

## Sound and Fury – engaging with the politics and the law of sexual rights

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**Abstract:** *Although past resistance to sexual rights in global debates has often been grounded in claims to culture, nation and religion, opposition voices are now using, rather than rejecting, the frame of international human rights. This Commentary argues that, despite opponents' attempts to defeat sexual rights with other rights claims, a careful understanding of the principles of international human rights and its legal development exposes how the use of rights to oppose sexual rights should, and will ultimately, fail. The Commentary briefly takes up three kinds of "rights" claims made by opponents of sexual rights: limiting rights to protect rights, textual basis, and universality, and explores the rationales and impact of their application to countering sexual rights. Because sexuality and reproduction intersect as well as diverge in the opposition they face, this struggle matters intensely and plays out across advocacy, programmatic and policy worlds. Underpinning this Commentary is the understanding that opposition to sexual and reproductive health rights uses common arguments about rights principles that must be understood in order to be countered.* © 2015 Reproductive Health Matters. Published by Elsevier BV. All rights reserved.

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### Introduction

Those who use international human rights to support programmes and policy that further the enjoyment of sexual health and rights are finding themselves facing new challenges. While using human rights to support work on sexuality and sexual health has often been attacked as an affront to morality or culture, what is new and worth marking is the way attacks on sexual rights

have changed. While some attacks on sexual rights continue to mobilize claims of "tradition", "morality", "religion" or "culture" to resist legal obligations,\* opposition to sexual rights now combines these arguments with the language of rights. As we explore below, this means the attacks no longer reject human rights but rather use the language and principles of rights, including attention to treaty interpretation, universalism, and the need to limit some rights to

\*We use three terms – culture, tradition and morality – to cover a great deal of ground. Historically and regionally different manifestations of almost all religions, whether they stem from Christianity, Islam, Hinduism, Judaism, Buddhism or other faiths, have been mobilized by powerful actors in political settings to regulate sexual behavior or reproductive capacity. Over the last twenty-five to thirty years, scholarship in *Reproductive Health Matters* and elsewhere has detailed a specific intensification and distinct shape of the opposition to the new paradigms of "sexual and reproductive health and rights", dating back to the "globalized focus" on this developed during the World Conference on Human Rights (1993), the International Conference on Population and Development (1994) and the Fourth World Conference on Women in Beijing (1995). For a comprehensive analysis of some of the commonalities across opposition to sexual rights as posed by a family of religious claims designated as "fundamentalisms", see: Freedman, Lynn P. The Challenge of Fundamentalisms. *Reproductive Health Matters* Volume 4, Issue 8, 55–69.

protect other rights. This Commentary aims to analyse the new style and content of recent attacks on sexual rights and to sketch out the rights bases to refute these attacks. Advocates for sexual rights can combat the challenges to those rights claims using the rules of human rights, but must acknowledge that in doing so we are participating in the ongoing process of contesting rights related to sexuality. In support of this effort, accompanying this Commentary, and included in this volume, is a guide to the body of rules and principles that govern the development of human rights generally, and to the application of human rights to sexuality and sexual health in particular.

### Resistance to sexual rights

The directions and forms of resistance to sexual rights are multiple. The resistance is broad in scope, linked to the fact that the content of sexual rights is expansive and intersects closely with reproductive rights. The constant marking of both “sexual rights” and “sexual and reproductive health and rights” as points of contestation prods us to enunciate the scope of “sexual rights” as linked to, but also distinct from, reproductive rights. We have resisted arbitrary line-drawing between and among these sets of rights for doctrinal, normative, contextual and political reasons. This resistance might strike some as ironic, given that one of the authors (Miller) produced a manifesto on the need to identify which rights were “sexual but not reproductive” almost a decade ago. But Miller’s point in calling attention to those sexual rights which were not reproductive was not to hive sexuality off from reproduction into a separate sphere of rights, but rather to make the point that sexuality and its diverse forms and meanings needed specific attention, including in its linkage to reproduction. At the turn of the millennium, this was not happening on a regular basis: many conversations about sexuality subsumed it under reproduction, while other conversations treated sexual rights as if they were only related to same-sex conduct, and in this mode never linked to reproduction.<sup>1</sup> We understand sexual rights to include the right to be free from discrimination based on sexual practice or orientation, but also to embrace how human rights have been applied to people’s access to contraception and abortion, and to determining when and if sexual conduct leads to reproduction.

We broadly hold that sexual rights are rights that allow people to determine how their sexuality matters, and to act on that determination. For example, rights relating to abortion are rights within the ambit of sexual rights insofar as they are part of a constellation of services, which include contraceptive services, and which allows heterosexual sexual conduct to be separated from reproduction. There are some reproductive rights, for example rights related to healthy maternity and childbirth, that are less connected to sexuality, and these are not included in sexual rights as discussed in this Commentary. There are, of course, sexuality-related aspects of maternal health which would be included, as when lesbian-identified women face discrimination or exclusion in access to reproductive health services such as artificial reproductive technology or services related to maternal health, because of living outside acceptable (married) norms. By the same token, there are the non-biological aspects of reproduction, such as adoption, that are clearly linked to rights related to gender, sexual orientation, and gender expression. These examples remind us that rights relating to sexuality and reproduction are closely linked and that rigidity in assigning rights to one category or another is not productive.

In the past, and still today in many contexts, attacks on sexual rights – regardless of how they are formally categorized – were and often are couched in the language of morality or culture. In this mode the language of human rights is pronounced irrelevant or outright denounced as an injection of a new and destructive approach to gender relationships, especially to the cultures and traditions claimed by various societies. In the face of such attacks, sexual health and rights advocates have focused their claims on *how rights worked*, that is, they demonstrate how human rights, such as the right to be free from torture and inhumane and degrading treatment, can and must be applied to ensure protections against sexual violence.<sup>2</sup> Bringing health and rights arguments together in this way relied on the application of accepted principles of human rights to new facts, such as applying the right to information and non-discrimination to guarantee the material and cultural conditions needed for individuals to express their sexual and gender identity or determine their reproductive lives. While not yet fully realized, the innovative application of rights arguments to sexual and reproductive health were accepted within the international

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