three levels of obligation can be distinguished: a duty to respect rights (to refrain from carrying out direct violations); a duty to protect rights (to prevent violations carried out by non-state actors); and a duty to fulfill rights (to take those measures necessary to ensure the realization of the rights concerned). Given the systemic relationship between restrictions on women's reproductive rights and the subordination of women in the family and within communal structures, the duty to protect against violations is particularly critical in assessing the scope of government obligations regarding reproductive rights. In addition, governments have general obligations under various human rights treaties to respect and ensure those civil and political rights, such as integrity of the person, that comprise aspects of reproductive rights. The duty to ensure those rights may in turn entail a duty to protect against private interferences with the right.

The duty to fulfill various components of reproductive rights entails duties both to create the societal preconditions for the effective exercise of those rights and to provide the means for realizing particular rights. For example, women's right to reproductive health services implies a duty of the State to allocate its resources so as to fulfill a core content regarding those services. The right to reproductive health services also implies a duty to eliminate discrimination that imposes *de jure* or *de facto* restrictions on women's access to services. Although duties regarding economic and social rights are to be progressively realized, breaches of those duties, including discrimination³ or the failure to take such minimum steps as formulating national policy in the area concerned, can be identified.

Within this framework, which characterizes reproductive rights as an aggregate of rights and recognizes a series of obligations flowing from particular rights within that aggregate, development of the law will require strategic choices that may implicate conflicting short-term and long-term interests. For example, as participants in the Conference pointed out, arguments relying on rights associated with the family or privacy may promote the constructions of gender within

2. See Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123 (1995).

3. See *id.*

existing interpretations of those rights that are antithetical to women's human rights. Arguments that rely on civil and political rights without including applicable economic and social rights may meet success in the short-term but have the long-term effect of perpetuating the neglect of economic and social rights.

Strategic choices, including paradigms of reproductive rights, must be made in light of the reality of women's lives, taking as the starting point both women's priority concerns and their experience of the relationship between reproductive rights and other rights. Efforts to develop the law must be grounded in specific factual contexts and our theoretical frameworks reconceptualized accordingly. A fluid relationship should be maintained between legal definitions of the scope of human rights obligations regarding women's reproductive rights, on the one hand, and fact-finding by health workers and human rights organizations that monitor women's reproductive rights, on the other hand.

Finally, strategies for development of the law must be accompanied by strategies for building national and international procedures to ensure accountability for violations. At the international level, the proposal for an optional complaints procedure under the Convention on the Elimination of All Forms of Discrimination Against Women discussed by Carlota Bustelo Garcia de Real⁴ offers one vehicle for strengthening government accountability. Existing human rights procedures for recourse, including those of the regional human rights bodies, should be used to augment efforts to vindicate reproductive rights at the national level.

In attempting to establish accountability, advocates must move beyond an exclusive focus on state action to consider the role of inter-governmental and other non-state actors in realizing or denying women's reproductive health and rights. In particular, there is a need to build human rights standards and implementation procedures to hold international financial institutions accountable for the direct and indirect effects of their policies and programs on women's reproductive rights and health.

Although establishing the legal accountability of these non-state actors is a long-term project, international financial institutions, as well as multinational corporations, may be held politically accountable in the short-term, by formulating human rights guidelines against which to assess the effects of their policies and by developing monitoring procedures that would apply those guidelines. Monitoring

4. Carlota Bustelo, *Reproductive Health and CEDAW*, 44 AM. U. L. REV. 1145 (1995).

by independent human rights bodies, such as the expert committees responsible for monitoring U.N. human rights treaties, is needed. In addition, initiatives are needed to strengthen the effectiveness of the internal review procedures and external political processes that now operate as checks on these institutions.

Contributors to this symposium issue have set out other challenges for advocates of women's reproductive rights and health and have suggested approaches to meet those challenges. The task of transforming international human rights law and procedures into more effective tools for advancing women's reproductive health and rights is but one aspect of the broad-based activism that has yielded unprecedented political gains for women in international decision-making processes at the ICPD, the 1993 World Conference on Human Rights, and the United Nations Conference on Environment and Development.

