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The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications

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THE USE OF HUMAN RIGHTS DISCOURSE
TO SECURE WOMEN'S INTERESTS:
CRITICAL ANALYSIS OF THE IMPLICATIONS

*Renu Mandhane**

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I. INTRODUCTION

"[H]uman Rights are women's rights—and women's rights are human rights."¹ This was Hillary Rodham Clinton's message at the 1995 United Nations Fourth World Conference on Women in Beijing ("Beijing Conference"). The quotation has become a catchphrase for international non-governmental organizations ("INGOs") based in the Global North.² Advocacy by INGOs to protect women's interests almost exclusively relies on established human rights norms and binding legal covenants. For the most part, human rights discourse is and will likely continue to be effective in securing women's interests internationally.

1. Hillary Rodham Clinton, Remarks to the United Nations Fourth World Conference on Women Plenary Session in Beijing, China (Sept. 5, 1995), *available at* http://douglass.speech.nwu.edu/clin_a64.htm (last visited Oct. 17, 2002).

2. The term "Global North" is used to refer to more developed nations such as those in the European Union, as well as the United States and Canada.

However, despite the relative success of the “women’s rights are human rights” approach, INGO advocates must recognize the limitations of exclusive reliance on human rights theory. This article highlights, for example, the significant theoretical constraints of universalism, the tendency of human rights advocates to ignore the underlying cause of rights violations, as well as problems associated with the concept of and informal hierarchy between rights. The article suggests that there are certain circumstances in which INGOs that rely primarily on human rights language in their advocacy efforts may wish to supplement their analysis with explicit reference to feminist legal theory in order to more effectively secure women’s interests globally. These ideas will be developed with ongoing reference to the recent and successful campaign initiated by Nepali women to have abortion legalized. The campaign was supported by the Center for Reproduction Law and Policy (CRLP) (New York) (now the Center for Reproductive Rights),³ in partnership with the Forum for Women, Law and Development (FWLD) (Katmandu). CRLP became involved with the domestic campaign to legalize abortion in 2001, largely to draw attention to the massive human rights violations arising out of its continued criminalization. Abortion was legalized by Nepal’s legislature in March 2002. The Nepal example will illustrate more concretely the way in which INGOs tend to focus on human rights analysis when advocating for women’s rights globally.

Section II discusses in detail the campaign to legalize abortion in Nepal. Section III considers the historical basis for the women’s human rights movement. Section IV outlines the rationales for and limitations of exclusive reliance on human rights discourse by INGOs. Section V explores the role that explicit reliance on feminist legal theory could play in addressing the shortcomings of the human rights approach. The paper concludes by urging advocates to remain critical of their discursive methods, even when such methods are successful and form the primary basis for their efforts.

3. The Center for Reproductive Rights, *About Us*, available at <http://www.crlp.org/about.html#name> (last visited Oct. 4, 2003). The Center for Reproductive Law and Policy officially changed its name to the Center for Reproductive Rights on Jan. 15, 2003. According to the Center, the name change was meant to highlight “the importance of focusing on the goals we are seeking to achieve (rights)—not just on the tools we use to attain them (laws and policies).”

II. THE CAMPAIGN TO LEGALIZE ABORTION IN NEPAL: AN EXAMPLE OF THE INGO FOCUS ON WOMEN'S HUMAN RIGHTS

The campaign to legalize abortion in Nepal is illustrative of some of the major trends in global advocacy to protect women's interests by INGOs based in the Global North. It highlights the existence and importance of domestic women's groups in advocacy to protect women's interests.⁴ The campaign also emphasizes the existence and strength of grassroots women's advocacy developed in the specific context of Nepali women's lives, and therefore not necessarily framed in identical terms to Western human rights or Western feminism.⁵ It further illustrates the fact that initial stages of advocacy to protect women's interests usually emanate from domestic women's groups (sometimes with the financial support of international organizations). It is often only in the final stages of a movement that INGOs become directly involved.⁶

INGO involvement usually centers around bringing attention to the human rights issues at play. INGOs often recharacterize the issue of domestic concern in terms of international human rights norms. This

4. THE CENTER FOR REPRODUCTIVE LAW AND POLICY & FORUM FOR WOMEN, LAW AND DEVELOPMENT, *ABORTION IN NEPAL: WOMEN IMPRISONED*, 31–32 (2002).

5. *Id.*

6. These characteristics are applicable to almost all of CRLP's international campaigns, including those initiated in Chile and El Salvador. See THE CENTER FOR REPRODUCTIVE LAW AND POLICY & THE OPEN FORUM ON REPRODUCTIVE HEALTH AND RIGHTS, *WOMEN BEHIND BARS: CHILE'S ABORTION LAWS: A HUMAN RIGHTS ANALYSIS* (1998) (outlining how discriminatory customs, practices and laws in Chile have resulted in numerous violations of women's reproductive rights); THE CENTER FOR REPRODUCTIVE LAW AND POLICY, *PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR: A HUMAN RIGHTS ANALYSIS* (2001) (considering how a recent constitutional amendment protecting the right to life from conception has impacted women's reproductive rights in El Salvador).

These insights are also applicable to campaigns by the Women's Rights Division of Human Rights Watch. See HUMAN RIGHTS WATCH, *FROM THE HOUSEHOLD TO THE FACTORY: SEX DISCRIMINATION IN THE GUATEMALAN LABOR FORCE* (2002) (outlining the continual violation of female workers' labor rights in the context of economic integration); HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2002) (outlining violations of women's human rights in the form of sexual violence experienced during the civil war).

usually involves reminders to the state⁷ and intergovernmental organizations⁸ of the human rights obligations at issue.

The campaign in Nepal also illustrates the persuasiveness of appeals to international human rights law for states seeking international acceptance. New and/or less-powerful states may be especially eager to comply with international treaties to affirm their commitment to the international legal order.⁹ It is easier for INGOs to seek such compliance when analysis of the issues is based on binding international covenants related to human rights.

More narrowly, Nepal is a compelling example because, as will be discussed in more detail below, the criminalization of abortion in Nepal was a serious problem.¹⁰ Given the severity and pervasiveness of the harm suffered by Nepali women due to the criminalization of abortion, the potential positive impact of a successful campaign to secure women's interests is all the more clear.¹¹ The eventual willingness of the government to reform the abortion law after initial hesitancy exemplifies the impact that advocacy by domestic women's groups and INGOs can have on the situation of women.

A. The Criminalization of Abortion in Nepal

Abortion was legalized in Nepal in March 2002. Until that time the law relating to abortion was extreme. Under the *Muluki Ain, 2020* (Country Code) ("Muluki Ain") abortion was characterized as homicide and was not permitted under any circumstance: "Except while doing something for the purpose of welfare, if a pregnancy is terminated, the person who terminates the pregnancy, the person who makes another

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7. See, e.g., Memorandum from the Center for Reproductive Law and Policy, to the Government of Nepal [hereinafter Memo of CRLP to Government of Nepal] (on file with author).
 8. See, e.g., Letter from Katherine Hall Martinez, Deputy Director & Melissa Upreti, Staff Attorney, International Program, Center for Reproductive Law and Policy, to The Committee on Economic, Social, and Cultural Rights (Aug. 10, 2001) [hereinafter Martinez and Upreti].
 9. See Christine M. Chinkin, Book Note, 92 AM. J. INT'L. L. 589, 590 (1998) (reviewing M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* (1997)).
 10. ABORTION IN NEPAL, *supra* note 4, at 14 ("For the women of Nepal, that country's abortion prohibition is a source of profound injustice.").
 11. Indeed, the legalization of abortion may have little impact on women if, despite the prior criminal penalty, safe abortions were widely available and people were never criminally prosecuted.

terminate a pregnancy or the person who helps in the termination of a pregnancy shall be guilty of an offense.”¹²

On the face of the statute, it appears that abortion could be justified in limited circumstances, i.e., “for the purpose of welfare.” In fact, the term “welfare” was undefined in law and most legal authorities and commentators held that abortion was never permissible.¹³ Abortion was not allowed even if it was necessary to save the woman’s life or health, if the pregnancy would result in fetal impairment, or was the result of rape or incest.¹⁴ This made the Nepali law concerning abortion amongst the harshest in the world.¹⁵

Nepal was also unique in being one of only a handful of countries that consistently prosecuted and imposed severe sanctions upon women who had abortions.¹⁶ Women accused of abortion faced a penalty of up to five years imprisonment.¹⁷ The severity of the punishment varied according to the duration of the pregnancy and whether or not the woman consented to the procedure.¹⁸ To compound the issue, due to inadequate fact-finding by police, women who miscarried were often prosecuted for abortion.¹⁹ Moreover, women who had abortions were

12. ABORTION IN NEPAL, *supra* note 4, at 12 (citing *Muluki Ain 2020* [Country Code 1963], ch.10, No. 28 (unofficial translation) [hereinafter *Muluki Ain*]).
13. *Id.* at 39 (“While some law enforcement officials have interpreted narrow exceptions into the law, most legal authorities and commentators affirm that abortion is not permitted on any ground.” (citing Interview with Burwal, Court of Appeals Justice, in Nepal (Mar.16, 2001); Interview with Nawalparasi, District Court Judge, in Nepal (Mar.15, 2001))).
14. See Prem J. Thapa et. al, *A Hospital-Based Study of Abortion in Nepal*, 23 *STUD. IN FAM. PLAN.* 311, 312 (1992).
15. See The Center for Reproductive Law and Policy, *Nations Worldwide Support a Woman’s Right to Choose Abortion*, 2 (Mar. 2000), available at http://reproductiverights.org/pub_fac_atkwwsup.html (last visited Nov. 3, 2003). Only forty-four countries in the world, representing significantly less than a quarter of the world’s population, have similarly strict laws. In contrast, fifty nations, representing more than 40% of the world’s population, permit abortion without restriction as to reason. The remaining ninety-seven nations permit abortion in certain circumstances.
16. See THE CENTER FOR RESEARCH ON ENVIRONMENT, HEALTH AND POPULATION ACTIVITIES (CREHPA), *WOMEN IN PRISON IN NEPAL FOR ABORTION: A STUDY ON IMPLICATIONS OF RESTRICTIVE ABORTION LAW ON WOMEN’S SOCIAL STATUS AND HEALTH* 18 (2000), available at <http://www.creHPA.org.np/ogs/creHPA/index.htm> (last visited Nov. 2, 2003). It should be noted that despite their culpability at law, those who performed abortions were rarely subject to criminal prosecution.
17. ABORTION IN NEPAL, *supra* note 4, at 39.
18. *Id.*
19. *Id.* at 43. The report gives as an example the plight of a woman, “Kali Maya,” who miscarried and was subsequently charged and convicted of abortion. At the time of writing the report, she was serving a twenty year sentence.

often charged with the very serious offence of infanticide.²⁰ In such cases a woman could be jailed for periods extending to twenty years and her property confiscated.²¹ According to a study completed in 1997, eighty women were serving prison sentences for abortion/infanticide.²² This number represented 22.4% of all women imprisoned in the country.²³

The criminalization of abortion raised myriad concerns regarding the rights of defendants and prisoners. The arrest, prosecution and imprisonment of women accused of abortion was highly problematic. Women were often convicted based on insufficient evidence, without the representation of a lawyer and without due process.²⁴ The denial of basic due process rights was common regardless of existing constitutional protections relating to them.²⁵ The right to criminal justice enshrined in the Nepali Constitution did little to protect women accused of abortion or infanticide.²⁶ Uneducated women suffered disproportionately from the lack of regard for their rights; many were unable to read the statements they were asked to sign by police, did not understand the nature of the charge(s) against them, and/or did not know of their legal rights.²⁷ Once detained, women and girls found that there was insufficient food and unavailable or sporadic medical assistance.²⁸ Of the eighty women detained for abortion or infanticide in 1997, court cases were still pending for the majority (56%) in 2000.²⁹ Convicted women were often forced to serve their sentences with their young children since no other care arrangements were available for them.³⁰

The foregoing, of course, only applied to women who survived having a clandestine abortion. Many women died in the process.³¹ In 1998, the Nepali government reported a total of 4,478 maternal deaths per year, placing Nepal among the countries with the highest maternal mortality rates in the world.³² Roughly 50% of all pregnancy-related

20. CREHPA, *supra* note 16, at 10.

21. ABORTION IN NEPAL, *supra* note 4, at 39–40.

22. CREHPA, *supra* note 16, at 12.

23. *Id.*

24. ABORTION IN NEPAL, *supra* note 4, at 63–77.

25. *Id.*

26. NEPAL CONST., art. XIV, § 4.

27. *See* CREHPA, *supra* note 16, at 12–14.

28. *Id.* at 8.

29. *Id.* at 16.

30. ABORTION IN NEPAL, *supra* note 4, at 24.

31. *See* CREHPA, *supra* note 16, at 23 (discussing the many negative health impacts of clandestine abortions).

32. ABORTION IN NEPAL, *supra* note 4, at 23.

deaths in the country were attributed to unsafe abortion.³³ The leading cause of hospital admissions for pregnant women was complications arising from unsafe abortion (54%).³⁴ In short, the criminalization of abortion in Nepal had profound impacts on the physical and mental health, welfare and long-term prospects of women who sought to terminate their pregnancies.

B. Gender Inequality in Nepali Society

Considering the above discussion, it is difficult to conceive why abortion continued to be subject to criminal penalty until so recently. From a purely technical standpoint, abortion remained subject to criminal sanction because of the failure on the part of the Nepali government to reform the antiquated *Muluki Ain*.³⁵ The *Muluki Ain* was drafted in the nineteenth century and was largely a codification of conservative and patriarchal Hindu philosophical texts.³⁶ In the 1930s the Nepali government revised the *Muluki Ain* to remove provisions that discriminated on the basis of caste; provisions that discriminated on the basis of gender were left untouched.³⁷ The *Muluki Ain* was not reformed again until 2002, when abortion was legalized.³⁸

From a social standpoint, the continued criminalization of abortion resulted from the prevalence of patriarchal norms in Nepali society.³⁹ The now-repealed law relating to abortion is just one example of the severe gender discrimination faced by Nepali women. The entrenched cultural preference for sons results in the neglect of girls and women from an early age.⁴⁰ Lower enrollment in school with significant dropout

33. *Id.* (This is compared to the global rate of 13% of maternal deaths due to unsafe abortion. See CREHPA, *supra* note 16, at 1.).

34. *Id.* at 23 (citing GOVERNMENT OF NEPAL, FAMILY HEALTH DIVISION, MINISTRY OF HEALTH, MATERNAL MORTALITY AND MORBIDITY STUDY, 67 (1998)).

35. Interview with Melissa Upreti, Legal Advisor for South Asia, The Center for Reproductive Law and Policy, in New York, NY (Sept. 27, 2002).

36. ABORTION IN NEPAL, *supra* note 4, at 37 (“Dictated by Hindu religious principles and beliefs, [the *Muluki Ain*] was rife with provisions that sanctioned caste-based and gender-based discrimination.”).

37. *Id.*

38. Interview with Upreti, *supra* note 35.

39. See SAPANA PRASHAN MALLA, THE FIRST CEDAW IMPACT STUDY: FINAL REPORT, NEPAL 79 (Marilou McPhedran, et al. eds., 2000) (“Patriarchal values, deep rooted in the social attitude, are controlling the family system, hence women have not been able to practice their rights due to the social, cultural and religious value system.”).

40. ABORTION IN NEPAL, *supra* note 4, at 30.

rates, increased workloads in the home, and early marriages characterize girls' and women's lives.⁴¹ There are severe restrictions on the ability of women to inherit and own property.⁴² Until 2002, women could not inherit property until they were thirty-five years old and then only if they were and remained unmarried.⁴³ In the labor force, "[women] systematically receive less pay than their male counterparts, despite a constitutional guarantee of equal pay for equal work."⁴⁴

As a result of these hardships, many Nepali women are ushered into a "cycle of oppression and submission."⁴⁵ Such oppression is most often characterized by economic dependency⁴⁶—especially for women from disadvantaged social groups.⁴⁷ The role of many women oscillates between caregiver and child-bearer. After marriage, girls and women are expected to produce a son to ensure an heir to the family enterprise, the longevity of the family name, and to replace the patriarch upon his passing.⁴⁸ During and after bearing children, women are the main caregivers to their husbands, children, and in-laws.⁴⁹ Women are valued in relation to their success in these various care-giving roles; they are valued relationally rather than individually.

In this light, the restriction of women's choices in relation to reproduction is only one manifestation of a larger social phenomenon whereby women are robbed of the opportunity to make autonomous decisions.⁵⁰ The exercise of autonomous decision-making by women is often viewed as an attempt to disrupt the moral and social fabric of

41. *Id.*

42. *Id.* at 95 n.58.

43. *Id.*

44. *Id.* at 31.

45. *Id.* at 30.

46. *Id.* at 31 ("These trends have stifled women's economic advancement and increased their dependence on male family members, thereby severely limiting their ability to voice their needs and to make independent decisions about their well-being.").

47. *Id.* at 30.

48. See University of Southampton, Reproductive Health Research, Opportunities and Choices, *Son Preference is Alive in Nepal, Limiting Contraceptive Use and Keeping Fertility High: Evidence from Nepali survey data, Fact Sheet 20*, available at <http://www.socstats.soton.ac.uk/choices/Opp&Choices%20Factsheet%2020.pdf> (last visited Nov. 19, 2003) (suggesting that "the level of son preference in Nepal is substantial.").

49. See United Nations Development Program, *The Beijing + 5: Nepal Review (2000)*, available at <http://www.undp.org.np/publications/beijing5/chap01.htm> (last visited Nov. 16, 2003)("[F]emale roles are associated with domestic work and rendering services to the male members of their families.").

50. Note, however, that women's level of decision-making authority in the private and public spheres varies according to caste. See ABORTION IN NEPAL, *supra* note 4, at 30.

society.⁵¹ Women convicted of killing their fetus were often reported to police by community leaders,⁵² ostracized by their families,⁵³ or otherwise marginalized. In the end, the continued criminalization of abortion was an assertion of male control over female reproductive capacity. It was an attempt to undermine the ability of women to make autonomous choices, to be independent, and to reject the role of caregiver/child-bearer. In this way, criminalization of abortion limited the ability of Nepali women to challenge the patriarchal organization of society. However, opposition to the criminalization of abortion gained force throughout the 1990s.⁵⁴

C. The Campaign to Legalize Abortion in Nepal and the Role of INGOs

Nepal is a relatively young democracy, only shifting from monarchist rule to democracy on April 22, 1991.⁵⁵ Women played a central role in the movement to democracy, though they exercised relatively little political power after its achievement.⁵⁶ One of the most significant challenges facing Nepal in its transition to democracy was establishing democratic principles and the institutional framework to uphold them.⁵⁷ Citizens unused to the democratic process had the difficult task of mobilizing to protect their interests in an unfamiliar political order. Even

51. See generally Malla, *supra* note 39.

52. ABORTION IN NEPAL, *supra* note 4, at 27 (recounting an inmate's story: "I told the village elder that I had miscarried but he responded by saying 'You killed it!' I denied killing it but he said 'It is held as murder,' and he reported me to the police.").

53. See *id.* ("No one in my family has ever come to visit me [in prison]"). See also *id.* at 43 (relating story of being taken to jail from the hospital and not being met by any family members); see also *id.* at 57 ("No one ever comes to visit me. I have no idea where my husband is. I don't even know if my parents know I am in prison.").

54. *Id.* at 32.

55. Malla, *supra* note 39, at 77.

56. See Saloni Singh, *Women and Political Participation in Nepal*, in PARTICIPATION—PARTICIPATORY DEVELOPMENT: ENLARGING PEOPLE'S CHOICES (2000), available at <http://www.nepan.org.np/publication/participatory/13.pdf> (last visited Nov. 14, 2003). See generally *Nepal's Women Back Democracy*, B.B.C. News (May. 13, 1999), available at http://news.bbc.co.uk/1/hi/world/south_asia/342834.stm (last visited Nov. 14, 2003).

57. See USAID, *Nepal* (2002), available at <http://www.usaid.gov/pubs/cbj2002/ane/np/> (last visited Nov. 3, 2003).

still, the somewhat fragmented women's movement that existed prior to 1991 became increasingly active after the end of monarchist rule.⁵⁸

In the early 1990s, civil society in Nepal flourished. The transition to democracy and exposure to international developments in human rights brought with it significant international moral and financial support for activism in Nepal.⁵⁹ Women began to discuss more openly the injustices they felt within the Nepali legal and social order. The absence of property inheritance rights for women emerged as a central rallying point for women's groups.⁶⁰ For many Nepali women, the continued denial of inheritance rights to women except in limited circumstances typified Nepali patriarchal norms.⁶¹ Denying women equal inheritance rights was seen as a central method of curtailing women's independence. Through discussions regarding inheritance rights, women's groups began to question more deeply Nepal's patriarchal order. The agenda of women's groups broadened to include "the right to safe, legal abortion, safe motherhood, affirmative action in educational and political institutions, the right of women to confer citizenship on their children," and the end to child marriage, trafficking of girls and domestic violence.⁶² The analysis adopted by domestic grassroots women's groups was largely feminist in orientation; it saw Nepali law as mirroring and reinforcing the patriarchal norms that continued to oppress women.⁶³

The mobilization of the women's movement culminated in the 1996 drafting of a Bill to revise the laws relating to property inheritance.⁶⁴ Nepali women's groups, with the support of INGOs, drafted the Bill.⁶⁵ The Bill was defeated in Parliament; popular opinion suggested that it was too revolutionary.⁶⁶ There was a fear, often expressed

58. ABORTION IN NEPAL, *supra* note 4, at 31–32 ("Following the disintegration of the *Panchayat* regime in 1990, a plethora of women's rights groups emerged and the focus of these activists broadened to include issues ranging from property rights to reproductive rights. Particularly over the last decade, women have been engaged in persistent struggle to end discrimination and exploitation both in the private and public spheres.")

59. Interview with Upreti, *supra* note 35.

60. *Id.*

61. *Id.*

62. ABORTION IN NEPAL, *supra* note 4, at 32.

63. Interview with Upreti, *supra* note 35.

64. *Id.*

65. Asian Women's Resource Exchange, Challenging Nepal's Inheritance Laws (1997), available at http://www.aworc.org/bpfa/pub/sec_f/eeco00001.html (last visited Nov. 3, 2003).

66. See Shrish S. Rana, *Inheritance Law Issues: What Values?*, THE PEOPLE'S REVIEW (Aug. 21, 1997), available at <http://www.yomari.com/p-review/august97/august-21/>

by women, that reforming the inheritance law would upset the social harmony of Nepali society and that it might even disadvantage women by alienating them from their once-protective families.⁶⁷ The fact that the drafters had received money from international sources exposed the Bill to criticism of being a foreign idea imposed on Nepal by the West.⁶⁸ The failure of the Bill was a setback for domestic women's groups.

Paralleling the Nepali women's movement was a campaign spearheaded by public health officials to legalize abortion.⁶⁹ Government public health experts were concerned with the link between the extremely high rate of maternal mortality in Nepal and the prevalence of clandestine abortions.⁷⁰ Their concern was manifested in a private member's Bill⁷¹ to legalize abortion tabled to Parliament in 1996.⁷² The thrust of the public health officials' argument was that abortion should be decriminalized to reduce the maternal mortality rate, not necessarily due to concern over the rights of women.⁷³ The Bill lapsed before it could be voted on, largely due to a succession of different governments and the general political instability that characterized Nepali politics in the 1990s.⁷⁴

While the bills relating to property inheritance and abortion were not passed, they did increase public discussion of issues pertaining to women. The pronouncements coming out of the Beijing Conference in 1995 empowered Nepali women to continue their struggle for legal reform; they affirmed that their demands were not unreasonable and were in fact an assertion of their rights.⁷⁵

law.html (last visited Nov. 3, 2003) ("A bill that intends to amend the Civil Code regarding inheritance of paternal property with equal rights for women in mind is typical of how Western values are perceived and fuel distorted demands on the plea of modernism here [in Nepal].").

67. *Id.*

68. *Id.*

69. Interview with Upreti, *supra* note 35.

70. *Id.*

71. A private member's Bill is one that is put forward by a member of Parliament on his/her own accord and not necessarily with the support of his/her political party.

72. See ABORTION IN NEPAL, *supra* note 4, at 40 ("In 1996, Member of Parliament and then President of the Family Planning Association of Nepal, Mr. Sunil Bhandari, introduced a bill seeking to legalize abortion on certain grounds and to regulate access.").

73. Interview with Upreti, *supra* note 35. Somewhat ironically, the Bill was entitled the "Protection of Pregnancy Act."

74. CREHPA, *supra* note 16, at 31. See generally Holly Gayley, *Gyanendra's Test: Nepal's Monarchy in the Era of Democracy*, 6:1 HARV. ASIA Q. (2001), available at <http://www.fas.harvard.edu/~asiactr/haq/200201/0201a009.htm> (last visited Nov. 3, 2003).

75. Interview with Upreti, *supra* note 35.

In 1997, the Nepali government agreed to address the issue of gender discrimination in the *Muluki Ain*, a turn-around that can be attributed to the continued pressure being asserted on the government by Nepali women's groups.⁷⁶ The government's efforts were informed by research undertaken by domestic nongovernmental organizations ("NGOs") who took the initiative to catalogue the discriminatory provisions in the *Muluki Ain* and recommended reforms from a gender perspective.⁷⁷ This initiative resulted in the *Muluki Ain* 11th Amendment Bill, 1997 ("11th Amendment Bill").⁷⁸ The Bill was eventually passed by Parliament in March 2002 and received royal assent in September 2002.⁷⁹ Notable provisions in the 11th Amendment Bill allowed for limited inheritance rights for women and legalized abortion.⁸⁰

Under the new provisions, abortion is permitted on demand within the first twelve weeks of pregnancy.⁸¹ Abortion is also permitted within

76. See ASIAN WOMEN'S RESOURCE EXCHANGE, *supra* note 65. The Forum for Women, Law and Development (FWLD) coordinated the actions of seventy lawyers to bring a case before the Nepali Supreme Court regarding inheritance rights for women under Nepali law. Based on the Constitutional guarantee of equality, the Supreme Court held that Parliament was required to introduce an appropriate Bill to remedy the discriminatory inheritance laws.

77. Interview with Upreti, *supra* note 35.

78. ABORTION IN NEPAL, *supra* note 4, at 40.

79. Interview with Upreti, *supra* note 35.

80. See ASIAN WOMEN'S RESOURCE EXCHANGE, *supra* note 65. While the Bill affords women property inheritance rights upon birth, it has been criticized by women's groups because it requires a woman who inherits property to return it to the family if she gets married.

81. *Muluki Ain 2020* [Nepal Country Code 1963] (amended 2002), translated in E-mail from Melissa Upreti, Legal Advisor for South Asia, The Center for Reproductive Law and Policy, to Renu Mandhane (Oct. 24, 2002, 12:30 EST) (on file with author). The amendments related to abortion read as follows:

The following provision (the new no. 28), shall replace the existing no. 28 of the Chapter on Life of the *Muluki Ain*:

No. 28. Anyone who has an abortion or causes an abortion, intentionally, knowingly or despite having reasonable grounds to believe that an abortion may result from their act shall be punished as follows:

Imprisonment for a year if the pregnancy is upto [sic] 12 weeks

Imprisonment for 3 years if the pregnancy is upto [sic] 25 weeks

Imprisonment for 5 years if the pregnancy is more than 25 weeks.

After provision no. 28, the following new provisions, no.s [sic] 28 (a) and 28 (b), have been added:

28 (a) The law prohibits anyone from forcing, threatening, *tricking* or providing incentives to a pregnant woman to have an abortion or to determine the sex of the fetus with the intention of having an abortion. Anyone who

the first eighteen weeks on the grounds of rape or incest; it is permitted without regard to the duration of the pregnancy to save the life or health of the woman, or where there is evidence of fetal impairment.⁸²

It was in the interim between the government initiating studies of gender discrimination in the *Muluki Ain* in 1997 and the passing of the 11th Amendment Bill in 2002 that CRLP became involved in Nepal.⁸³ It worked in partnership with a NGO based out of Katmandu, the Forum for Women, Law and Development (FWLD).⁸⁴ According to its mission statement, CRLP is “dedicated to promoting women’s equality worldwide by guaranteeing reproductive rights as human rights.”⁸⁵ In Nepal, CRLP’s goal was to expose the continued criminalization of abortion in Nepal as resulting in massive human rights violations.⁸⁶ CRLP wished to recharacterize what had, up until that point, been regarded as a public health issue, as an issue of human rights.⁸⁷ It focused not only on the economic, social and cultural rights violations resulting from the ban, but also on the violation of civil and political rights.

causes a pregnant woman [to] have an abortion under such circumstances or anyone who determines the sex of the fetus or causes a woman to determine the sex of the fetus with the intention of having an abortion shall be liable to punishment of upto [sic] one year in prison and anyone who *performs or causes* a sex selective abortion shall be punished with an additional imprisonment term of one year.

28 (b) Notwithstanding anything mentioned in no. 28 of this chapter, in the following circumstances and in accordance with the law as prescribed by His Majesty’s Government of Nepal, on the fulfillment of the prescribed grounds of eligibility and with the written permission of a medical practitioner, an *abortion* on any of the following grounds shall not be considered a *termination of pregnancy* (i.e., a punishable act as defined in section no. 28)

... if done within the first 12 weeks of the pregnancy, with the consent of the woman

... if done within 18 weeks where the pregnancy is a result of rape or incest, with the consent of the woman

... if failure to terminate the pregnancy will create a threat to the woman’s life or her physical health or mental health or if in the opinion of a qualified (as per the requirements of the law) medical practitioner the child born will be impaired, with the consent of the woman.

82. *Id.*

83. ABORTION IN NEPAL, *supra* note 4, at 5.

84. *Id.* CRLP and FWLD conducted a fact-finding mission in Nepal in March 2001, *id.* at 23.

85. CENTER FOR REPRODUCTIVE LAW AND POLICY, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS, 52 (2001).

86. Interview with Upreti, *supra* note 35.

87. *Id.*

CRLP, in partnership with FWLD, undertook a fact-finding mission in Nepal in March 2001.⁸⁸ During the mission, staff attorneys from CRLP and FWLD met with domestic women's advocates, women serving prison terms for abortion and related infanticide convictions, police officers, members of the judiciary and government officials.⁸⁹ CRLP and FWLD summarized their findings in a report entitled *Abortion in Nepal: Women Imprisoned*.⁹⁰ Relying on binding international covenants to which Nepal is a party, the report catalogued the human rights offenses arising out of the criminalization of abortion in Nepal. The report suggested that the following rights were being violated due to the unavailability of safe and legal abortion: the right to life,⁹¹ the right to health,⁹² the right to equality and non-discrimination,⁹³ and the right to reproductive self-determination.⁹⁴ The report also concluded that,

88. ABORTION IN NEPAL, *supra* note 4, at 23 (“[T]his report exposes the government’s denial of Nepali women’s right to safe and legal abortion and its violation of the rights of criminal defendants who are prosecuted under the abortion prohibition.”).

89. *Id.* at 24–25.

90. *Id.*

91. *See, e.g., Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 (1996), Beijing, China, Sept. 4–15, 1995, paras. 37–39, available at <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm> (last visited Oct. 27, 2003) [hereinafter *Beijing Platform for Action*]; *Programme of Action of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13/Rev.1 (1995), Cairo, Egypt, Sept. 5–13, 1994, paras. 7.3, 7.15, 8.34, available at http://www.unfpa.org/icpd/icpd_poa.htm (last visited Nov. 3, 2003) [hereinafter *ICPD Programme of Action*]; *Convention of the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990), arts. 6.1, 6.2 [hereinafter *Children’s Convention*]; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), art. 6.1 [hereinafter *Civil and Political Rights Covenant*]; *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948), art. 3 [hereinafter *Universal Declaration*].

92. *See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women* G.A. Res. 34/180, U.N. GOAR, 34th Sess., Supp. No. 46 (1979), at 193, U.N. Doc. A/34/46, (entered into force Sept. 3, 1981) art. 12 [hereinafter *CEDAW*]; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), (entered into force Jan. 4, 1976), art. 12(1) [hereinafter *Economic, Social, and Cultural Rights Covenant*].

93. *See, e.g., Beijing Platform for Action, supra* note 91, paras. 27, 44; *CEDAW, supra* note 92, arts. 1, 3; *Civil and Political Rights Covenant, supra* note 91, art. 2.1; *Economic, Social and Cultural Rights Covenant, supra* note 92, art. 2.2; *ICPD Programme of Action, supra* note 91, principles 1,4; *Universal Declaration, supra* note 91, art. 7.

94. *See, e.g., Beijing Platform for Action, supra* note 91, para. 37; *CEDAW, supra* note 92, art. 16 (1.e). *See also Children’s Convention, supra* note 91, arts. 6.1, 6.2, 16.1, 16.2; *Civil and Political Rights Covenant, supra* note 91, arts. 6.1, 9.1, 17.1; *ICPD*

through the prosecution and imprisonment of women accused of abortion, the following rights were being violated: the right to be free from arbitrary arrest and detention,⁹⁵ the right to equality and non-discrimination,⁹⁶ the right to due process,⁹⁷ and the right to humane treatment in detention.⁹⁸

CRLP also wrote a letter to the United Nations Committee on Economic, Social and Cultural Rights (the "Committee").⁹⁹ In 1999, in furtherance of its treaty obligations, Nepal submitted a report to the Committee outlining the measures it had taken to uphold its obligations under the International Covenant on Economic, Social and Cultural Rights.¹⁰⁰ In relation to gender equality, Nepal noted that its Constitution and the *Civil Liberties Act 1954* protected against discrimination. Nepal stated that it had: "remained effortful to adopt necessary administrative as well as legislative measures, or to revise its existing legislative provisions, in line with the international norms and principles in the field of women's rights."¹⁰¹ The CRLP letter was meant to aid the Committee in preparation of its response to the Nepali report. In a letter dated August 10, 2001, CRLP reminded the Committee that women's reproductive rights were an integral part of the Committee's

Programme of Action, *supra* note 91, principle 8; *Universal Declaration*, *supra* note 91, art. 3.

95. *Civil and Political Rights Covenant*, *supra* note 91, art. 9.1.

96. *See, e.g., Beijing Platform for Action*, *supra* note 91, paras. 9, 39; *CEDAW*, *supra* note 92, arts. 2, 15; *Civil and Political Rights Covenant*, *supra* note 91, arts. 2, 14.1; *Universal Declaration*, *supra* note 91, art. 7.

97. Due process includes:

1. the right to be informed of the charges, and prompt proceedings (*Civil and Political Rights Covenant*, *supra* note 91, art. 9.2);
2. the right to counsel (*Civil and Political Rights Covenant*, *supra* note 91, art. 14.3(d); *Universal Declaration*, *supra* note 91, art. 11(1));
3. the right to a fair and public hearing (*Civil and Political Rights Covenant*, *supra* note 91, art. 14.1; *Universal Declaration*, *supra* note 91, art. 10);
4. the right to be presumed innocent;
5. the right to remain silent;
6. the right to be present at trial; and
7. the right to appeal a conviction.

98. *Civil and Political Rights Covenant*, *supra* note 91, art. 7. *See also Children's Convention*, *supra* note 91, art. 37(c); *Universal Declaration*, *supra* note 91, art. 5.

99. Martinez & Upreti, *supra* note 8. The Committee is the treaty-monitoring body for the *Economic, Social and Cultural Rights Covenant*, *supra* note 92.

100. *Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum*, Nepal, U.N. Doc. E/1990/5/Add.45 (2000).

101. *Id.* at 17.

mandate.¹⁰² The letter argued that the criminalization of abortion in Nepal was resulting in the breach of various articles in the Economic, Social and Cultural Rights Covenant.¹⁰³

In its Concluding Observations in relation to Nepal, the Committee stated:

The Committee urges the State party to take remedial action to address the problems of clandestine abortions, unwanted pregnancies and the high rate of maternal mortality. In this regard, the Committee urges the State party to reinforce reproductive and sexual health programmes, in particular in rural areas, and to allow abortion when pregnancies are life threatening or a result of rape or incest.¹⁰⁴

This was a bold move on the part of the Committee since, as a matter of policy, the United Nations does not promote the legalization of abortion in countries where the practice is illegal.¹⁰⁵

Finally, CRLP sent comments to the Nepali government regarding the first draft of the 11th Amendment Bill.¹⁰⁶ The comments characterized abortion as a human rights issue and reminded Nepal of its international commitments under various international human rights covenants.¹⁰⁷ In particular, the memorandum noted Nepal's obligations

102. Martinez & Upreti, *supra* note 8, at 1 (“Women’s reproductive rights form an integral part of the Committee’s mandate. Article 12(1) of the ICESCR recognizes ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ In interpreting the right to health, this Committee, in General Comment 14, has explicitly defined this right to ‘include the right to control one’s health and body, including sexual and reproductive freedoms.’”).

103. *Id.* (“We believe the situation discussed below [in relation to the prohibition of abortion in Nepal] constitutes a serious violation of the Nepalese government’s obligation [to] ensure women’s Reproductive Health, under articles 12, 10, and 15(1)(b) of the ICESCR.”).

104. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal*, 26th Sess., 44th–46th, 55th mtgs., para. 55, U.N. Doc. E/C.12/1/Add.66 (2001) [hereinafter *CESCR Concluding Observations: Nepal*].

105. *Nepal Legalizes Abortion in Response to United Nations Demands*, Lifesite, Mar. 15, 2002, available at <http://www.lifesite.net/ldn/2002/mar/02031502.html> (last visited Sept. 11, 2002) [hereinafter *Nepal Legalizes Abortion*].

106. Memo from CRLP to the Government of Nepal, *supra* note 7.

107. The instruments that Nepal has ratified (along with the dates entered into force in Nepal) include: *Children’s Convention*, *supra* note 91; *Civil and Political Rights Covenant*, *supra* note 91; *Economic, Social and Cultural Rights Covenant*, *supra* note 92; *CEDAW*, *supra* note 92; *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, Annex at 207, U.N. Doc. A/44/49

in relation to the rights to life and health, the right to equality and freedom from discrimination, and the right to autonomy in decision-making in private matters.¹⁰⁸ The memorandum offered the Nepali government specific recommendations based on the text of the first draft of the 11th Amendment Bill.¹⁰⁹

The Nepali Parliament passed the 11th Amendment Bill in March 2002.¹¹⁰ It did so two months after the final comments from the United Nations Committee on Economic, Social and Cultural Rights were released.¹¹¹ After King Gyanendra granted Royal Assent in September 2002, the 11th Amendment Bill became law.¹¹²

Despite the passing of the 11th Amendment Bill, roughly 30 Nepali women remain in prison on charges of abortion or infanticide. There is no provision in the Bill requiring the release of these women.¹¹³ Melissa Upreti, a staff attorney at CRLP, stated: "Nepal's brutal abortion law is now history, but the fate of those women imprisoned for abortion is unclear. Women's equality under the law requires the government to take action and end this great injustice of imprisoning women for abortion."¹¹⁴ Since passage of the 11th Amendment Bill, aggressive campaigning by domestic NGOs and INGOs has resulted in the release of twenty-three women imprisoned for abortion as of January

(1989), (*entered into force* July 11, 1991); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (Jun. 13, 1991); *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59 (1966) (*entered into force* Mar. 23, 1976); *International Convention for the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX), 660 U.N.T.S. 195 (1965) (*entered into force* Jan. 4, 1969) [hereinafter *Convention of Elimination of Racial Discrimination*]. Moreover Nepal has signed documents negotiated at UN Conferences such as: *Beijing Platform for Action*, *supra* note 91; *ICPD Programme of Action*, *supra* note 91.

108. Memo from CRLP to the Government of Nepal, *supra* note 7, at 2–3.

109. *See id.* at 3–8.

110. *Nepal Legalizes Abortion*, *supra* note 105.

111. *Id.*

112. Press Release, The Center for Reproductive Rights, Nepal's King Legalizes Abortion: A Victory for Nepalese Women and Advocated Worldwide (Sept. 26, 2002), available at http://www.crlp.org/pr_02_0926nepal.html (last visited Oct. 7, 2003).

113. *Nepal: Country Code (11th Amendment) Bill and Women's Rights*; WOMEN LIVING UNDER MUSLIM LAWS (Forum for Women, Law and Development, Nepal) 2002, available at [http://wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-3355&cmd\[189\]=x-189-3355](http://wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-3355&cmd[189]=x-189-3355) (last visited Oct. 19, 2002).

114. Press Release, The Center for Reproductive Law and Policy, Nepal Legalizes Abortion: Next Step is to Release Women in Prison for Abortion (Mar. 14, 2002), available at http://www.crlp.org/pr_02_0314nepal.html (last visited Dec. 5, 2002).

2004.¹¹⁵ Moreover, the government has begun working towards making safe abortions accessible. In December 2003, Nepal's Ministry of Health adopted a procedural order, which authorizes the provision of abortion services in public hospitals and other government health facilities.¹¹⁶

D. Evaluating the Outcome of the Campaign

For the most part, the Nepali campaign to legalize abortion was a success. Passage of the 11th Amendment Bill by Parliament signaled a new approach to women's legal interests, including abortion. The new approach involved giving the Constitutional principle of gender equality formal recognition in the text of Nepali law. The movement from complete ban to legalization was relatively swift. It took only six years from the government rejecting the first Bill aimed at the legalization of abortion, for abortion to become legal in most cases.

The success of the campaign can be attributed to three factors. Foremost, the campaign to legalize abortion benefited from the political climate surrounding the passage of the 11th Amendment Bill. The most contested element of the 11th Amendment Bill was not the abortion provision, but rather the provision related to property inheritance.¹¹⁷ The notoriety of the property inheritance issue shifted Parliament's attention away from any opposition to the legalization of abortion.¹¹⁸ Thus, from a strategic point of view, it was easier to have abortion legalized in an omnibus amendment to the *Muluki Ain* with other controversial elements, rather than as a stand-alone Bill as was attempted in the 1990s.

Second, the success of the campaign was largely a result of the appeal to public health concerns. The pressure to legalize abortion did not come solely from women's groups, who the public blamed for attempting to upset social harmony.¹¹⁹ Abortion was characterized by government officials¹²⁰ and even the UN Committee on Economic,

115. The Center for Reproductive Rights, *Landmark Order Establishes Safe Abortion Services Throughout Nepal*, available at http://crlp.org/ww_asia_nepal.html (last visited Feb. 13, 2004).

116. *Id.*

117. Interview with Upreti, *supra* note 35.

118. *Id.*

119. See Rana, *supra* note 66.

120. ABORTION IN NEPAL, *supra* note 4, at 33–36.

Social and Cultural Rights¹²¹ as an issue tied to the high incidence of maternal mortality. This made the abortion issue less controversial and even 'marketable' to social conservatives.

Finally, in its attempts to gain legitimacy internationally, the new democratic government in Nepal had become a party to many binding international legal obligations.¹²² Arguments to legalize abortion that had their basis in international human rights, such as those put forward by CRLP, were more persuasive than they might have been in a more established democracy.¹²³ There was at least some pressure on the Nepali government to obey its international obligations, quite apart from concerns regarding gender discrimination or public health.¹²⁴

III. HISTORICAL BACKGROUND TO THE WOMEN'S HUMAN RIGHTS MOVEMENT

Women's advocates from INGOs now commonly refer to women's human rights. As the example from Nepal suggests, INGOs often rely on human rights discourse when advocating for the interests of women. However, human rights conventions, for the most part, were created by and for men.¹²⁵ Human rights have not always included women's rights. According to Catherine MacKinnon, "[r]ights that human beings have by virtue of being human have not been rights to which women have had access, nor have violations of women as such been part of the definition of the violation of the human as such on which human rights law has traditionally been predicated."¹²⁶

Part of the historical blindness of human rights analysis to issues of gender stems from the fact that violations of women's rights do not take place in the context of wars, prison cells, or torture chambers, but in the

121. *CESCR Concluding Observations: Nepal*, *supra* note 104, at para. 32 ("The Committee notes with deep concern the high rates of maternal mortality, especially in rural areas, owing mainly to unsafe and illegal abortions . . .").

122. *See* Chinkin, *supra* note 9. Peterson suggests that conformity with international law is essential to recognition of a new government. This likely includes conformity with international human rights law.

123. *Id.* at 589. Chinkin suggests that in the 1990s, respect for human rights, democracy and the rule of law were central to recognition of new governments, especially in Eastern Europe.

124. *See, e.g., CESCR Concluding Observations: Nepal*, *supra* note 104.

125. Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 *BROOK. J. INT'L L.* 605 (1996).

126. Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 *HARV. WOMEN'S L.J.* 5 (1994) [hereinafter *Rape, Genocide and Women's Human Rights*].

context of their everyday lives.¹²⁷ The fact that many women were, and continue to be, denied access to safe and legal abortion is just one example of a human rights violation that went unnoticed for decades despite the existence of human rights protections.¹²⁸

While human rights documents dating back to 1945 formally recognize sex equality, women's human rights were rarely differentiated from human rights in general.¹²⁹ Some suggest that the primary international human rights treaties and organizations "do not appear to deal specifically with violations of the human rights of women, except in a marginal way or within the framework of other human rights issues."¹³⁰ Others suggest that "[i]nternational human rights and the legal instruments that protect them were developed primarily by men in a male-oriented world."¹³¹ The failure of existing conventions to take into account the specific human rights concerns of women resulted in the drafting of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") in 1979.¹³² CEDAW became effective in 1981 and, as of June 2002, has been ratified by 170 countries.¹³³ Nepal ratified CEDAW on April 22, 1991.¹³⁴

The drafting and ratification of CEDAW by states was a first step in formulating a women's human rights discourse.¹³⁵ CEDAW was revolutionary in its aim to protect a wide variety of women's rights, including reproductive rights.¹³⁶ However, as with other human rights

127. Anthony P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, 26 COLUM. HUM. RTS. L. REV. 751, 751 (1995); MacKinnon, *supra* note 126, at 5; Hernandez-Truyol, *supra* note 125.

128. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 19 (Rebecca Cook ed., Univ. of Pa., 1994) [hereinafter Cook].

129. See, e.g., *Universal Declaration*, *supra* note 91.

130. Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3:1 HUM. RTS. Q. 12 (1981).

131. Cook, *supra* note 128, at 10.

132. CEDAW, *supra* note 92.

133. For a complete list of parties to CEDAW see <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 13, 2004).

134. See United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, available at <http://www.unhrc.ch> (last visited Feb. 1, 2004).

135. Cook, *supra* note 128, at 10–11 (suggesting that CEDAW "progresses beyond earlier human rights conventions by addressing the pervasive and systematic nature of discrimination against women.").

136. CEDAW, *supra* note 92, art. 12. Note that CEDAW fails to mention a right to safe and legal abortion.

conventions, CEDAW only resulted in formal recognition of women's human rights. Many states that signed CEDAW did not take it seriously and viewed women's human rights as a marginal issue.¹³⁷ A number of states noted substantive reservations to the international convention.¹³⁸

Thus, despite the existence of CEDAW, one must understand that the women's human rights movement was not initiated by governments or through the intergovernmental system.¹³⁹ Instead, it was the result of aggressive campaigning on the parts of women's groups and INGOs.¹⁴⁰ The 1990s marked the beginning of forceful campaigning by INGOs for women's human rights.¹⁴¹ For example, CRLP was established in 1992 in order to advocate for the protection of women's reproductive rights, which had traditionally been viewed as a public health issue.¹⁴²

The campaign to bring women's interests into the discourse of human rights met with great success at the international conferences in Vienna,¹⁴³ Cairo,¹⁴⁴ and Beijing.¹⁴⁵ Indeed, Amnesty International, in its campaign leading up to the Beijing Conference, emphasized the catchphrase "women's rights are human rights" as a guiding principle for negotiation of the Declaration and Platform for Action.¹⁴⁶ One indication of the Amnesty International campaign's success was Hillary Rodham Clinton's announcement in Beijing that "women's rights are human rights."¹⁴⁷ Her words were significant because they came from a mainstream political figure, representing what is arguably the most powerful nation in the world. In the new millennium, the "women's

137. Jo Lynn Southard, *Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L. L. REV. 1, 18 (1996).

138. *Id.* For a complete list of states who have registered reservations see <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 13, 2004).

139. Hernandez-Truyol, *supra* note 125, at 617.

140. *Id.*

141. For example, Human Rights Watch's launched its Women's Human Rights Project in 1990. CRLP was established in 1992.

142. The Center for Reproductive Rights, *supra* note 3.

143. *Vienna Declaration and Programme of Action, World Conference on Human Rights*, UN Doc. A/CONF.157/23 (1993), Vienna, Austria, Jun. 14–25, 1994, available at <http://www.hri.ca/vienna+5/vdpa.shtml> (last visited Oct. 19, 2002) [hereinafter *Vienna Declaration*].

144. *ICPD Programme of Action*, *supra* note 91.

145. *Beijing Platform for Action*, *supra* note 91.

146. AMNESTY INTERNATIONAL, WOMEN'S RIGHTS ARE HUMAN RIGHTS: COMMITMENTS MADE BY GOVERNMENTS IN THE BEIJING DECLARATION AND PLATFORM FOR ACTION, 1–2, (1996) available at <http://web.amnesty.org/library/index/ENGIOR410051996/> (last visited Oct. 24, 2003).

147. Clinton, *supra* note 1.

rights are human rights" approach has come to dominate the field in terms of INGO advocacy to protect women's interests.

IV. THE PERSUASIVENESS OF HUMAN RIGHTS DISCOURSE AND RELATED CRITIQUES

Given the focus of INGOs on human rights discourse in their efforts to secure the interests of women globally, it is helpful to consider the rationales underlying this approach. However, given that the central goal of this paper is to consider some of the implications of exclusive use of human rights discourse by INGOs, the rationales will also be critiqued. Despite the complexity of the issues, as the Nepal example indicates, advocacy based on principles of human rights is oftentimes very effective. Even still, there must be critical analysis of this trend, if only to determine that it is the most appropriate mode of advocating for women's interests.

A. Universalism

An underlying reason for the reliance of INGOs on human rights discourse in efforts to secure women's interests is the discourse's universalist orientation.¹⁴⁸ The presumption that human rights are universal is illustrated in human rights instruments. The Universal Declaration of Human Rights provides that the rights contained therein are "a common standard of achievement for all people and all nations."¹⁴⁹ The rights articulated in CEDAW are assumed to be equally applicable to all women, regardless of their race or sexuality.¹⁵⁰ These documents rarely afford a role for culture in the performance or nonperformance of their obligations. Indeed, CEDAW specifically states that efforts to eliminate discrimination against women may require state parties to take measures to modify existing customs or practices that discriminate against women and thereby violate their human rights; it actually privileges universal human rights (i.e., non-discrimination) over cultural considerations.¹⁵¹

148. For a general discussion of the universalist nature of human rights see INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 193 (Henry J. Steiner & Philip Alston, eds., Oxford Univ. Press 1996).

149. *Universal Declaration*, *supra* note 91, at Preamble.

150. Southard, *supra* note 137, at 3.

151. *CEDAW*, *supra* note 92, arts. 2(f), 5(a).

In many ways, it is very attractive to suggest that human rights are the entitlement of every person, regardless of culture, religion, nationality, or gender.¹⁵² In terms of women's human rights, universalism allows advocates to bring to light the fact that gender concerns are common to all countries, cultures and religions.¹⁵³ The universal nature of human rights lends legitimacy to efforts of INGOs based in the Global North that operate abroad. By relying on a universalist framework, such organizations can avoid suggestions that they are privileging their own cultural norms above those of the particular society in question. Instead, such INGOs are seen as working to protect the rights that are common to all women.

The usefulness of a universalist discourse in the advocacy of INGOs is illustrated by the campaign to legalize abortion in Nepal. CRLP envisioned its role in Nepal as highlighting the human rights abuses that resulted from the criminalization and prosecution of abortion.¹⁵⁴ In this regard, CRLP did not argue that Nepal should follow the lead of most Western countries, such as the United States, in legalizing abortion. Nor did it attack the legitimacy of Nepali cultural norms that played a role in the continued criminalization of abortion. Beyond the obvious distaste of these arguments, advancing them, especially given CRLP's status as an INGO based in the Global North, may have exposed it to attacks of cultural imperialism. In this regard, the universalist orientation of human rights discourse is likely very attractive to INGOs doing work abroad, especially in the Global South.¹⁵⁵

1. Western Cultural Imperialism

Despite its strengths, the universalist nature of human rights is also a shortcoming. The claim that human rights are universal has been the subject of much controversy.¹⁵⁶ Human rights norms have been attacked as only representing the Western liberal notion of rights,¹⁵⁷ and therefore

152. This is also one of the most contentious aspects of human rights discourse, as will be discussed below.

153. Hernandez-Truyol, *supra* note 125 (“[A]s far as universally enjoying human rights—women simply do not. This is a true in the West as it is in the East, and in the North as it is in the South.”).

154. ABORTION IN NEPAL, *supra* note 4, at 23.

155. The term “Global South” is used to refer to developing countries, including the least developed countries.

156. See STEINER, *supra* note 148, at 192–194 (discussing the debate between universalists and cultural relativists).

157. *Id.* at 187–91.

inapplicable to non-Western societies.¹⁵⁸ Critics have suggested that requiring compliance with human rights norms is an attempt by the West to impose its own set of cultural values on non-Western countries.¹⁵⁹ There is a suggestion that advocacy based on human rights is tantamount to cultural imperialism.¹⁶⁰ While allegations of cultural imperialism may be extreme, it is clear that there is dissatisfaction amongst some non-Western states regarding the nature of the underlying norms that are reflected in human rights discourse. Indeed, since the signing of the first human rights treaties, there has been questioning of whether human rights are or ever can be truly universal.¹⁶¹

In regard to INGOs advocating for women's interests internationally, the cultural critique of human rights theory must be taken seriously. Given that most human rights INGOs are based in the Global North, and human rights analysis is often viewed as a product of Western liberal traditions, human rights INGOs use of the the analysis may lack legitimacy in other countries. This will especially be the case when INGO advocacy is focused on countries where there is no indigenous concept of liberal rights, such as those that are primarily community-based.¹⁶² While Nepal has signed numerous international human rights covenants before CRLP became involved in the domestic campaign to

158. Charles Taylor, *Human Rights: The Legal Culture*, in PHILOSOPHICAL FOUNDATIONS OF RIGHTS 49–51 (United Nations Educational Scientific and Cultural Organization, 1986).

159. Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POLICY 24 (1993) at 33 (arguing that the West's increasing focus on democracy and human rights in international relations has its basis in ideology: "The West needs its myths; missionary zeal to whip the heathen along the path of righteousness and remake the world in its own image is deeply ingrained in Western (especially American) political culture. . . . The self-congratulatory tone of much of Western commentary at the end of the Cold War and the current triumphalism of Western values grate on East and Southeast Asians.").

160. Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 217 (1999) ("[T]he cultural relativism critique of international human rights law implies the charge of imperialism. Implicit in the cultural relativism critique is an interpretation of human rights advocacy as the claim that non-western peoples should be governed by western opinions rather than their own.").

161. *Statement on Human Rights*, in 49 AM. ANTHROPOLOGIST 539, 542 (1947) ("Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.").

162. This should be differentiated from rogue states that suggest that human rights are not universal in order to justify mass violations thereof. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 119 (1989).

legalize abortion, CRLP was the first group to highlight the lack of safe and legal abortion as a violation of women's human and reproductive rights.¹⁶³ It is at least plausible that this was because domestic women's groups did not identify with the Western liberal concept of human rights analysis. Such groups preferred to frame the abortion issue as being related to public health¹⁶⁴ or the patriarchal social structures within Nepali society.¹⁶⁵ The fact that domestic women's groups often do not use the language of women's human rights must be acknowledged and seriously considered by INGOs that frame their analysis in terms of rights.

2. Victimization

Another critique of the universalist notion of human rights is that it leads to application of a victim rhetoric when addressing issues pertaining to women in the Global South. On this theory, the INGO focus on women's human rights emphasizes the victimization of women, especially when advocacy is aimed at ending violence against women. According to Professor Ratna Kapur: "[I]n the context of law and human rights, it is invariably the abject victim subject who seeks rights, primarily because she is the one who has had the worst happen to her."¹⁶⁶ Kapur argues that the victimization rhetoric at play in international women's rights discourse is problematic for three reasons.¹⁶⁷ First, the rhetoric essentializes the experiences of women by suggesting that all women are victims and victimized in the same way.¹⁶⁸ Second, it is based upon cultural essentialism such that women in the Global South are seen as victims of their culture, while Western culture is not held to the same degree of scrutiny.¹⁶⁹ Finally, victimization rhetoric invites protectionist responses from states, which do little to empower women or promote women's rights.¹⁷⁰ Kapur suggests that discourse focused on the empowerment of women fails to avoid the tendency to view women in

163. Interview with Upreti, *supra* note 35.

164. *Id.*

165. *Id.*

166. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 5 (2002).

167. *Id.* at 6.

168. *Id.* at 6, 7–12.

169. *Id.* at 6, 13–17.

170. *Id.* at 6–7, 17–21.

the Global South as victims.¹⁷¹ In this regard, the exclusive focus on universalist human rights discourse by INGOs is problematic.

3. The Impossibility of Privileging Particular People's Rights

Another potentially troublesome, though highly attractive, aspect of the universalist orientation of rights language is the impossibility of privileging certain people's rights over those of other people.¹⁷² It would violate the universalist notion of human rights to suggest that certain people's rights deserve greater protection than other's. But what if the exercise of one person's rights infringes on the ability of another person to exercise his/her rights? Whose rights do we protect? Logically, we would privilege the exercise of rights that is more consistent with the values we wish to promote in society. Human rights theory does not allow for this type of logical inquiry. Because human rights discourse does not privilege certain rights or societal goals, it cannot transcend this conflict of rights.¹⁷³ While there might be an attempt to "balance" rights, there can be no formal privileging. This can pose a significant obstacle when advocating for women's rights.

In its campaign, CRLP characterized the denial of safe and legal abortion as violating women's rights to life, health, equality, non-discrimination, and reproductive self-determination.¹⁷⁴ What would happen if an anti-choice group also adopted the human rights language to suggest that allowing women to have abortions without the consent of the father of the unborn child violates the father's right to privacy,¹⁷⁵ right to found a family,¹⁷⁶ right to freedom of religion,¹⁷⁷ or the "rights"

171. *Id.* at 21.

172. See generally Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 388 (1984) ("Rights theory does not indicate which of the two values—freedom or security—the decisionmaker should choose in a given case [where these values are in conflict]. Because it cannot transcend this fundamental conflict of values, rights theory does not offer an adequate basis for legal decisions.").

173. There has been some attempt to come up with a set of fundamental rights, which usually correspond to the civil and political rights. See, e.g., Theodoor C. van Boven, *Distinguishing Criteria of Human Rights*, in 1 INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43 (Karel Vasak & Philip Alston eds., 1982). However, there is no consensus in this regard and many see such an exercise as problematic. See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 21–23 (1986).

174. ABORTION IN NEPAL, *supra* note 4, at 45.

175. *Universal Declaration*, *supra* note 91, art. 12.

176. *Id.* art. 16(1).

177. *Id.* art. 18.

of the unborn child?¹⁷⁸ This is not an academic exercise; these are the very arguments advanced by self-defined “liberal” anti-choice groups.¹⁷⁹ The problem with human rights analysis is that it does not allow us to privilege the woman’s rights over those of the father (or unborn child).¹⁸⁰ We may choose to do so, as was done in *Roe v. Wade*¹⁸¹ or *R. v. Morgentaler*,¹⁸² but this involves going outside the rights framework. It involves making value judgments, which do not form part of the discourse of human rights.¹⁸³ Thus, an INGO that employs the language of human rights in its advocacy must be prepared to go outside the discourse if confronted with challenges to their inherent privileging of women’s rights over the potential rights of others.

4. Formal Equality

Finally, and related to the foregoing critique, it is at least arguable that securing human rights for women only guarantees formal equality to women rather than substantive equality.¹⁸⁴ By advocating within a universalist human rights framework, INGOs can only ask that women be afforded the same rights as men—i.e., that they be treated equally to men. However, as feminists have long pointed out, formal equality is often insufficient to secure substantive equality. To ensure the latter, we may need to treat women differently—to afford them “more” rights so to speak. However, due to its universalist orientation, human rights discourse is unable to accommodate the idea that some people might be

178. In the Anglo-American tradition, it is not widely accepted that unborn children have rights.

179. PRO-LIFE LIBERALS, A PROGRESSIVE ARGUMENT AGAINST ABORTION, available at <http://www.prolife.liberals.com/basics.html> (last modified Sept. 8, 1997) (arguing that fetal rights are a natural progression of the human rights framework and that the fetus’ right to life must be respected).

180. See CAROL SMART, FEMINISM AND THE POWER OF LAW 145 (1989) (in describing the various problems with rights language for women, Smart argues that a wife or child’s right not to be molested may be balanced against the legally-recognized rights of the husband and that courts are reluctant to privilege one person’s rights over the other).

181. 410 U.S. 113 (1973) (recognizing the women’s right to privacy as paramount to other interests in relation to abortion).

182. [1988] 1 S.C.R. 30 (Can.) (recognizing the women’s “right to life, liberty and security of the person” as paramount to other interests in relation to abortion).

183. Olsen, *supra* note 172.

184. Formal equality aims at *de jure* equality—i.e., treating likes alike. Formal equality requires that men and women are treated the same. Substantive equality, however, aims at achieving *de facto* equality such that women might be treated differently than men in order to ensure an equitable outcome.

entitled to more rights than others. For example, in Nepal, it is arguable that securing the right to safe and legal abortion does not ensure the substantive equality of women. Substantive equality would require ensuring that women be able to exercise their rights fully and this may require granting women additional rights. Unfortunately, this is not a claim that INGOs could make within the universalist discourse of human rights.

B. The Existence of Binding Legal Obligations

Human rights were created through multilateral treaties. While the notion of basic human rights likely existed prior to the end of the First World War, the wide range of rights currently protected under human rights regimes did not form part of customary international law. Human rights discourse as we know it only became part of international dialogue after the signing of the Charter of the United Nations.¹⁸⁵ Today there are many binding international legal covenants related to the protection of human rights.¹⁸⁶

The existence of binding and enforceable legal obligations related to human rights makes the discourse attractive to INGOs for three reasons. First, the existence of CEDAW, for example, takes women's human rights outside the realm of feminist theory or moral philosophy and into the sphere of law.¹⁸⁷ While assertions of morality are often seen as varying across cultures, international law is applicable regardless of such differences. In this manner, the existence of binding legal covenants related to human rights affords INGOs a partial response to the allegations of cultural relativists: this is not about immorality, it is about illegality. In Nepal, CRLP did not say that the rights abuses resulting

185. Charter of the United Nations, *adopted* June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. See STEINER, *supra* note 148, at 118, 122 (“[T]he United Nations Charter itself first gave formal and authoritative expression to the human rights movement that began at the end of World War II. . . . Through interpretation and extrapolation, the sparse text [of the Charter] has constituted a point of departure for inventive development of the entire movement.”).

186. The website for the United Nations High Commissioner for Human Rights has a comprehensive listing of international human rights instruments available at <http://www.unhchr.ch/html/intlinst.htm> (last visited Nov. 23, 2003).

187. Of course, it is arguable whether international law, and especially international human rights law, can be equated to the hard law of domestic contracts or torts.

from the criminalization of abortion were immoral; it said that they were illegal.¹⁸⁸

Second, human rights norms backed by the force of international law allow INGOs to engage the legal and political system of the country alleged to be in violation of such rights. Relying on covenants that the government itself has signed may force it to be more responsive to the concerns raised by INGOs. In Nepal, allegations of illegality allowed the CRLP to engage the legal and political system, especially since Nepal had recently signed a number of international human rights conventions.¹⁸⁹

Finally, the legal underpinnings of human rights discourse may be useful in the drafting of legal and policy materials by INGOs. It is easier to structure reports, legal briefs, position papers, and recommendations around established and objective criteria such as violations of internationally recognized human rights covenants. Such documents can often be submitted to treaty monitoring bodies, governments, other INGOs, the media, and other actors that have the ability to exert some degree of pressure on governments.

Again, the report issued by CRLP, *Abortion in Nepal: Women Imprisoned*, is illustrative. It is a report structured around the violation of human rights. The report also recommends that NGOs operating in Nepal “[u]se the international mechanisms for enforcement of human rights treaties, including opportunities to submit reports to treaty monitoring bodies and file complaints under the optional protocols to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Civil and Political Rights”¹⁹⁰

Indeed, CRLP submitted a letter to the Committee on Economic, Social and Cultural Rights, as well as a memorandum to the Nepali government, both of which are structured around the violation of human rights covenants.¹⁹¹ These documents illustrate the usefulness of being able to structure reports and recommendations around the established legal system for the protection of human rights. It allows for more effective lobbying of government.

188. ABORTION IN NEPAL, *supra* note 4, at 45–83. See also Memo from CRLP to the Government of Nepal, *supra* note 104.

189. Abortion in Nepal, *supra* note 4, at 45–83.

190. *Id.* at 18.

191. Martinez & Upreti, *supra* note 8; Memo from CRLP to the Government of Nepal, *supra* note 104.

1. The Focus on Discrete Rights and Individual Wrongs

In using the language of human rights, INGOs must address issues in terms of discrete rights violations against individuals.¹⁹² For example, in Nepal, CRLP highlighted the way in which the criminalization of abortion resulted in a number of specific violations to human rights treaties.¹⁹³ However, there may be instances where the injustice encountered does not clearly relate to the violation of a particular right against an individual; this is often the case in relation to injustices arising due to gender inequality.¹⁹⁴ In such instances, INGOs that focus exclusively on human rights discourse may be unable to argue that the injustice in question is illegal and must be addressed. In countries where there tend not to be flagrant human rights abuses related to individual women, the exclusive focus on human rights analysis may curtail the effectiveness of INGO advocacy.

2. The Human Rights System as Privileging Certain Rights

While the binding legality of human rights covenants makes the discourse attractive, relying on such covenants forces INGOs to accept the informal hierarchy of rights at play within the system. Human rights

192. SMART, *supra* note 180, at 145 (“A third problem with rights is that they are often formulated to deal with a social wrong, yet they are always . . . focused on the individual who must prove that her rights have been violated.”).

193. ABORTION IN NEPAL, *supra* note 4, at 45–83.

194. CATHARINE A. MACKINNON, *SEX EQUALITY* 22 (2001) [hereinafter *SEX EQUALITY*]:

[L]egal systems since the Enlightenment have recognized rights for individuals one at a time—either as a unique self or as an undifferentiated member of humanity—but rarely as members of social groups. Social groups are seen to make persons “different,” while their individuality and common humanity makes them “the same.” Human rights are thus seen as individual rights, not rights deriving from group membership, whether ascribed to individuals as members of groups or to groups as such. Group membership has been seen to be in tension with humanity understood in individual or universal terms, not as constitutive of it. Group membership can be used to socially define people as unequal to one another; yet membership in social groups undeniably shapes people in their particularity and in their humanity. Group membership does not simply distinguish humans; it is part of being human. Similarly, each woman who is discriminated against as a woman is personally harmed, certainly, but she is harmed in and because of her status as a member of the group women. The injuries harm each woman but the basis on which the harm is done is group-based and collectively shared.

discourse is problematic because of the historic privileging of civil and political rights over economic, social, and cultural rights.¹⁹⁵ Formally, both sets of rights are acknowledged to be “universal, indivisible, interdependent and interrelated.”¹⁹⁶

In practice, however, state parties to the Economic, Social and Cultural Rights Covenant rarely take particular measures to implement such rights.¹⁹⁷ This is in part because the Economic, Social and Cultural Rights Covenant only requires states to strive towards “progressive realization” of the rights therein as per Article 2(1). Beyond the textual ambiguity of the Economic, Social and Cultural Rights Covenant, the under-development of such rights has been attributed to three factors: 1) the ambivalence of most governments to take action, 2) the reluctance of INGOs to focus specifically on economic and social rights, and 3) the lack of innovative legal and other approaches to implementation.¹⁹⁸

CRLP was not reluctant to focus specifically on economic and social rights in its campaign in Nepal. It highlighted many of the economic and social rights that were violated by failing to provide safe and legal abortions to Nepali women.¹⁹⁹ It also highlighted the civil and political rights at issue due to the prosecution of women who had undergone illegal abortions.²⁰⁰ There is strategic value in pointing out civil and political rights violations in addition to those relating to economic, social and cultural rights; it makes for a stronger case because of the privileging of civil and political rights in the human rights framework.

While CRLP was able to point to numerous civil and political rights violations resulting from the abortion ban in Nepal, this may be more difficult in other campaigns to protect women’s interests. It is relatively easy to imagine situations where women’s economic, social and cultural rights are the only rights at issue. Examples are: access to housing, the availability of food and safe drinking water, and the affordability of contraceptives. Indeed, some of the most pressing problems facing the women’s movement, such as the trafficking of women and girls, the feminization of poverty, the rising number of women with AIDS, and female genital mutilation, are all issues concerning almost exclusively economic, social, and cultural rights.

195. STEINER, *supra* note 148, at 256.

196. *Vienna Declaration*, *supra* note 143, para. 5.

197. STEINER, *supra* note 148, at 256.

198. *Id.* at 269.

199. ABORTION IN NEPAL, *supra* note 4, at 45–56.

200. *Id.* at 59–83.

The historical privileging of civil and political rights over economic, social, and cultural rights is especially problematic for women. Due to pervasive and historically-defined gender roles, women tend to have a particular interest in the protection of their economic, social and cultural rights.²⁰¹ Women, especially in the Global South, are often caregivers to their families, are responsible for obtaining clean water and buying food, are stand-in doctors when medical services are unavailable or unaffordable, and so on.²⁰² Moreover, as marginalized members of society, and due to the growing feminization of poverty, women are often not in positions of power and consequently cannot effectively demand the protection of their economic, social and cultural rights.²⁰³

201. ALISON SYMINGTON, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, 1–2 (2002) (“The ICESCR is an instrument with particular importance for gender advocates, not least because women have different needs and experiences than men in economic, social and cultural spheres and often have the most at stake when those rights are not protected.”).

202. Shelagh Day, Leilani Farha, Marianne Möllmann et al., *Montreal Principles of Women’s Economic, Social and Cultural Rights* (manuscript at 2–3), HUM. RTS. Q. (forthcoming).

The inequality in the lives of women that is deeply embedded in history, tradition and culture affects women’s access to and enjoyment of economic, social and cultural rights. To ensure women’s enjoyment of these rights, they must be implemented in a way that takes into account the context in which women live. For example, the traditional assignment to women and girls of the role of primary care-giver for children, older persons and the sick restricts women’s freedom of movement and consequently their access to paid employment and education. The economic and social devaluation of the work, paid and unpaid, that women traditionally do from a very young age, contributes further to fixing women in a position of economic and social inequality. These factors diminish women’s earning capacity and their economic autonomy, and contribute to the high rates of poverty among women worldwide. Traditional, historical, religious or cultural attitudes are also used to justify and perpetuate discrimination against women in the delivery of economic, social and cultural rights, including health services and education, by public and private agencies.

203. *Id.* at 3.

Inequality in women’s enjoyment of economic, social and cultural rights contributes to their economic dependence, denial of personal autonomy and lack of empowerment. These in turn limit still further women’s ability to participate in public life, including fora for economic, social, political and legal policy and decision-making Economic, social and cultural rights and civil and political rights are particularly indivisible and interconnected in the lives of women: inequality in economic, social and cultural rights undermines women’s ability to enjoy their civil and political rights,

The Economic, Social and Cultural Rights Covenant includes rights relating to social security,²⁰⁴ protection of the family,²⁰⁵ consensual marriage,²⁰⁶ standard of living,²⁰⁷ physical and mental health,²⁰⁸ and education.²⁰⁹ As mentioned, these are all areas of particular concern to women due to historically-defined gender roles. Thus, women often have the most to lose when economic, social and cultural rights are not protected to the same extent as civil and political rights. The historical privileging of civil and political rights over economic, social and cultural rights, coupled with the tremendous positive impact that the latter could have on women, is a major flaw in the current human rights system. This flaw may seem relatively unproblematic when there is a civil and political rights dimension to a women's issue, but may prove more difficult when the issue at hand relates only to the protection of economic, social and cultural rights.

C. The Relative Force of Human Rights Obligations

In many countries where INGOs operate, international human rights treaties have more force than domestic constitutional protections.²¹⁰ This is especially the case in new and unstable democracies. Nepal provides an example. According to CRLP, “[d]espite constitutional guarantees of equality and freedom, Nepali women continue to experience severe gender discrimination.”²¹¹ In their fact-finding mission, CRLP found that interpretation of the Nepali Constitution to protect and promote women's interests was inconsistent and that judges continued to use religion as a legal basis for justifying gender discrimina-

which then limits their capacity to influence decision and policy-making in public life.

204. *Economic, Social and Cultural Rights Covenant*, *supra* note 92, art. 9.

205. *Id.* art. 10.

206. *Id.*

207. *Id.* art. 11.

208. *Id.* art. 12.

209. *Id.* arts. 13–14.

210. This is in direct contrast to Western democracies, such as the United States or Canada, where constitutional protections are stronger than international legal obligations. Indeed, in both these countries, provisions in their respective constitutions were relied upon to secure the right to safe and legal abortion. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (discussing the right to privacy) and *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.) (discussing the right to life, liberty and security of the person).

211. *ABORTION IN NEPAL*, *supra* note 4, at 11.

tion.²¹² Therefore, while Nepal has constitutional guarantees that could have been interpreted to include a right to safe and legal abortion and to procedural safeguards in the criminal process, they were viewed as ineffective. As a result, CRLP focused on holding Nepal accountable not to its Constitution but to binding human rights documents.²¹³ Nepal is a striking example of a country in which the use of human rights discourse by INGOs is poised to be most effective.

1. Instances Where Human Rights Obligations Lack Strength

There are instances where human rights obligations will lack strength due to the political context in a particular country. Some countries are not party to any of the major human rights treaties, or are highly skeptical of them. For example, Singapore tends to be highly critical of what it considers to be Western cultural imperialism,²¹⁴ has not acceded to the majority of international human rights conventions,²¹⁵ and has been condemned for various human rights violations in the past.²¹⁶ In such a country, advocacy based on international human rights norms may fall upon deaf ears.

In other instances, international human rights norms may lack relative strength when compared to domestic constitutional protections. For example, in the United States, most human rights treaties are not self-executing, meaning that they are not the law of the land unless Congress enacts specific legislation to that effect.²¹⁷ The United States has not yet

212. *Id.* at 37.

213. *Id.* at 23–24.

214. See Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743 (1996).

215. Office of the UN High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (Nov. 2, 2003), available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Nov. 23, 2003) (showing that Singapore has only ratified CEDAW and the *Children's Convention*).

216. Tay, *supra* note 214, at 745 (“[Singapore] has recently faced Western critics over issues such as the caning of a youth from the United States, judicial proceedings for contempt of court against a foreign academic and an international newspaper, and social controls such as a ban on chewing gum.” (citations omitted)).

217. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (Oxford Univ. Press 2d ed. 1996), available at http://www.law.nyu.edu/kingsburyb/fall01/intl_law/PROTECTED/unit4/unit4.html (last visited Oct. 24, 2003) [hereinafter HENKIN]. For a further discussion of U.S. protection of international human rights, see Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59 (2001).

ratified CEDAW, but protects women against discrimination through the United States Constitution.²¹⁸ Indeed, abortion rights were granted to women due to the protection of privacy in the United States Constitution, and not as a result of international human rights obligations.²¹⁹ In countries where constitutional protections are stronger than international human rights norms, INGO advocacy based on human rights discourse may be less effective than it was in Nepal. This must be a consideration when determining the discursive technique that will more effectively secure the interests of women.

D. Pressure from the International Community

Another reason to frame advocacy to protect women's interests in terms of human rights is the fact that there is strong pressure from the international community, especially the Global North, to conform to human rights treaties. Many states in the Global North condemn the rights violations occurring in the Global South.²²⁰ Sometimes the result is the imposition of sanctions or other coercive measures to ensure compliance.²²¹ As such, compliance with human rights norms is often viewed as a method of establishing legitimacy for new democracies.²²² As a result, INGO advocacy based on human rights norms is likely to be very effective in new democracies or countries seeking approval from the Global North.

For example, in Nepal, the new democratic government signed and ratified (with virtually no reservations) almost all of the major international human rights treaties.²²³ It did this in order to signal to the world

218. The Center for Reproductive Rights, *CEDAW: The Importance of U.S. Ratification* (June 2003), available at http://www.crlp.org/pub_fac_cedaw.html (last visited Oct. 24, 2003). The United States has not yet ratified CEDAW, despite having signed it in 1980. However, women in the U.S. enjoy substantial rights due to the nondiscrimination provisions in the United States Constitution.

219. *Roe v. Wade*, 410 U.S. 113 (1973).

220. See United States Department of State, *Human Rights Reports* (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/> (last visited Oct. 24, 2003). The Nepal country report, released Mar 31, 2003, states: "The Government's human rights record remained poor, and it continued to commit numerous abuses."

221. For example, in 1996 the United States Congress enacted legislation imposing sanctions on Burma (Myanmar) due to its gross human rights violations. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166, and 3009-167 (1997).

222. Chinkin, *supra* note 9, at 590.

223. See generally *Civil and Political Rights Covenant*, *supra* note 91; *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR,

that it was a legitimate democratic regime committed to the ideals of human rights.²²⁴ In Nepal, where there is a conflict between national laws and binding human rights principles, the latter govern.²²⁵ It is likely that CRLP knew of the pressure on new governments, such as Nepal's, to comply with their human rights commitments in order to gain legitimacy and to ensure good diplomatic relations with the Global North. Thus, adopting the language of human rights in new democracies or in countries seeking legitimacy in the international community may be particularly effective.

E. Non-Consideration of Underlying Socio-Cultural or Political Practices

Human rights analysis is theoretically attractive to INGOs because it allows them to engage in advocacy without necessarily calling into question the existing socio-cultural or political regime allowing for rights violations to occur. INGOs demand that the illegal violation of women's human rights stop, not that the socio-cultural or political regime that allows for such violation be altered. While asking for the former may implicate the latter, the two demands are different. Asking that a particular human rights violation stop is discrete; asking a country to change entrenched patterns of socio-cultural and political engagement is overly broad.

It is likely that demanding that a government stop a particular violation of women's rights will be more palatable to domestic leaders than attacks on the whole structure of a society. For one, those in power may

21st Sess., Supp. No. 16, at 59 (1966) (*entered into force* Mar. 23, 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, Annex at 207, U.N. Doc. A/44/49 (1989), (*entered into force* July 11, 1991); *Economic, Social and Cultural Rights Covenant*, *supra* note 92; CEDAW, *supra* note 92; *Children's Convention*, *supra* note 91; *International Convention for the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX), 660 U.N.T.S. 195 (1965) (*entered into force* Jan. 4, 1969) [hereinafter *Convention of Elimination of Racial Discrimination*]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (Jun. 13, 1991). Moreover Nepal has signed documents negotiated at UN Conferences such as: *ICPD Programme of Action*, *supra* note 91; *Beijing Platform for Action*, *supra* note 91.

224. *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Nepal*, U.N. ECSCOR, at ¶¶ 2–3, U.N. Doc. E/1990/5/Add.45 (1999).

225. ABORTION IN NEPAL, *supra* note 4, at 36.

see demands to change their socio-cultural or political structure as infringing on national sovereignty or as cultural imperialism. This may dissuade them from acting to end the rights violation.

Moreover, even if a country recognizes that there must be a shift in its socio-cultural or political organization, compliance with such a demand may be difficult. How does one quickly change entrenched patterns of social organization? In this regard, a discrete demand to stop violating a particular human right allows a state to comply through a discrete action.²²⁶ This may be attractive to some states, especially those seeking international approval through compliance with international obligations.²²⁷ Finally, a government may be more apt to respond to a demand to remedy a particular rights violation to deflect scrutiny from overall social structures in society that are oppressive to women²²⁸ or where compliance with the demand does not require government expenditure.²²⁹

CRLP's recommendations to the Nepali government in its report, *Abortion in Nepal: Women Imprisoned*, are indicative of the strength of human rights discourse in allowing INGOs to make discrete demands to stop rights violations. All of the recommendations involve specific measures that attempt to remedy the rights violations chronicled in the report.²³⁰ For example, CRLP urges the government to "adopt the 11th Amendment Bill decriminalizing abortion in most circumstances," "[r]elease women who are currently in prison for having had abortions," "cease prosecuting women for having undergone illegal abortion procedures," and "implement and enforce guarantees of the rights of criminal

226. For example, in December 2001, the Kenyan government criminalized female genital mutilation ("FGM") in response to domestic and international pressure regarding the protection of children's and women's human rights. However, despite criminalization, it is unlikely that FGM will stop since it is an entrenched cultural practice. See *Kenya: It May Be a Crime But FGM Won't End Yet*, AFRICA ONLINE (Jan. 28, 2002), available at <http://www.africaonline.com/site/Articles/1,3,45116.jsp> (last visited Oct. 28, 2003).

227. *Id.* ("The Kenyan parliament on 29 November passed the Children Bill 2001, the first comprehensive child law in the country and an attempt to bring national law in line with the UN Convention on the Rights of the child.")

228. For example, while Kenya took the laudable step of criminalizing FGM, the oppression of women remains systemic and widespread. See Press Release, Amnesty International, Kenya: A Human Rights Memorandum to the New Government (Feb. 18, 2003), available at <http://web.amnesty.org/library/index/ENGAFR320042003> (last visited Oct. 29, 2003).

229. Often, a government will pass a law which they claim will put an end to the rights violation, without adequately enforcing the law. See *id.* (suggesting that Kenya must ensure that its FGM law is enforced).

230. See ABORTION IN NEPAL, *supra* note 4, at 15–19.

defendants and prisoners.”²³¹ The strength of human rights discourse in allowing INGOs to frame their requests discretely is apparent from this example.

1. Failing to Address the Root Cause of Rights Violations

While there are strategic benefits to side-stepping critical analysis of the underlying social structure of society that has resulted in rights violations, there are also costs. The results-oriented nature of rights discourse glosses over the fundamental reason why women’s rights continue to be neglected: the oppression of women under patriarchal forms of social organization. An INGO that adopts the language of human rights is limited to demanding that the violation of women’s rights be stopped or that women be granted certain rights.²³² If the violation is stopped or these rights are granted, the INGO cannot ask for more without going outside the rights paradigm. This is problematic because it does not allow INGOs to bring into focus the historic and continued oppression of women. It does not call into question the system of patriarchy that causes rights violations or prevents women from actually exercising their rights.²³³ While some may question whether it is even appropriate for INGOs to question the social structures of a society, it is at least clear that many of the victories that result from a focus on an end to rights violations will be only partial victories.²³⁴

In Nepal, CRLP demanded that abortion be legalized in order to stop various rights violations that resulted from its criminalization. After Nepal complied with this demand, CRLP called it a victory for

231. *Id.* at 15–16.

232. See SMART, *supra* note 180, at 144 (“There are several problems with using rights as part of a feminist strategy. The first is that rights oversimplify complex power relations. This means that the acquisition of rights in a given area may create the impression that a power difference has been ‘resolved.’ Yet the exercise of power in, for example, the private sphere may have little to do with legal rights.”).

233. *Id.*

234. *Id.*

{T}he exercise of a right does not [necessarily] empower the weaker individual. It may simply draw the state’s attention to a situation . . . This is not, of course, an argument against rights. It is, however, meant to alert us to the fact that legal rights do not resolve problems. Rather they transpose the problem into one that is defined as having a legal solution. This may not be the problem identified by the individuals whose rights are being invoked, moreover the solution may itself do little to alter the power relations that remain intact.

women.²³⁵ However, the victory is only partial if women continue to live under patriarchy. In such a case, despite the existence of safe and legal abortion, many women will not be able to obtain an abortion due to pressure from their fathers or husbands and the devaluing of their autonomy. Additionally, the government may not devote adequate resources to ensuring access to safe abortion services. These factors may not change even when abortion is safe and legal. The focus on human rights and the securing of discrete rights draws attention away from this fact. By failing to question whether the underlying modes of social organization that allowed the rights violation to occur in the first place have also changed, human rights discourse has the potential to equate not violating a right with the empowerment of women within society. Oftentimes this is not the correct equation. The inability to question the underlying social structures that lead to rights violations is a shortcoming in human rights analysis, especially when the concern is the protection of women's interests.

*F. The Existence of International Human Rights
Organizations and "Rights Talk"*

From a practical standpoint, an INGO may adopt the language of human rights to protect women's interests simply because it is, foremost, a human rights organization. Many of the well-established, well-funded and high profile INGOs advocating for women's interests are international human rights organizations; examples include Amnesty International, Human Rights First (formerly the Lawyer's Committee for Human Rights) and Human Rights Watch. These INGOs were using the language of human rights in relation to the protection of civil and political rights long before the women's human rights movement of the 1990s.²³⁶ It makes sense that such organizations would embrace the women's human rights approach due to their comfort with the language of human rights and to ensure consistency with their overall mandate.

235. Press Release, Center for Reproductive Law and Policy, Nepal's King Legalizes Abortion: A Victory for Nepalese Women and Advocates Worldwide (Sept. 6, 2002), available at http://www.crlp.org/pr_02_0926nepal.html (last visited Oct. 20, 2002).

236. For example, Amnesty International was formed in 1961 to advocate for the rights of political prisoners. See Amnesty International, *About Amnesty International*, available at <http://web.amnesty.org/pages/aboutai-index-eng> (last visited Nov. 3, 2003).

Moreover, such INGOs can implement a “Women’s Rights Division”²³⁷ as one part of their overall scheme, or launch a “Women’s Day Campaign” without having to apply for separate funding.²³⁸

Of course, on its face, this does not explain the existence of many INGOs that focus exclusively on women’s human rights, such as CRLP. There may still be pressure on international women’s organizations to employ the discourse of human rights because they operate in a community in which the dominant vocabulary is that of human rights. Collaboration with and support from other INGOs may be easier to negotiate when one is using a common language.

V. A ROLE FOR FEMINIST LEGAL THEORY IN RESPONDING TO SOME OF THE CRITIQUES OF HUMAN RIGHTS DISCOURSE

The idea that “women’s rights are human rights” has come to dominate advocacy by INGOs globally. However, there are some negative implications associated with the exclusive reliance on human rights discourse in relation to the protection of women’s interests globally. This section considers how feminist legal theory may offer a discourse for responding to some of these challenges.

A. Feminist Legal Theory: A Working Definition

Before articulating a working definition of “feminist legal theory,” its limited relevance must be acknowledged. The definition put forward will not be universally accepted and will not capture the myriad strands of feminist legal analysis that have developed in the last twenty years. The only purpose in posing a definition at all is to aid in the foregoing discussion. For the purpose of this analysis, feminist legal theory refers to a discourse in which particular laws and legal institutions are seen as

237. Human Rights Watch has such a division. See Human Rights Watch, *Women’s Rights*, available at <http://www.hrw.org/women/index.html> (last visited Nov. 3, 2003).

238. See Amnesty International, *Freedom from Terror, Safety From Harm: Challenge your Government to Stamp Out the Torture and Ill-treatment of Women* (March 6, 2001), available at <http://web.amnesty.org/library/Index/engACT770022001?OpenDocument&of=THEMES\WOMEN?openDocument&of=THEMES\women> (last visited Nov. 3, 2003).

reflecting and reinforcing patriarchal norms, thereby contributing to the continued marginalization of women.²³⁹

This definition presumes an understanding of the feminist notion of patriarchy. In the starkest terms, patriarchy is systemic male domination.²⁴⁰ According to feminists, society is structured around power relationships and, in particular, around the power of men.²⁴¹ This forms the basis of patriarchy. The effects of patriarchy are found in both the private and public sphere, and in both intimate and institutional relationships. In the private realm, the results of patriarchy include the privileging of male children in many cultures²⁴² and widespread domestic violence throughout the world.²⁴³ In the public realm, patriarchy explains the undervaluation of female labor in many societies²⁴⁴ and the relative absence of women in politics.²⁴⁵ In terms of the proposed definition, feminist legal theory views aspects of law, a public institutional framework, as reflecting and reinforcing patriarchal male power.²⁴⁶

239. See *SEX EQUALITY*, *supra* note 194, at 2.

The second-class status of women as a group is widely documented to be socially and legally institutionalized, cumulatively and systematically shaping access to life chances on the basis of sex. As a result, women, compared with men, are deprived of access to many measures and markers of social worth, including dignity, respect, resources, security, authority, credibility, speech, power, and full citizenship.

240. Association for Women's Rights in Development, *Young Women and Leadership Glossary*, available at <http://www.awid.org/ywl-glossary/> (last visited Nov. 14, 2003). Patriarchy is defined as "institutionalized male domination," the "situation of men being dominant in all state institutions," and "men having more power and more access to power than women."

241. *Id.* See also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *TOWARD A FEMINIST THEORY OF THE STATE*].

242. *ABORTION IN NEPAL*, *supra* note 4, at 30.

243. See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993). The Preamble to the Declaration refers to the facts that violence against women is pervasive and cuts across lines of income, class and culture.

244. See *ABORTION IN NEPAL*, *supra* note 4, at 31.

245. INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *WOMEN IN PARLIAMENT: BEYOND NUMBERS*, Foreword (1997), available at <http://www.idea.int/gender/wip/index.htm> (last visited Oct. 29, 2003).

Patriarchy, subordination of women, and the deep-rooted perception that the public domain is reserved for men and that the social contract is about the relationship between men and government and not citizens and government, come together to exclude women [from politics] notwithstanding rights guaranteed in law and the political rhetoric of good governance and participatory democracy.

246. *SEX EQUALITY*, *supra* note 194, at 23.

Certain laws both reflect and reinforce patriarchal norms. A law may reflect patriarchal norms because it is created in a social context in which male power is the dominant form of gender ordering.²⁴⁷ The reflection of patriarchy in certain laws is inevitable because there are no alternative forms of gender ordering that are similarly privileged or as pervasive in our society. Even though other methods of gender ordering might be envisioned, law may still reflect male power because it is created and interpreted by those who have a vested interest in maintaining the status quo. For the most part, policy-makers, legislators, regulators, and judges are men and the law tends to reflect their viewpoints, concerns and aspirations. And while many judges would not see themselves as actively perpetuating patriarchy, they often do so by simply “applying the law” without critical analysis.

Because a law may reflect patriarchal norms, upholding it reinforces these same norms. For example, a law that criminalizes abortion is a reflection of patriarchy in two ways. First, by penalizing women who choose to terminate their pregnancy, the law implies that a woman’s role is that of child-bearer.²⁴⁸ Second, a law criminalizing abortion suggests that women are incapable of controlling or should be denied control over their own bodies.²⁴⁹ Anti-abortion laws also reinforce

Legal institutions have largely supported or enforced these inequalities, whether women are expressly stripped of legal rights by law, given formal equality in countries where legal rules are not the real rules, or given sex equality where law counts but gender-specific violations of it are ignored. . . . In a combined regime of unequal treatment and status, through a seamless web of society and law, women as women—understood as members of a social group defined as gender female—are deprived of avenues for independence and self-development, degraded for profit and entertainment and pleasure, violated with impunity, and exploited without limit. In such regimes, law sees women to limit and control them. Otherwise, it does not see them at all.

247. TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 241, at 161–62.

The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies. The state’s formal norms recapitulate the male point of view on the level of design.

248. Center for Reproductive Rights, Abortion, *available at* http://www.crlp.org/ww_iss_abortion.html (last visited Nov. 23, 2003) (“At the core of reproductive rights is the principle that a woman has the right to decide whether and when to have a child. When faced with an unwanted pregnancy, only she can decide whether she will carry the pregnancy to term.”).

249. *Id.*

patriarchal notions. Such laws give institutional legitimacy to patriarchal norms, shape popular perceptions about appropriate gender roles, and suggest that it is permissible to rob women of their autonomy.²⁵⁰

Feminist legal theory suggests that laws that reflect and reinforce patriarchy will contribute to the continued marginalization of women. Marginalization refers to the peripheral status of a group of people in terms of their power in society. Through the reflection and reinforcement of male power, particular laws increase the already existing power disparity between the sexes and contribute to the further marginalization of women. Due to their marginalization, women's needs and interests are undervalued. In the end, according to feminist legal theory, the law can be seen as another tool for male domination of women.

B. Adoption of the Language of Feminist Legal Theory to Respond to Some of the Critiques of Human Rights Discourse

This subsection considers whether feminist legal theory, as defined, is a discourse that could be relied upon by INGOs to respond to some of the critiques of human rights discourse. There are particular instances where an INGO may wish to couple its reliance on human rights discourse with arguments grounded in feminist legal theory.

1. Universalism

Feminist legal theory has been subject to similar attacks as human rights analysis based on its tendency to universalize the experiences and goals of differently situated women.²⁵¹ Even still, feminist legal theory offers a means of responding to some of the critiques of human rights universalism.

At a macro level, feminist legal theory is subject to the same attacks as human rights discourse regarding universalism: critics question its applicability outside the West. Feminist legal theory has its origins in feminism, which in turn has its origins in the Western concept of indi-

250. Kenneth L. Karst, *Women's Constitution*, 1984 DUKE L. J. 447, 457 (1984) ("Prominent among the means historically used to control women's sexuality and maternity has been the law. The range of controls can be called to mind just by reciting a list of legal topics . . . [including] abortion.").

251. Angela Harris, *Race and Essentialism in Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing MacKinnon for attempting to speak for women of colour).

vidual rights.²⁵² People suggest that the link between feminist legal theory and the Western liberal concept of rights makes it inapplicable to non-Western cultures.²⁵³ The critique is similar to the one launched against human rights discourse in that it suggests that feminist legal theory involves envisioning a universal set of concerns that are applicable to all women.²⁵⁴ According to some scholars, internationalizing feminist legal theory has the potential to be ethnocentric.²⁵⁵

While feminist legal theory can be attacked as universalist, it does not attract the same particular critiques associated with the universalist notion of human rights. For example, a major failing of human rights discourse is that it does not allow for value judgments and privileging in situations where there is a conflict between two peoples' rights.²⁵⁶ In contrast, feminist legal theory is not bound by the idea that there can be no privileging of certain people's rights over the rights of others.²⁵⁷ It is inherently connected to value judgments because it is rooted in condemnation of patriarchal domination. Thus, a feminist theorist would not face the same conundrum when determining, for example, whether a woman should be allowed to have an abortion despite the protests of the father. A feminist theorist would recognize the historical oppression of women and the devaluing of their choices, and would privilege the autonomous decision of the woman.

Moreover, feminist legal theory is not married to the notion of formal equality to the same extent as human rights analysis. Due to the focus on universalism, human rights discourse is constrained by the idea that we are all entitled to the same set of rights and that no person is entitled to more rights than another.²⁵⁸ This is problematic in relation to women because such formal equality reinforces the marginal status of women. While feminist legal theory does not aim to secure the power

252. See Jean Bethke Elshtain, *Exporting Feminist: Transcending National Boundaries*, 48 J. INT'L AFFAIRS 541 (1995).

253. *Id.* at 544.

254. See L. Amede Obiora, *Feminism, Globalization, and Culture: After Beijing*, 4 IND. J. GLOBAL LEGAL STUD. 355, 395-399 (1997).

255. Antoinette Sedillo Lopez, *Ethnocentrism and Feminism: Using Contextual Methodology in International Women's Rights Advocacy and Education*, 28 S.U.L. REV. 279, 284 (2001). While Lopez seems to use interchangeably the idea of an international feminist movement and a women's rights movement, her critique is applicable to what this paper has defined as feminist legal theory.

256. See generally Olsen, *supra* note 172.

257. See TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 241.

258. *Universal Declaration*, *supra* note 91, at art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind," thereby implying that no person is entitled to more rights than any other person.).

for women *over* men, it does focus on substantive equality. For example, a feminist legal theorist would recognize that, because women have historically been marginalized through patriarchal legal institutions, they must be accorded more extensive legal rights than their male counterparts in order to obtain true equality. The feminist legal theorist's focus on substantive equality is an important means of addressing the problems emanating from the universalist notion of human rights.

2. Consideration of Underlying Socio-cultural or Political Practices

Another weakness discussed in relation to INGOs advocacy based on human rights theory is the tendency not to consider the underlying social, cultural and political practices that lead to rights violations.²⁵⁹ Ensuring that women's human rights are not violated without critically analyzing the underlying system that has created the violations that may result in partial victories. Explicit reliance on feminist legal theory by INGOs provides a means for thinking critically about the patterns of social organization that result in rights violations, and a means to avoid satisfaction with partial victories.

Under the definition offered, feminist legal theory focuses on systems of patriarchy as reflected and reinforced in law. Explicit reliance on feminist legal theory would allow INGOs to focus on the underlying patriarchal systems that lead to the marginalization of women and thereby suggest solutions that have a potential to actually change the status of women in society. While the demands made by those who adopt the language of feminist theory may be discrete, such as legalizing abortion, the theoretical basis for the demand would call into question the whole socio-cultural and political foundation of society. While human rights analysis avoids asking why a rights violation is occurring, this is the very focus of feminist legal theory.²⁶⁰

Because feminist legal theory questions the underlying patriarchal norms influencing law, victories based on it will have strong precedential value. If a government accepts that a law must be changed because it is a reflection of patriarchal norms, it may be easier to argue that other laws that are also influenced by patriarchy are also illegal. This can be contrasted to human rights analysis where, once a specific rights violation stops, it is difficult to apply the victory to other campaigns in that

259. SMART, *supra* note 180, at 144.

260. See generally TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 241.

country.²⁶¹ In this manner, arguments based on feminist legal theory may be attractive to INGOs that wish to assist in vast reforms to the justice system in a given country and ensure that women are able to benefit from the end of overt rights violations.²⁶²

The Nepal example is illustrative. CRLP played an extremely important role in highlighting the fact that denial of safe and legal abortion violated the legally-enforceable and universally-applicable human rights of Nepali women.²⁶³ However, while CRLP mentioned the patriarchal nature of Nepali society in its report *Abortion in Nepal: Women Imprisoned*,²⁶⁴ it did not focus on the way in which the restrictive abortion law in Nepal reflected and reinforced patriarchal norms. Failure to do so drew attention away from the fact that, despite the legalization of abortion through reform to the *Muluki Ain* in March 2002, many women will be unable to access abortion due to the systems of patriarchy at play in their communities.

Thus, while CRLP deemed the legalization of abortion a victory, more explicit consideration of feminist legal theory would have suggested that, while the end to the overt violation of women's rights is significant, it is insufficient to truly promote the interests of women. Explicit reliance on feminist legal theory would have allowed CRLP to highlight the fact that the legalization of abortion is more meaningful if it is coupled with attempts to undermine patriarchal structures that rob women of their autonomy.

However, it should be noted that there are circumstances in which the feminist preoccupation with patriarchy is inadequate to explain the particular oppression being experienced by women. In her article entitled *Rape, Genocide, and Women's Human Rights*, Catherine MacKinnon suggests that systematic rape committed in the context of a genocidal war cannot adequately be explained by feminism.²⁶⁵ While feminists would acknowledge the atrocities, the discourse would suggest that because the oppression of women by men is the norm, the rape of women during war is just "business as usual," albeit more public and gruesome.²⁶⁶ Some feminists might even suggest that focusing on rape in

261. However, note that the victory may serve as a helpful precedent in campaigns in other countries.

262. Note that broad reform to Nepal's justice system was not CRLP's goal since its mandate is focused on reproductive rights, though it would likely have been supportive of other initiatives aimed at raising the status of women.

263. See, e.g., *ABORTION IN NEPAL*, *supra* note 4.

264. *Id.* at 30–31.

265. *Rape, Genocide, and Women's Human Rights*, *supra* note 126, at 11.

266. *Id.*

times of war draws attention away from the rapes that occur in the private realm on a more regular basis. However, according to MacKinnon, “genocide is not business as usual—not even for men.”²⁶⁷ Rape committed as a tactic of genocidal war has roots more complicated than patriarchy;²⁶⁸ there is a danger that a feminist legal theorist will overlook this fact due to his/her exclusive focus on patriarchy.²⁶⁹ This is a strong critique against the use of feminist legal theory by INGOs in all instances as a means for addressing the underlying source of rights violations. In certain situations, INGOs must find alternative means for understanding the underlying reasons why rights violations occur.

However, where the existence of patriarchal social structures adequately explain the cause of rights violations, it is essential for INGOs committed to advancing the cause of women to draw attention to those structures. Failure to do so exposes INGOs to attacks of being short-sighted and incomplete. While partnerships between INGOs and domestic groups are essential to understanding the patriarchal nature of a society, through such exercises INGOs cannot absolve themselves of the responsibility to highlight the social structures that have caused the

267. *Id.*

268. *Id.* at 11–12.

Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peace; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.

269. *Id.* at 11.

The feminist version of the cover-up is particularly useful to the perpetrators because it seems to acknowledge the atrocities—which are hard to deny (although they do that too)—and appears to occupy the ground on which women have effectively aroused outrage against them. But its function is to exonerate the rapists and to deflect intervention. If all men do this all the time, especially in war, how can one pick a side in this one? And since all men do this all the time, war or no war, why do anything special about this now? This war becomes just a form of business as usual. But genocide is not business as usual—not even for men.

rights violations in question. This is especially the case because INGOs tend to get more funding and media attention than domestic groups. In relation to Nepal, CRLP saw its role as complementing domestic advocacy focused mainly on feminist legal analysis of the old *Muluki Ain* by bringing a human/reproductive rights perspective to the issue.²⁷⁰ While the goal is laudable, it could have also highlighted the patterns of patriarchy that resulted in the criminalization of abortion. In short, INGOs need not abandon the language of human rights in advocating for women's interests, but must couple their advocacy with explicit reliance on feminist legal theory to highlight the patriarchal societal structures that have allowed rights abuses to occur, and work towards dismantling such structures.

3. The Existence of Binding Legal Obligations

For the most part, human rights discourse is particularly attractive to INGOs because it is based on enforceable legal obligations entered into voluntarily by the state in question. However, by focusing on legally enforceable obligations, INGOs are forced to work within the international legal system as it is constituted. In this regard, INGOs that rely exclusively on human rights discourse must pitch their advocacy in terms of the violation of discrete rights, and must also accept the historic privileging of civil and political rights over economic, social and cultural rights.

INGOs may wish to adopt the language of feminist legal theory in situations where there are no violations of discrete rights *per se*. In certain instances, women may face various injustices that cannot be characterized as a particular rights violation. Such injustices might include the feminization of poverty, or the increasing number of women suffering from AIDS. INGOs may also wish to employ feminist legal theoretical insights where there tend not to be flagrant human rights abuses related to women. In such instances, it may be more effective for INGOs to focus on the way in which the social and cultural patterns of male domination are reflected and reinforced through the law.

Moreover, INGOs should consider using the language of feminist legal theory because it is capable, in a way that human rights discourse historically has not been, of privileging certain interests over others. The privileging of civil and political rights in human rights theory has a

270. Interview with Upreti, *supra* note 35.

disproportionately negative impact on women.²⁷¹ Feminist legal theory, as defined, does not require the same sort of naming and categorization of interests; it is focused on the way in which law reflects and reinforces patriarchal norms to the detriment of women. It aims at raising women's overall status in society.²⁷² Feminist legal theorists would only distinguish between the types of interests at issue to the extent that each interest has a disproportionate impact on the status of women; in this regard, it may "privilege" the economic, social and cultural rights that affect women most. In terms of advocacy, since the majority of the rights violations relating to women are of an economic, social and cultural nature, it may be in the interests of INGOs to adopt the language of feminist legal theory.

4. The Relative Strength of Human Rights Obligations versus Constitutional Protections

Human rights discourse is poised to be incredibly effective in countries where human rights obligations are respected, where the government wishes to integrate more fully into the international community, and where appeals to human rights obligations are more effective than domestic constitutional protection. It will be less effective in countries where international human rights law is not well respected, where binding human rights instruments have not been signed and ratified, where constitutional protections are stronger than international safeguards on women's rights, or where domestic sovereignty concerns are paramount. Countries that have historically resisted application, either explicitly or implicitly, of international human rights instruments domestically include the United States²⁷³ and Singapore.²⁷⁴ In such instances, it will likely be more effective for an INGO to employ feminist legal theory to lobby the government.

271. Day, *supra* note 202, at 2.

272. SEX EQUALITY, *supra* note 194, at 24.

When law guarantees equality on the basis of sex, it *assumes* that women and men are equal in some relevant sense. To defend current social reality as consistent with a guarantee of equality of the sexes is to assert that women's current treatment *is* equal. This, in turn, is to defend systematically fewer material resources and systemic victimization through aggression as what equality for women looks like—a notion that can be valid only if women are a different order of being from men.

273. See Henkin, *supra* note 217.

274. See Tay, *supra* note 214.

VI. CONCLUSION: CRITICALLY ANALYZING THE HUMAN RIGHTS SYSTEM ITSELF

This paper is a first attempt at critically analyzing the modern trend of INGOs to adopt the language of human rights to advocate for women's interests. Perhaps INGOs should consider explicit reliance on feminist legal theory to respond to some of the shortcomings associated with exclusive use of human rights analysis.

A byproduct of this analysis is the conclusion that INGOs must commit themselves to critical analysis of the discursive techniques they employ to secure the interests of women. The language of feminist legal theory may be an effective means for INGOs to critically analyze the human rights framework itself. In this light, the framework must be viewed as a legal construct that itself reflects and reinforces patriarchal norms. Adoption of the idea that "women's rights are human rights" does not and should not deter INGOs from considering the manner in which human rights discourse can sometimes detract from the pursuit of or obscure the nature of women's interests. The dangers of using human rights discourse only manifest themselves when one stops being critical of the discourse and becomes afraid to abandon or supplement it when required by the interests of women. Unthinking and unwavering allegiance to the idea that "women rights are human rights" cannot be tolerated when such allegiance does not result in the best outcome for women. ♣

