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## COMMENT

### A BRIEF INTRODUCTION TO THE RELATIONSHIP BETWEEN SEXUALITY AND RIGHTS

*Oliver Phillips\**

#### I. INTRODUCTION: THE SKEPTICAL START

The fact that human rights are a relatively novel instrument of social justice is belied by the numerous conventions and extensive organizations that exist for their advocacy, for their definition, and for their delivery. Their relative novelty is further belied by an apparently universal consensus as to their symbolic significance, most paradoxically displayed by the sense of righteousness with which competing claims to rights are invariably asserted in so many varied conflicts, whether domestic or international, individual or collective. But even this consensus disappears in the face of claims to “sexual rights,” as the established notion that national, regional, or religious values cannot trump human rights is frequently negated in a flurry of contention and appeals for discretion in the name of cultural integrity.<sup>1</sup>

The broad array of claims that might be defined as sexual rights have been developed over the last few decades to an extent that is constantly constrained by this lack of consensus. Resistance to the recognition of sexual rights tends to derive from reactions that range from that of the skeptical jurist to one of outright refusal on the grounds of ideological dogma. In this Comment, I

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\* Reader in Law, University of Westminster, 4-12 Little Titchfield Street, London W1W 7UW, E-mail: O.Phillips01@wmin.ac.uk. Ph.D., University of Cambridge, 1999. I owe many thanks to Carole Vance and Alice Miller for the many fruitful conversations on sexuality and rights that have arisen out of my participation as a Rockefeller Fellow in the Program for the Study of Sexuality, Gender, Health, and Human Rights at the School of Public Health, Columbia University, New York. While these conversations have significantly informed my thinking on the interaction of sexuality and rights, I should stress that unless otherwise signified, any contentious statements, shortcomings, or lacunae appearing in this brief Comment are my own responsibility.

<sup>1</sup> For more on this, and a discussion of the international advance of rights around sexual orientation in particular, see Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN*, HEALTH & HUM. RTS.: AN INT’L J., July 2004, at 48.



intend to address the former of these reactions, by considering questions that I imagine gestating in the minds of those who have never directly encountered the need for sexual rights: What has sexuality got to do with rights? Do sexual rights really have a sound basis both in reality and in the jurisprudential abstract?

This critical interrogation is sometimes carried even further with the suggestion that making a claim for sexual rights trivializes and distracts from other “more fundamental” human rights claims. In the southern African context in which I work, while it is now less frequent for this claim to be made, ten years ago many southern Africans would plainly query why they should be worried about sexual rights when people might be jailed without due process, tortured whilst in custody, and on release deprived of the social and economic rights that would allow them to feed their families. Surely these are far more fundamental rights, than the frivolous right to exercise some sexual desire? Are sexual rights not simply a manifestation of bourgeois complacency? Do they not simply arise when we have already established other more fundamental rights and have the time and space that allows us the indulgence to think about them?

Fewer southern Africans now ask this question, partly because the heavy toll of HIV/AIDS has made the importance of sexual rights undeniable to so many ordinary southern Africans. But I would stress that this is not the only reason: while we need to recognize that sexual rights *are* a fundamental strategy for combating the spread of HIV/AIDS, that role cannot be the sole basis for their recognition. For sexual rights to be justiciable and transformative, they must be rationalized and reasoned for more rigorously than as an immediate response to this desperate disease. This process has been initiated to some extent by such rights-oriented organs as the Constitutional Court of South Africa,<sup>2</sup> who treat their new constitution as an explicitly transformative (rather than simply remedial) document.<sup>3</sup> Five out of the sixteen

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<sup>2</sup> Information on the Constitutional Court of South Africa can be found at <http://www.concourt.gov.za>.

<sup>3</sup> For example, petitioners to the Constitutional Court have successfully relied on the socio-economic rights articulated in the Constitution to oblige the government to deliver policies on housing and healthcare guaranteeing far more extensive provisions than those initially proposed by the government. *See Gov't of Rep. of S. Afr. v. Grootboom*, 2001 (1) SALR 46 (CC) (holding that the government had an obligation to make housing more available); *Minister of Health v. Treatment Action Campaign* (No. 2), 2002 (5) SALR 721 (CC) (providing an obligation on the government to take additional steps to combat mother-to-child transmission of HIV); *see also* Oliver Phillips, *(Dis)Continuities of Custom in Zimbabwe and South Africa: The Implications for Gendered and Sexual Rights*, HEALTH & HUM. RTS.: AN INT'L J., July 2004,



prohibited grounds of discrimination relate to gender and sexuality,<sup>4</sup> and there are as many references to social and economic rights as there are to civil and political.<sup>5</sup> This proactive and inclusive approach gives the constitution the potential to be an “enabling tool” through which social transformation becomes possible given the right political context.<sup>6</sup> But here too there are disputed limits regarding the extent to which rights may be associated with sexuality, particularly where conformity to normative ideals is in question.<sup>7</sup>

This Comment is therefore a brief attempt to address these fundamental questions of how sex fits with human rights and to clarify the reason for the fast-growing claims and increasing recognition of sexual rights as a field of advocacy, academic research, and contested practical application. I focus on providing a conceptual understanding of the importance of sexual rights, rather than a detailed account of specific interpretations of treaty provisions, landmark court rulings, specific applications, or UN Human Rights Committee reviews.<sup>8</sup> My aim is to outline some of the needs that exist and to provide some realization of how these needs should become established as rights.

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at 82 (providing further discussion of constitutions as transformative versus remedial documents).

<sup>4</sup> The “Equality Clause” prohibits discrimination “on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” S. AFR. CONST. ch. 2, § 9(3).

<sup>5</sup> Among other rights, Chapter 2 of the Constitution guarantees the provision of adequate housing (§ 26); health care, food, water, and social security (§ 27); and both basic and further education (§ 29). S. AFR. CONST. ch. 2, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27> (last visited Mar. 4, 2005).

<sup>6</sup> For a discussion of the South African Constitution’s role as an “enabling tool,” see Mikki van Zyl, *Escaping Heteronormative Bondage: Sexuality in Sexual Citizenship*, in (UN)THINKING CITIZENSHIP: FEMINIST DEBATES IN CONTEMPORARY SOUTH AFRICA, 149 (Amanda Gouws ed., 2005). For a consideration of its limitations in this role, see Saras Jagwanth & Christina Murray, *Ten Years of Transformation: How Has Gender Equality in South Africa Fared?*, 14 CAN. J. WOMEN & L. 255 (2002).

<sup>7</sup> The unanimous decision of the South African Constitutional Court in *S v. Jordan*, 2002(6) SALR 642 (CC), was that the criminalisation of sex work was consistent with the constitution and that its decriminalization was a matter for the legislature. The limits of the Court’s association of rights and sexuality had clearly been reached as this represented an approach of unprecedented caution and jurisdictional restraint. For more on this approach, see Phillips, *supra* note 3, at 82, 97-99.

<sup>8</sup> For an excellent review and analysis of the reporting of rights in relation to sexuality, see Cynthia Rothschild, *Not Your Average Sex Story: Critical Issues in Recent Reporting on Human Rights and Sexuality*, HEALTH & HUM. RTS.: AN INT’L J., July 2004, at 165.



## II. PRIVATE SEX AS A PUBLIC CONCERN

Feminist theory and psychoanalysis have both marked sexuality as one of the sites at which we might start to understand the politics of intimacy and desire. This is important because it is a pivotal arena for the intersection of public structures and private lives. It is this public/private divide that makes sexual rights so important and at the same time, so contentious and difficult.

It is useful to start by considering how sex is private or public. Do we want the state in our bedrooms or not? It might be claimed that asserting a sexual right is inviting the state into our beds, thus courting interference in something that should be private and personal. Sex is generally a manifestation of a most private act, an expression of deeply personal intimacy: yet it is also universally subject to extraordinary levels of formal regulation by the State and other public institutions, as it lies at the heart of what Foucault termed bio-power: the State's control over demographic developments and the bodies of citizens.<sup>9</sup> Notions of public health and public morality, not to mention assumptions of convention and rules of religion, resonate just as powerfully in relation to sex as do claims to privacy and freedom of association.

A simple illustration of this of most relevance to North America and Western Europe, but of variable relevance elsewhere, is the manner in which the process of "coming out," leaving the secrecy of the "closet" and publicly expressing "gay pride," explicitly challenges the assumed universalism of hetero-normativity. This process challenges the assumptions that everyone is heterosexual and that the world should expect that everyone will be heterosexual. Coming out is seen as a strategy to gay liberation, primarily because as an act of self-disclosure, it is an act of agency that preempts the vulnerability that comes with being exposed by another. The person coming out exercises some choice over how and where she/he does so. Coming out implicitly delivers greater control over when, how, and to what extent hetero-normative public structures might intrude in a same-sex relationship. Naturally, it can only

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<sup>9</sup> Foucault suggests that the imposition of an "anatomo-politics" of the individual body (health and hygiene, work, efficiency, morality, productivity) as well as "bio-power," the demographic regulation of the social body (registration of births, marriages, deaths, and the development of total institutions such as schools, prisons, hostels, etc.), are significant in that they supply the "normalizing judgment" which produces self-disciplined "obedient subjects," MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 139-41 (Robert Hurley trans., Penguin Books 1978), by instilling "habits, rules, orders, and authority that is exercised continually around him and upon him and which he must allow to function automatically in him," MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 128 (Alan Sheridan trans., Penguin Books 1979) (1977).



provide this control in a social context in which there is already some sense of community from which she/he can draw a measure of social capital and in which she/he can find protection. There is no point in coming out if she/he will be the only person to do so, as such notable isolation simply increases levels of vulnerability.

The more general point is that one's ability to resist the intrusion of public structures in one's intimate life, one's ability to assert one's own desire or, alternatively (but perhaps more importantly), to reject an uninvited proposition, and one's ability to express consent to a sexual act, are crude but effective measures of social power. The ability to exercise these measures of social power places sex and pleasure at the heart of so much political struggle, whether articulated in terms of class, race, or gender. This struggle has been disturbingly highlighted by failed attempts in southern Africa to prevent the transmission of HIV/AIDS as women's disproportionate vulnerability to infection is mapped with increasing frequency as deriving from their lack of broader social power.<sup>10</sup> Specifically, it is clear that marriage provides no reduction of risk but frequently heightens women's vulnerability on account of their relative lack of power (whether economic or sexual) in a highly gendered social order.<sup>11</sup> Just as one's ability to negotiate safe sex depends on access to power within a relationship, so the capacity to fulfill desires, experience sexual pleasure, resist unwanted pressure, avoid obligation, and refuse uninvited sexual advances are all mediated by our access to power in broader social relationships.

### III. THE SIGNIFICANCE OF SEXUAL VIOLENCE

Clear illustrations of the way in which sexual relations are symbolic of broader social relations abound, but one place that they are most explicitly visible is in the narratives of colonial conquest and their resonance in the national imaginations of post-colonial states today. While many of the historical examples of this phenomenon are well known, Afghanistan and Iraq provide us with more recent instances of pertinence. The explicitly sexual nature of the mistreatment of inmates at Abu Ghraib prison in Baghdad is a good example, albeit an extreme one, of how sexual power closely reflects the power of broader social relations. Furthermore, the inclusion of British forces

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<sup>10</sup> See, e.g., *HIV/AIDS IN AFRICA: BEYOND EPIDEMIOLOGY* (Ezekiel Kalipeni et al. eds., 2004).

<sup>11</sup> See generally *AIDS, SEXUALITY AND GENDER IN AFRICA* (Carolyn Baylies & Janet Bujra, eds., 2000).



in the American-led coalition that deposed the Taliban in Afghanistan in 2002 is sure to have resurrected narratives of sexual conquest that resonate powerfully in the Afghan nationalist memory. When the British occupied Kabul between 1839 and 1841, their licentious treatment of Afghan women has been suggested to be one reason for the growth of a deep-seated hostility and resentment;<sup>12</sup> this was clearly manifested in 1842 in the Khyber Pass with the killing of the 4500 retreating British and Indian troops, and nearly all 12,000 women and children who made up their camp followers.<sup>13</sup> Later that year, British forces retaliated by razing Kabul's great bazaar and leaving thousands of Afghans dead.<sup>14</sup> Remembered in Britain as the "sacking of Kabul," this is memorialized in Afghanistan with a "bitterness and resentment of foreign influence that lasted well into the twentieth century and may have accounted for much of the backlash against the modernization attempts of later Afghan monarchs."<sup>15</sup> It is correct to ask whether, in over 200 years of repeated military occupation by the British, carried out in the name of bringing civilized government to the territories of Afghanistan and Iraq, the dynamics of sexual conquest remain the same, with men regarding women's bodies as the terrain through which colonial subjugation is practiced and resisted. It is equally important to recognize that this particular history of persistent military interference accompanied by sexual appropriation and humiliation is the context in which much of the Arab world will situate the widely publicized treatment of detainees at Abu Ghraib prison.

The narrative of such histories takes on a symbolic power of enormous significance. This power is illustrated by the claims made in 2003 by a large number of Kenyan women who had given birth to children of white fathers: in an attempt to sue the British Army for a considerable sum these women claimed that they were the victims of mass rape by British soldiers.<sup>16</sup> Further

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<sup>12</sup> See Ronald Hyam, *Empire and Sexual Opportunity*, J. IMPERIAL & COMMONWEALTH HIS., Jan. 1986, at 34.

<sup>13</sup> See *The First Afghan War: 1839-1842*, at <http://www.indhistory.com/afghan-war-1.html> (last visited Mar. 4, 2005).

<sup>14</sup> Sally Ann Baynard, *The First Anglo-Afghan War*, in *Afghanistan: A Country Study* 29 (Richard F. Nyrop & Donald M. Seekins eds., 1986), at <http://www.gl.iit.edu/govdocs/afghanistan/Afghanistan-Chapter1.pdf> (last visited Mar. 4, 2005).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., *KENYA: Maasai Women to Sue British Army for Alleged Rape* (Mar. 11, 2003), at [http://www.irinnews.org/report.asp?ReportID=32757&SelectRegion=East\\$Africa](http://www.irinnews.org/report.asp?ReportID=32757&SelectRegion=East$Africa) (last visited Mar. 5, 2005); Joyce Mulama, *Tales of Rape, Sodomy by British Soldiers*, (July 15, 2003), at <http://www.refusingtokill.net/rape/rightsKenya.htm> (last visited Mar. 5, 2005); Jennifer Friedlin, *Kenyan Women to Sue British Army for Alleged Rapes* (Aug. 11, 2003), at [http://www.awakenedwoman.com/kenyan\\$lawsuit.htm](http://www.awakenedwoman.com/kenyan$lawsuit.htm) (last visited Mar. 5, 2005).



investigation called into question many (but not all) of the allegations of rape,<sup>17</sup> however, what is important here is that the story took this shape. The story means that either the long history of violent male conquest continues unchanged or, at the very least, that the memory of similar historical acts is such a part of the post-colonial legacy that it can give a significant measure of credibility to fabricated but expensive claims.

The 1896 Ndebele rebellion in Southern Rhodesia and the 1906 Zulu rebellion also included explicit grievances about the British treatment of women.<sup>18</sup> Soon after these rebellions, in both Southern Rhodesia and Papua New Guinea, the British imposed the death penalty for the rape, or even the attempted rape, of a white woman by a black man; no protection was given to black women raped by white men.<sup>19</sup> Thus, the capacity to determine with whom one has sexual relations has long been a precise indicator of social power in that it reflects the extent of one's ability to lay claim to basic rights of privacy and freedom of association, not to mention the protection of bodily integrity or autonomy, and the possibility of securing these through recourse to the law.

The above examples offer an indication of fairly predictable privileging of race and class in a colonial context. They are historical examples and they rely on fairly blatant examples of what are now widely accepted to be unjustifiable inequalities of treatment, primarily because they describe the differential regulation of sexual behaviour according to race or class, an approach that the international condemnation of apartheid highlighted as universally unaccept-

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<sup>17</sup> Andrew Harding, *UK Says Kenya Rape Reports "Fake"*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/world/africa/3140592.stm> (last updated Sept. 25, 2003).

<sup>18</sup> See Hyam, *supra* note 12, at 34.

<sup>19</sup> See John Pape, *Black and White: The 'Perils of Sex' in Colonial Zimbabwe*, 16 J. S. AFR. STUD. 699 (1990). See also Oliver Phillips, *Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion, and Individual Autonomy* (1999) (unpublished Ph.D. dissertation, University of Cambridge) (on file with author).



able.<sup>20</sup> However, many sexual rights are not so unambiguously presented as universally applicable.

The examples cited above also refer to sexual violence and this element of violence has served as a point of agreement across different cultures in an area fraught with disagreement. The Declaration on the Elimination of Violence Against Women, adopted in December 1993 by the UN General Assembly, emphasizes that the various forms of violence against women occur in the family and in the community, and can be perpetrated or condoned by the State; it also affirms that violence against women “constitutes a violation of the rights and fundamental freedoms of women.”<sup>21</sup> It specifically addresses “physical, *sexual*, and psychological” violence in public and private life<sup>22</sup> and reflects a consensus that sexual violence should be abhorred. It is arguable that there is international recognition that it is impossible to justify the infliction of sexual violence. This is evidenced by the fact that even where there is a report of its perpetration by state-sanctioned militia (such as in the former Yugoslavia or in present-day Zimbabwe), there is an official attempt on the part of the state to deny or be distanced from it. However, even this approach towards sexual violence is only a very recent consensus, and, as will be seen, the premise of protection is a difficult foundation for the promotion of further rights implying equality and agency.

A cursory glance at the development of domestic regimes of law and the definition of the crime of rape in many cultures around the world, including the Roman law that yields such a historical influence over Anglo-American and European law, indicates that only recently has the law against rape become preoccupied with protecting bodily integrity. Historically, the Roman law on rape was closely related to the law against abduction. The legacy of this relationship is that many subsequent legal regimes were primarily concerned

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<sup>20</sup> “States . . . condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature . . . .” International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243, 244 [hereinafter *Apartheid Convention*]. Recognizing that the *Apartheid Convention* was never ratified by major powers such as the United States, Great Britain, France, Canada, and Japan, and that the Convention has thirty-one signatories and 101 parties, *Apartheid Convention, Status of Ratifications, Reservations and Declarations*, at [http://www.unhchr.ch/html/menu3/b/treaty8\\$asp.htm](http://www.unhchr.ch/html/menu3/b/treaty8$asp.htm), it is nevertheless arguable that its lack of status in international law does not match the significant consensus reflected in its content. The condemnation of apartheid is exemplified in the historic isolation of the pre-1994 apartheid South Africa and the consequent reentry of the post-1994 democratic South Africa into international organizations and communities.

<sup>21</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess. at 1, U.N. Doc. A/RES/48/104 (1993).

<sup>22</sup> *Id.* art. 1 (emphasis added).



with protecting a woman as the property of a man. Until recently, the legal definition of rape was limited to forcible penetration of the vagina with a penis—in many countries this is still the case. At earlier stages, there was frequently a requirement of ejaculation. In many legal regimes, a husband could rape his wife with impunity. Considered together, all these factors can lead to no other conclusion than that the primary objective of the law was to protect a man's exclusive access to his wife's reproductive system. Only in the last twenty to thirty years has widespread reform of the laws against rape in many jurisdictions placed the protection of a person's bodily integrity and sexual autonomy at the centre of a rape complaint.<sup>23</sup> This recent development provides an indication of just how young and underdeveloped the notion of rights relating to sexual behavior and the concept of sexual autonomy might be.

#### IV. A CRITICAL LOOK AT SEXUAL HARM AND REPRODUCTIVE RIGHTS

The current incontestability of a woman's right to protection from sexual harm is a testament to the effectiveness of feminist campaigning, as women from North and South have highlighted the need for state engagement in protecting women from sexual abuse. Although the terms "sexual" or "reproductive" rights may be traced to movements that initially surfaced in North America and Europe, similar yet distinct movements on behalf of women's reproductive health and rights rapidly formed during the early to mid-1980s in Latin America, Asia, and Africa. This global movement was not only significant in developing the notion of sexual rights, but also impelled official recognition in the form of various statements concerning women's rights.<sup>24</sup>

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<sup>23</sup> For example, over the last five years, the laws defining sexual offenses in England and Wales have been reformed on the explicit premise of protecting the vulnerable while still recognizing the need for autonomy. U.K. HOME OFFICE, SETTING THE BOUNDARIES: REFORMING THE LAW ON SEX OFFENCES ¶¶ 0.6-0.7, at iv (2000), *available at* <http://www.homeoffice.gov.uk/docs/vol1main.pdf> (last visited Mar. 5, 2005). As a result, rape is now defined as the non-consensual penile penetration of vagina, anus, or mouth (of either a man or a woman), while other definitions of serious sexual assault are completely non-gender-specific. Sexual Offences Act, 2003, § 1 (Eng.).

<sup>24</sup> In 1994, a UN Special Rapporteur on Violence Against Women was appointed. *See* Special Rapporteur on Violence Against Women, Its Causes and Consequences, at <http://www.ohchr.org/english/issues/women/rapporteur/> (last visited Mar. 5, 2005). Also in 1994, the Program of Action produced by the UN-sponsored International Conference on Population and Development in Cairo explicitly affirmed that "[r]eproductive health therefore implies that people are able to have a satisfying and safe sex life;" the Program went further in recognizing that reproductive health care "includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and



Coalitions among women and across the divides of North and South, East and West, were formed to produce constructive results at the key moments of the 1993 World Conference on Human Rights in Vienna,<sup>25</sup> the 1994 International Conference on Population and Development (ICPD) in Cairo,<sup>26</sup> and the 1995 Fourth World Conference on Women (FWCW) in Beijing.<sup>27</sup> The success of the negotiations around different women's needs and in the face of strong opposition from fundamentalist religious groups (whether Christian, Islamic, or others) led to the term of most productive currency being that of "reproductive rights."

Paradoxically, the commitment signified through these conventions has resulted in little effective action to transform the broader social context that obstructs reproductive rights and engenders sexual harm.<sup>28</sup> Sexual rights have found considerable purchase when rooted in the incontestability of the need for protection from sexual harm. Consequently, connections between reproductive health and human rights have been developed with some considerable success. But as Alice Miller cautions, women's rights, and sexual rights more broadly, have also been constrained by their reliance on notions of sexual harm and reproductive health as the inherent demand for protection of women exists in tension with the need for promotion of women's rights.<sup>29</sup> A focus on harm can deflect from and frustrate the more fundamental goals of empowerment and agency that are required to transform the context in which harm occurs, as it

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sexually transmitted diseases." Programme of Action of the UN ICPD, Ch. VII: Reproductive Rights and Reproductive Health, Basis for Action, ¶ 7.2, at <http://www.iisd.ca/Cairo/program/p07002.html> (last visited Mar. 5, 2005).

For discussion of the engagement of sex worker rights organizations in the North and South, see GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 167-225 (Kamala Kempadoo & Jo Doezema eds., 1998).

For the suggestion that the increasingly global association of women's organizations fuelled the possibility of UN support, see Jutta M. Joachim, *Shaping the Human Rights Agenda: The Case of Violence Against Women*, in GENDER POLITICS IN GLOBAL GOVERNANCE 143-160 (Elisabeth Prugl & Mary K. Meyer eds., 1999).

<sup>25</sup> UN Office of the High Commissioner for Human Rights, World Conference on Human Rights, <http://www.unhchr.ch/html/menu5/wchr.htm>.

<sup>26</sup> United Nations International Conference on Population and Development (ICPD), <http://www.iisd.ca/cairo.html>.

<sup>27</sup> The United Nations Fourth World Conference on Women, <http://www.un.org/womenwatch/daw/beijing>.

<sup>28</sup> See Alice Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, HEALTH & HUM. RTS.: AN INT'L J., July 2004, at 16, 16-47 (providing an excellent analysis of the limitations of the "social harm" model as a platform for developing gendered and sexual rights).

<sup>29</sup> *Id.*



“tends to reduce women to suffering bodies in need of protection by the law and the state, rather than as bodies and minds in need not only of protection, but participation and equality.”<sup>30</sup> For Miller, this begs the question of whether rights serve as mere remedies, or whether they should be seen as potentially transformative, in tackling the broader relations of social and economic power that frame sexual politics.<sup>31</sup> The real provision of sexual rights (e.g., assuring a woman’s ability to control her own reproductive life and the broader possibility that people might associate sex with pleasure rather than compulsion) clearly depends on challenging the conditions that facilitate exploitation (whether economic or other) and discrimination (racial, gendered, etc.) at a trans-national level. The current global context of human rights would suggest that we are only at the beginning of such an ambitious project.

#### V. NON-REPRODUCTIVE SEX AND THE DIFFICULTIES OF NOT BEING CHASTE

It is undeniable that claims based on “reproductive rights” have enjoyed a measure of strategic success. This success is precisely the result of their not extending far into the terrain of this more ambitious project. Framing claims around sexuality as “reproductive rights” keeps the discussion primarily within the paradigm of the biological. While this approach has achieved some consensus around women’s rights to control their own fertility, it also significantly limits the analysis to that of reproductive sex, excluding the (often more) contentious arena of non-reproductive sex. Moreover, by focusing on the biological, there is the possibility of eliding the fact that it is, in the end, the social and cultural construction and management of that biology that is at issue. A focus on reproductive rights tends to engage with only the more privileged (i.e., ‘legitimized’ procreative heterosexual relations) sections of the sexual hierarchies that Gayle Rubin noted were constituted through stereotype, law, and convention.<sup>32</sup> By marginalising that sex which is not reproductive, this approach successfully engages those (e.g., religious fundamentalists) who would rather not countenance discussion of (“illegitimate”) sex as pleasure, and

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<sup>30</sup> *Id.* at 25.

<sup>31</sup> *See id.* at 27-31.

<sup>32</sup> Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267-319 (Carole Vance, ed., 1984) (providing an early analysis of sexual stereotypes and their significance in determining levels of citizenship and status). The Rubin article laid much of the ground for subsequent work on sexuality.



so presents a key method of building a broad-based consensus. But it simultaneously fails to address the rights of those whose sexual behavior does not fit within a reproductive paradigm, who do not fit the chaste model of the innocent victim,<sup>33</sup> and who are often most vulnerable to sexual exploitation and discrimination.

There are two specific groups of people whose exclusion from this approach it is worth considering here: sex workers and people who identify as lesbian/gay/bisexual/transgender (l/g/b/t). The difficult task of addressing the broader context within which sexuality operates is clearly reflected in the struggles around the provisions pertaining to sex work in the UN Trafficking Protocol.<sup>34</sup> Both feminist lobbyists and state delegates were divided over the issue of whether prostitution could be seen as legitimate labor (in which case sex workers would have access to rights protecting their working conditions and their migration for work would be subject to the same protections and restrictions as any other form of labor) or whether prostitution should be seen through the model of sexual harm as an inevitable violation of women's human rights (in which case, sex workers could not represent themselves as legitimate workers in need of protection, but rather would be represented by others as "fallen" or exploited women in need of rescue).<sup>35</sup> The pivotal concept around which these two competing definitions battled, was that of "consent," an issue whose determination relies on distinguishing those economic and social contexts in which consent might be freely given from those where it is acquired through compulsion. A failure to resolve this difficult question and focus on the broader issues of equity in international migration and conditions of labor is unsurprising when one considers that it demands that sex work be considered outside the realm of morality and away from the issues of monogamy, family, and women's chastity that so frequently frame its discussion. This inability to

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<sup>33</sup> Carole Vance and Alice Miller have written cogently on the difficulty of representing experienced sexual agents as requiring protection of their sexual rights, when the most successful claims of sexual rights invoke narratives of innocence and respectability in their representation of victimization. The danger of this model is that complying with this imperative of respectability will simply reinforce the hierarchies that are fundamental to so many forms of sexual exploitation. See Alice Miller & Carole Vance, *Sexuality, Human Rights, and Health*, HEALTH & HUM. RTS.: AN INT'L J., July 2004, at 11; Miller, *supra* note 28.

<sup>34</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex 2, U.N. Doc. A/45/49 (Vol. 1) (2001).

<sup>35</sup> Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations*, SOC. & LEGAL STUD., Mar. 2005, at 61, 61-89.



deal dispassionately with sexual behavior that is not chaste has led the Trafficking Protocols to become simply another tool in the apparatus of control that may be exercised over trafficked people, rather than an instrument that might serve to improve the conditions of their lives as migrant workers.<sup>36</sup>

This difficulty in affirming the rights of those who are sexually active but remain outside the legitimizing domain of heterosexual marriage is compounded by a further factor. A key tension in the relationship between sex and rights is that the regulation or acceptability of sexual behaviour and identity is culturally variable. The concept of sexual rights brings to center stage the tense relationship between claims to universality inherent in human rights and cultural relativism of expressions of intimacy, reproduction, gender relations, and identity that are so frequently central to national, religious, and moral discourses. Claims to traditional culture or religious values are the most frequent tools wielded in opposition to any development of l/g/b/t rights. While similar claims have been unequivocally rejected as a defense for other forms of discrimination, this does not appear to be so clearly the approach when it comes to issues of sexual orientation.

There are obvious problems in relying on terminology so associated with Anglo-American culture such as “lesbian” and “gay,” but claims of cultural imperialism wear thin when local groups indigenous to so wide a variety of regions repeatedly lay claim to this identity in order to express their own particular sense of marginalization.<sup>37</sup> The challenge to “traditional culture” posed by rights of sexual orientation is rather argued to derive from the fundamental principles that underlie these claims and that are inherent in the broader implications of equity that adhere to sexual rights: principles of autonomy, gender equality, bodily integrity, and respect for sexual and familial diversity.<sup>38</sup>

It is clear that issues of sexuality go to the heart of the position of women. Any discussion of sexual rights implicitly involves a consideration of the social position of women, as quite simply, the right to choose when, how, and with whom one has sex demands that women, as well as men, have independent

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<sup>36</sup> Vanessa Munro, *A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia*, SOC. & LEGAL STUD., Mar. 2005, at 91, 91-114.

<sup>37</sup> For more discussion on this point, see Oliver Phillips, *Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa*, in LAW AND SEXUALITY: THE GLOBAL ARENA 17, 17-34 (Carl Stychin & Didi Herman, eds., University of Minnesota Press 2001) (2000).

<sup>38</sup> See Saiz, *supra* note 1, at 5.



control over their sexual lives. This may sound simple, but in fact, it makes sexual rights deeply contentious, as it inevitably challenges the fundamental structures that reproduce social power in general. In many cases, the debate around lesbian and gay rights is in fact a debate about the right of women to exercise control over their own sexuality independently of a man. This is a debate that gets invested with national identities, loaded with resistance to neo-liberal economic policies, and lubricated with claims of cultural imperialism. But at the centre of all the smoke and mirrors that get positioned and repositioned around the pervasiveness of the homosexual/heterosexual binary is a firm resistance to the possibility of women putting their own desires before that of their parents and siblings.

For an example of this idea: in any culture where there is a form of bridewealth or dowry (such as in southern Africa), the refusal of a woman to marry has economic consequences for the entire family. Claims to lesbian or gay rights therefore have disruptive economic consequences for the whole family. In southern Africa, the refusal of a woman to marry will mean that she does not bring any bridewealth into her family. Her brothers in turn have less money with which to secure themselves good wives. Thus, a woman's sexual choices have economic consequences for those around her, and that is why historically, a woman's sexuality did not belong to her, but to her lineage. But the advent of the colonial state and the introduction of state sanctions to regulate marriage (insisting that women should consent to marriage and that young girls should not be pledged into marriage), divorce (giving the women the power to divorce their husbands if necessary), and adultery (making it a criminal offence for women—although the practice of polygyny meant that it could not be an offence for men) immediately transferred sexuality out of lineage control.<sup>39</sup> It introduced the notion of a citizen with rights and obligations (however limited) in and to the State rather than to the ancestral family and immediately invoked the notion of legal subjectivity, however partial.<sup>40</sup> Full legal personhood, however, implicitly includes the attendant rights and responsibilities of sexual autonomy, making sexual rights an inevitable end to the initial transfer from lineage to state control. The development of the nation-state with citizens and state subjects is therefore a context within which the question of sexual rights automatically arises. Gender equality implicitly requires a recognition of the possibility of sexual independ-

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<sup>39</sup> Diana Jeater, *MARRIAGE, PERVERSION AND POWER: THE CONSTRUCTION OF MORAL DISCOURSE IN SOUTHERN RHODESIA 1894-1930*, at 81 (1993).

<sup>40</sup> For a more developed discussion of the history of "partial subjectivities" in relation to sexuality and rights today, see Phillips, *supra* note 3, at 86-90.



ence, and for that equality to be unconditional, it must inevitably include the possibility of a same-sex relationship.

## VI. CONCLUSION

The demand for sexual rights invokes far greater challenges of equity and equality across multiple fields than might initially appear to be the case. Sexuality is implicitly bound into and connected with a far greater number of indices of social and economic power than we have historically assumed. This could be one reason that sexual rights is occupying an increasing amount of our attention in both international (whether through the UN or the WHO) and national arenas (e.g., through debates on law reform).<sup>41</sup> Nevertheless, the progression and development of sexual rights is not constant so much as contested, precisely because it demands that we articulate an ever more inclusive, comprehensive, and complex understanding of the basis of rights. Indeed the ground that has been gained through the media of health and harm gives us some indication of the uncertain terrain that lies ahead and the pressing need for a more lateral and considered approach to the complexity of rights, particularly if we are to see rights as transformative rather than simply remedial. The various arenas for the exercise of sexual rights considered in this Comment suggest that we are merely at the start of a transformative moment, with much of the narrative of sexual rights still to come.

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<sup>41</sup> Ignacio Saiz provides clear and detailed evidence, covering the last ten years, of a considerable body of work done by the UN's expert human rights mechanisms to develop international standards and hold states accountable for a range of human rights violations based on sexual orientation. This progress, however, is in stark contrast to the consistent denial and defiance shown by governments at the more "political" UN forums such as the Commission on Human Rights or the UN World Conferences . . . .

Saiz, *supra* note 1, at 50.

International human rights advocacy groups have demonstrated a similar increase in the amount of attention devoted to sexual rights. For example, it was only in 1991 that Amnesty International felt able to consider people imprisoned due to their sexual orientation prisoners of conscience. In the last fifteen years, there have been numerous campaigns on the issue of sexual rights. See, e.g., AMNESTY INT'L, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY (2001); see also HUMAN RTS. WATCH & INT'L GAY AND LESBIAN RTS. COMM., MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA (2003), available at <http://www.hrw.org/reports/2003/safrica/afriglhr0303.pdf>.