

REMARKS OF ANNE TIERNEY GOLDSTEIN*

I was very pleased to be asked to be on this particular panel, because I think the International Covenant on Civil and Political Rights (Civil and Political Covenant) too often is overlooked by people interested in women's international human rights. In fact, I believe that the Civil and Political Covenant is the treaty that provides some of the most powerful tools for attacking sex discrimination. It is in many ways even more powerful than the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), because the Women's Convention was drafted by people thinking about women and ratified by States that were thinking about women, and the States, therefore, wrote reservations to prevent the Women's Convention from having too much impact. The strength of the Civil and Political Covenant, like the strength of the American Convention, is that it has not only a clause under which States promise to not discriminate with regard to the covenant itself but has a freestanding equal protection clause. A country that ratifies the covenant, which many countries did without thinking about women, promises not to discriminate on the basis of sex in any of its laws.

The Women's Convention is important because of its specificity and because the Committee on the Elimination of Discrimination Against Women (CEDAW) has so much expertise. But in a sense, the Women's Convention is also redundant. If a country has ratified the Civil and Political Covenant, it has promised not to discriminate against women, and anything that would be banned as discrimination against women under the Women's Convention would also be banned under the Civil Covenant.

The Covenant and the Women's Convention are said to differ, in part, because of the public/private distinction that we have been hearing so much about. The Women's Convention purports to reach

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private conduct; it gives States a duty to shape private conduct. The Covenant is supposed to be about only public action.

In fact, this public/private distinction is largely illusory. Professor Susan Ross of Georgetown has suggested that whenever you see the word "public," substitute the word "important," and whenever you see the word, "private," substitute the word, "unimportant." What one country or what one era sees as public, another will see as private, and vice versa. The public/private distinction is no more—and no less—than a male judgment of what is important enough to try to fix.

Think about the public/private distinction in the context of the history of our own country. Why is it that lynching was recognized as public nearly 100 years before domestic violence was, when both lynching and domestic violence are perpetrated by private individuals? At least in theory, conventional criminal assault and murder provisions could have been invoked against both lynch mobs and batterers. Yet the need for specific provisions to deal with lynching was acknowledged (in the form of federal civil rights legislation) long before domestic violence legislation was enacted by any legislature.

Now think about the public/private distinction in the context of international law. Disappearances have been considered a violation of international law for a good twenty years, even though they are often perpetrated by private actors. Yet it is only in the past five years or so that human rights groups and academics have begun to conceptualize domestic violence as a human rights issue. The Women's Convention does not even *mention* domestic violence (although the CEDAW has interpreted provisions of the treaty to encompass violence against women as a form of discrimination).

Even if one were to accept the public/private distinction as a meaningful one, however, it is far from clear that the Women's Convention reaches "private" conduct and the Civil and Political Covenant does not. Under Article 2 of the Covenant, States bind themselves "to respect *and to ensure*" to individuals within their territories the rights recognized in the treaty. Under Article 6 they guarantee that the "inherent right to life . . . *shall be protected by law.*" Article 8 bans all forms of slavery and the slave trade, not merely government trafficking in human beings. Article 17 not only proscribes "arbitrary or unlawful interference with [] privacy, family, home or correspondence [and] unlawful attacks on [] honour and reputation," but also grants individuals "the right to *the protection of the law against* such interference or attacks." Nothing in the Covenant limits the responsibilities of member States to matters that can be characterized as taking place within a "public" sphere.

Finally, even if it were true that the Covenant only imposed negative duties on member States (i.e., that it only required States to refrain from affirmative acts of discrimination, and did not require States to take any positive action), the Covenant still provides women with powerful tools in the area of reproductive rights, because in most countries this is a field that is riddled with state action. There is no need to resort to elaborate theories of state accountability for nonaction. For example, if a State has a law that requires a woman to have her husband's consent before she can get birth control, that is state action. If she needs her husband's consent for an abortion, that is state action. State action cannot make an act, such as abortion, legal but discriminate on the basis of gender as to who can decide to perform that act.

If a State has a law that places a higher value on female chastity than on male chastity, that is state action. Several countries in the world still have laws that decriminalize or even legalize abortion to save a woman's honor—sometimes worded in terms of a male defendant saving his wife or daughter's honor.

Well, what does that mean? That kind of law is, itself, a form of active, and not merely tolerated, discrimination by the State. There is no state action problem if a State authorizes abortion in cases of rape but then defines marital rape as noncriminal.

Like Sarah Lai,¹ I feel a little undressed, because I have been working on this metaphor all morning of a spider's web and I am not sure I have it quite right. Discrimination in every country of the world consists of a web of lies. I have been trying to figure out what the spider is that is hiding in the center, and I think it is something called patriarchy; it is the male reluctance to give up power. If you go for the spider first, you are going to lose; it will bite. If you go for the web, on the other hand, you can at least expose the spider to everybody. You can at least show what is going on, and you can begin to unravel the system that supports the spider. Eventually, if you unravel enough of the web, the spider will either have to die or at least become a vegetarian.

To be more specific, I would like to take the case of Nigerian child marriage that Sarah Lai is working on. She points to the problems of applying international law norms. Is child marriage inherently violative of international human rights standards? Take a case where

1. Sara Lai, Co-Acting Director of Human Rights Watch/Women's Rights Project presented a paper at this Conference, *Experiences in Fact-Finding and the Application of Human Rights Standards to Reproductive Health Issues*, which she plans to publish in the *Harvard Human Rights Journal*.

a young girl agrees to marry for economic reasons or in order not to shame her family in a culture that understands marriage to be the union of two families. Have her rights been violated? If so, which ones? If she is of marriageable age, she has an internationally recognized right to marry.

The problem is, as Sarah's remarks demonstrate, that human rights treaties provide little guidance on what constitutes marriageable age. Although the Women's Convention has a provision that deals specifically with child marriage, Article 16(2), that provision leaves States free to set any minimum age of marriage they want. In other words, you will always get into trouble if you go for the spider first. If you go for something based on documents drafted with women in mind, it will be hard to win.

On the other hand, if you take the Civil and Political Covenant and Nigerian law itself, you have a slam-dunk case, because under Nigerian criminal law, Article 282 of the penal code, it is rape to have sex with a girl under fourteen. A girl under fourteen is too young to consent to rape under Nigerian law, unless she is your spouse, because marital rape is legal under Nigerian law. Therefore, you have a situation in which the State of Nigeria has passed a law saying that females, but not males, forfeit their rights to the protection of the criminal law on marrying. That is sex discrimination, which violates not only the Civil and Political Covenant, but the Constitution of Nigeria.

If you focus on the documents that were not written with women specifically in mind, you will almost always win. That is why the Civil and Political Covenant is such an exciting and potentially useful tool in this area.