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MOTHERS, RIGHTS OF

I. Overview

[1] Motherhood has most often been defined in international human rights law as a special status in need of protection rather than a right. Early feminists used 'maternalism' as a justification for women's access to civil and political rights, such as the right to vote, arguing that women's role as mothers made them uniquely qualified to contribute to public life. Women's status as mothers was for these 'first wave' feminists an important part of the justification for women's claims to citizenship rights.

[2] With the emergence of the international human rights framework in the aftermath of the second world war, feminists lobbied for 'the rights of motherhood' to be included in the → Universal Declaration of Human Rights (UDHR); a compromise was reached in drafting Article 25, which rather than situating mothers as citizens possessing rights (Lake [1999] at 205) stipulated that 'motherhood and childhood are entitled to special care and assistance' (Art 25 UDHR).

[3] The campaigns of second wave feminism, which sought to distinguish between the biological and social aspects of the reproductive and caring roles traditionally undertaken by → women and to broaden out the range of roles and opportunities available to them, were often focused on women's access to → abortion and → reproductive rights, or what has been described as 'the right not to become a mother' (Eisenstein [1984] at 70). Some second wave feminists categorized motherhood as oppressive, at least as it operated under patriarchy. More recently, some scholars of motherhood have called for the establishment of 'matricentric feminism', seeking to distinguish itself from first-wave feminism's maternalist agendas but unapologetically placing mothers' needs and concerns at the centre of women's empowerment (O'Reilly, *Matricentric Feminism* [2020] at 52).

[4] In the current era, while → children have the right 'as far as possible' to know and be cared for by their families (Art 7 → Convention on the Rights of the Child (CRC); see also → children and young persons, right of), there is no explicit 'right to mother' under international human rights law protecting women's relationships of care for their children. While arguably a definitive 'right to mother' does not exist, mothers do have a range of rights and protections articulated in universal and regional human rights instruments.

II. Sources

[5] The rights of mothers can be identified in the universal human rights framework within the UDHR; the → Genocide Convention; the → International Covenant on Civil and Political Rights (ICCPR) and → the International Covenant on Economic, Social and Cultural Rights (ICESCR); the → Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the → Convention on the Rights of the Child (CRD); the → Declaration on the Rights of Indigenous Peoples (UNDRIP); the → International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); the → International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and the → Convention on the Rights of Persons with Disabilities (CRPD).

[6] UN human rights treaty bodies have also made a number of → general comments and recommendations addressing aspects of the rights of mothers, including General Comment No 28 (2000) on the equality of rights between men and women by the Human Rights Committee (HRCtee); General Comment No 14 (2000) on the right to the highest attainable

standard of health by the Committee on Economic, Social and Cultural Rights (CESCR); the CEDAW Committee's General Recommendation No 17 (1991) on the measurement and quantification of the unremunerated domestic activities of women, General Recommendation No 19 (1992) on Violence against women, General Recommendation No 21 (1994) on Equality in marriage and family relations, General Recommendation No 23 (1997) on Article 7 (political and public life), General Recommendation No 24 (1999) on Article 12 (Women and health); the CRC Committee's General Comment No 4 (2003) on adolescent health and development, General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health; and the joint General Recommendation No 31 of the CEDAW Committee / General Comment No 18 of the CRC Committee on harmful practices (including forced pregnancy and child marriage). → ILO standards also establish key principles in relation to the employment rights of mothers.

[7] Rights of mothers are also expressed within a number of regional treaties, including the → Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the → Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa (Maputo Protocol), and the → Arab Charter on Human Rights (Art 33). The → European Convention on Human Rights (ECHR) addresses parental rights (not explicitly pertaining to mothers) under Article 8 (right to respect for private and family life).

III. Content and Scope of the Rights

1. Parental rights

[8] There are many references within UN human rights conventions to the rights, responsibilities and duties of parents, as well as to the family as the 'natural and fundamental group unit of society'; the existence of diverse family forms and functions is recognized (UNGA, *Families in the Development Process* [1989] para 4b). Article 10 ICESCR calls for 'the widest possible protection and assistance' to be accorded to the family, particularly during child-rearing (Art 10(1)). Article 17 ICCPR protects against arbitrary or unlawful interference in the family. Article 5 CRC articulates the right to parent. The scope of parental rights is limited by the best interest of the child. For example, Article 5(b) CEDAW establishes the primacy of the interest of the child. HRCtee General Comment No 17 stipulates that where parents seriously fail in their parental duties, ill-treat or neglect their children, the state should intervene to restrict parental authority and the child may be separated from their family when circumstances require this. Although framed within the context of the best interests of the child, the CRC requires states parties to respect 'the responsibilities, rights and duties of parents' (Art 5), and refers to the child having 'as far as possible, the right to know and be cared for by his or her parents' (Art 7). Article 9 requires states parties to 'ensure that a child shall not be separated from his or her parents against their will', except where to do so would be necessary for the best interest of the child. Article 18 recognizes that parents 'have the primary responsibility for the upbringing and development of the child', and that states parties 'shall render appropriate assistance to parents [...] in the performance of their child-rearing responsibilities', including through the provision of child-care services for working parents (see also HRCtee, *GC No 17: Rights of the Child* [1989] para 6). Parents also have the primary responsibility for securing the conditions of living necessary for the child's development, but are entitled to receive 'material assistance and support' from states parties should the need arise, particularly in regard to nutrition, clothing and housing (Art 27). Article 23 CRPD aims to eliminate discrimination against → persons with disabilities in all matters relating to parenthood. The ICPPED requires states parties to prevent the removal of children whose parents are subjected to → enforced disappearance or children born during the captivity of a mother subjected to enforced

disappearance; and to identify and return such children to their families of origin (Art 25). The ICMW calls on states parties to respect the liberty of parents who are migrant workers to ensure the religious and moral education of their children (Art 12); protects migrant workers and their families from arbitrary or unlawful interference (Art 14); and requires states parties to protect the unity of the families of migrant workers (Art 44).

[9] Not surprisingly CEDAW is a key instrument in defining the scope of the rights of mothers. Despite emphasizing maternity as a social function and the common responsibility of men and women in child-rearing (Art 5(b)), CEDAW has a strong focus on pregnancy, childbirth, maternal and post-natal health – the biological rather than social aspects of motherhood. There is an exclusive focus within CEDAW on maternity, and no consideration of the equivalent conditions for fathers that might facilitate their more active involvement in caring for children.

2. Mothers' right to employment and maternity benefits

[10] Rather than defining motherhood as a 'right', the UDHR outlines the entitlement of mothers to 'special care and assistance' (Art 25(2)). The right of mothers to receive 'special protection' for a 'reasonable period' before and after childbirth is expressed in Article 10(2) ICESCR; this article also establishes the rights of working mothers to paid leave or access to social security benefits during this period (→ social security, right to). Article 11(2) CEDAW calls on states parties to prohibit dismissal on the grounds of pregnancy, maternity leave or marital status, to introduce paid maternity leave (or comparable benefits), to provide social services such as childcare to support parents to combine carers responsibilities with paid work and participation in public life, and to provide 'special protection' to pregnant women from harmful types of work. ILO Maternity Protection Convention, 2000 (No 183) also protects pregnant and breastfeeding women from being forced to undertake harmful work, and stipulates a minimum period of maternity leave, cash and medical benefits for women in the labour market, non-discrimination in employment, the right of return after absence on maternity leave, and breastfeeding breaks for nursing mothers.

3. Maternity and the right to health

[11] Women's right to the highest attainable standard of health (→ health, right to) includes the right to 'dignified, respectful health care throughout pregnancy and childbirth' (WHO, *Adolescent Pregnancy Fact Sheet* [2014]). The CESCR's General Comment No 14 identified the provision of maternal health services as a core obligation which cannot be derogated (→ absolute and relative rights), and stipulated that states parties have an 'immediate obligation to take deliberate, concrete and targeted steps towards fulfilling the right to health in the context of pregnancy and childbirth' (UN [2014] at 52; see also → core obligations and progressive realization). CEDAW refers to women having equal access to health services including 'those related to family planning' (Art 12) and women having *the same rights as men* to determine 'the number and spacing of their children' (Art 16(1)(e)).

4. Reproductive rights

[12] Outlining the argument that 'women's rights are human rights', the UN Office of the High Commissioner for Human Rights highlighted the connection between women's sexual and reproductive health and their ability to enjoy multiple other human rights, including the → right to life, the right to be free from torture or ill-treatment (→ torture, prohibition of), the right to health, the right to privacy (→ private and family life, right to respect for), the → right to education and the → prohibition of discrimination (OHCHR [2014] at 50).

[13] General Recommendation No 19 (1990) by the CEDAW Committee addressing Violence Against Women highlighted the impact of compulsory sterilization or abortion on women's physical and mental health and as an infringement of women's right to decide on the number and spacing of their children. States parties were urged to take measures to prevent coercion in regard to fertility and reproduction, and to ensure women's access to appropriate fertility services and medical procedures to prevent the incidence of unsafe illegal abortion. In General Recommendation No 24 (1999), the CEDAW Committee called upon states parties to ensure the prevention of coercion in regard to fertility and reproduction, to ensure women were not forced to undertake unsafe illegal abortions because of the lack of appropriate services regarding birth control, to amend legislation criminalizing abortion 'as far as possible', to withdraw punitive measures imposed on women who have had abortions, and to give priority to family planning and sexual education to reduce unwanted pregnancy and maternal mortality rates (paras 24 (m), 31(c)). HRCtee General Recommendation No 28 (2000) urged states to ensure access to abortion, at least in circumstances where there is a threat to the woman's life or health, or where the pregnancy is the result of incest or rape (para 11). The CRC highlighted in its General Comment No 15 (2013) that adolescents should have access to sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion, without the requirement to have the permission of a parent or legal guardian. States have an obligation to adopt measures to reduce maternal morbidity and mortality in adolescent girls; discrimination against pregnant adolescent girls in schools is also prohibited. Discrimination against women, girls and others based on sex, gender, actual or perceived → sexual orientation or gender identity (→ gender identity and expression) and sexual characteristics often underlies torture and ill-treatment committed against them in healthcare settings (HRC, *Report of the Special Rapporteur on Torture* [2016]).

5. Motherhood and the right to equality in family relations

[14] Article 16 CEDAW aims to eliminate discrimination against women 'in all matters relating to marriage and family relations.' Clause (d) states that women should enjoy '[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.' This clause provides equality in parental rights between women and men but does not specify what these rights may entail. Clause (e) stipulates that women have *the same rights as men* to decide on the number and spacing of their children and access to the information necessary to exercise these rights. Similarly, Clause (f) relates to women's enjoyment of '[t]he same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount'. CEDAW General Recommendation No 21 (1994) addresses equality in marriage and family relations, highlighting the need for women in *de facto* relationships to have equal status in family life and equal rights and responsibilities with men for the care and raising of dependent children. The CEDAW Committee emphasized that both parents, irrespective of marital status and whether or not they live with their children, share equal rights and responsibilities for them. General Recommendation No 21 also acknowledged that women's responsibilities for bearing and raising children can have an impact on their right of access to education, employment and other personal development activities, and 'impose inequitable burdens of work' on women; for these reasons the Committee determined that women are entitled to decide on the number and spacing of their children (para 21). In order for this right to be achieved, women must have access to information about contraceptive measures and guaranteed access to sex education and family

planning services (paras 22-23). The need for women's non-financial contributions through their caring work to property acquired during marriage to be accorded the same weight as financial contributions on division of marital property was also highlighted.

6. The impact of motherhood on women's right to involvement in political and public life [15] The CEDAW Committee's General Recommendation No 23 (1997) addressed women's involvement in political and public life, highlighting the impact of women's central role in sustaining the family and the failure of men to share in the tasks associated with the care and raising of children in women's exclusion from political life and decision-making processes (paras 8-11).

7. Other rights of mothers

[16] The Genocide Convention contains clauses relevant to both the biological and social aspects of women's status as mothers or potential mothers, prohibiting genocidal acts designed to prevent births within a national, ethnic, racial or religious group (which includes genocidal rape) (Art II(d)) and the forcible transfer children from one group to another (Art II(e)).

IV. Challenges and trends

[17] Ensuring women's and girls' right to safe pregnancy and reproductive health remain key challenges. The → UN Human Rights Council's Resolution 11/8 on preventable maternal mortality and morbidity and human rights (2009) noted that maternal mortality is the leading cause of death among women and of girls of reproductive age. Child pregnancy is also a major concern – each year an estimated two million girls under 15 give birth (WHO, *Adolescent Pregnancy Fact Sheet* [2014]). Girls under 16 years face higher maternal mortality rates and a 50 per cent higher infant mortality rate (WHO, *The Prevention and Elimination of Disrespect* [2015]). The impact of unwanted pregnancy and motherhood on girls' access to the right to education remains a key issue (IACHR, *Access to Maternal Health* [2010]).

[18] The lack of legal protection for the rights of lesbian, bisexual and transgender mothers and co-mothers is another major challenge. Queer mothers face a range of issues including custody rights, second-party adoption, discriminatory practices and social biases in determining 'the best interests of the child' (Park [2020] at 69).

[19] Rapid developments in medically assisted reproduction are challenging the long-established principle of *Mater sempra certa est* (the mother is always certain), with potentially profound implications for legally defining who is actually the mother of a child. Surrogacy raises important questions about the issue of informed consent and the commodification of children and of women's reproductive capacity. National and international human rights frameworks provide inadequate protections to ensure the rights of children born through surrogacy, and inconsistent approaches to issues of parental rights, the child's right to an identity and citizenship, and the right of adults to form a family (Wells-Greco [2015]). Similar to surrogacy, migrant worker mothers (sometimes referred to as transnational mothers), whose mothering involves a constellation of care encompassing the biological mother, their children and the caregivers of the migrant workers' children (Portier-Le Cocq [2020] at 7), highlight the increasing complexity in protecting the range of rights holders whose needs have to be addressed.

V. Conclusion

[20] There is an ongoing need to proactively implement programs to ensure mothers can access their rights, to address gaps in mothers' rights, and to extend the human rights framework to engage with emerging issues impacting on the rights of mothers, to empower all mothers to undertake their carer roles with dignity and freedom.

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