Revisiting the Feminist Critique of Rights: Lessons for a New Older Persons' Convention?

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Introduction

In recent years, there has been growing concern about the violation of older peoples' human rights and their lack of protection in existing international human rights law.[1] Depictions of violations against older people such as abuse, discrimination, and enforced poverty, have resulted in the human rights of older people increasingly being discussed on the international stage. In 1982 the First World Assembly on Ageing in Vienna adopted the Vienna International Plan of Action on Ageing (VIPAA), followed ten years later by the United Nations Principles on Older Persons (UNPOP), and, subsequently, the Madrid Plan of Action on Ageing (MIPAA) in 2002. These documents, however, have no legal force,[2] and, as De Hert and Mantovani (2011, 402) have argued, such instruments have been largely unsuccessful in elevating the status of older people as full human rights' bearers. As Doron, Brown, and Somers (2013, 169) claim;

> From a normative perspective...the needs of older people have not been met by the Vienna Plan, the Madrid Plan or the UN Principles for Older Persons. In these plans, created over the course of nearly two decades, nations have set policies that have been ignored and action plans that have been abandoned.'

In light of such criticisms of existing laws and principles, in 2002, at the Second World Assembly on Ageing in Madrid, the Rwandan delegation to the Assembly proposed that the

[1] The right to non-discrimination and equality of treatment in Article 26 of the International Covenant on Civil and Political Rights, and Article 2 of the International Covenant on Economic, Social, and Cultural Rights, for example, include protection on the grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', but do not explicitly refer to age.

[2] In Wales, however, the Older Person's Commissioner's mandate specifically includes reference to UNPOP (Commissioner for Older People (Wales) Act 2006, s 25), as does the recent Social Service and Well-being (Wales) Act 2014 (s 7(1))

United Nations consider creating an international legal human rights convention directly concerned with the rights of older persons. As a result of this, and the later Chung Report (2009), the United Nations Department for Economic and Social Affairs established a Working Group, part of whose mandate was to consider the feasibility of such a convention.

The academic debate as to whether an older person's human rights convention is desirable is well rehearsed (Doron and Apter 2009; Williams 2011). Traditional criticisms of such a convention have questioned its possible utility; the difficulties of creating a single human rights treaty for the diversity of people we call 'old'; and, finally, the difficulty on agreeing a global consensus as to which rights should be protected for older persons. These criticisms are valid, but are not the focus here. Instead, this chapter seeks to advance this existing debate by considering human rights at a broader conceptual level, and, specifically, the very efficacy and utility of 'human rights' as a legitimate tool for older people. Its aim is to consider the extent to which existing feminist concerns – which form the theoretical framework for this collection - about the substance and structure of human rights laws can also be applied in relation to the application of human rights in old age. By viewing human rights through a feminist lens, it is suggested that a number of criticisms of the existing legal landscape emerge, and therefore the central aim of the chapter is to explore the question as to the extent to which drafters of a new convention for older people *could* and *should* listen to these existing feminist concerns over human rights law. As Binion (1995, 513) articulates, 'while the focus of [feminist] analysis is on women's experience, a feminist approach might have immediate implications for the rights of all disempowered peoples and raise questions about social organization generally.'

Feminist Criticisms of Human Rights

Broadly speaking, there are two main strands into which feminist criticisms of human rights fall. The first is criticisms of the *utility* and *efficacy* of human rights laws specifically applicable to women, notably, treaties such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women (DEVAW). Given that this strand of existing literature is concerned with criticisms of these women-specific treaties *per se*, it is only of indirect relevance in a collection about old age and will not be discussed in any depth. The second strand of criticism is more applicable to the aims of this chapter, and postulates that 'human rights law' generally, as a substantive body of law, is of only limited utility in achieving equality and combatting abuses faced by women (and, arguably, other oppressed groups). Within this second strand are a number of ideas - however this chapter focuses on two in particular - the overly individualistic paradigm of the legal subject who is the traditional bearer of human rights, and the implications this first criticism has for the public-private debate. It is necessary to briefly explain these ideas in more detail, and how they have been articulated by feminists, in order to explore how such criticisms might be interpreted in the context of old age and a specific human rights convention for older persons.

Feminist critiques of human rights, as Charlesworth, Chinkin, and Wright (1991, 635-638) elaborate, are multi-faceted and have a number of manifestations, all of which arguably result in a limitation on the level of protection that human rights can offer women as *individuals*, but also impact how much protection they can afford women collectively as an oppressed *group*. As noted above, one of the main criticisms of human rights law is the idea that traditional human rights formulations are premised on a legal subject who embodies a

particular set of characteristics. This is the legal subject who represents the masculine public persona; someone who is detached and individualistic, or as Brown (2000, 239) notes, '…a discourse that presumes an ontologically autonomous, self-sufficient, unencumbered subject'. In effect, it is argued by feminists that the international human rights law system in both substance and structure is inherently gendered, and favours masculine interests that gives priority to – and even deifies - the 'public individual' over the 'private relational' being.

How, then, does such an argument come about and how is it arguable that human rights law does this? First, human rights operate in such a way that human rights discourse effectively reduces complex power relations down to a very simplistic model whereby such problems are seen as 'solved' once a particular right is acquired. Once the right to, for example, be free from discrimination is acquired,[3] it is assumed that such discrimination is unlawful and that it will be effectively eradicated by virtue of such international laws. Yet such an approach does not pay sufficient scrutiny to types of discrimination, its pervasiveness particularly in the private sphere, and whether simply 'eradicating' discrimination is the best solution. Moreover, priority in international human rights law has historically been given to securing civil and political rights for individuals - rights such as freedom from discrimination, suffrage rights, and freedom religion. Indeed, some substantive civil and political rights themselves – such as the right to privacy, explored in greater depth later – may even operate to the detriment of oppressed individuals, or be rendered down by treaties and by the courts interpreting these treaties, to a simple binary between the public and the private domains. Securing these 'types' of rights, as Bunch (1990, p.488) argues, may in fact be seen as less of

[3] See, for example, CEDAW Article 1.

an issue among some groups – such as women - than securing socio-economic rights, especially given that women may find their socio-economic rights violated more frequently than their civil and political ones. Interestingly, and again this is a point that this chapter will return to later, there is also some limited evidence to demonstrate that this may also be a significant factor in older peoples' perceptions of human rights as legal tools – such as the Human Rights Act 1998 in England and Wales – and that they therefore do not resonate greatly with older people. A poll conducted with older people in 2005 found that many of the participants felt disengaged from the types of rights – predominantly civil and political rights – protected by such laws (Lewis and Morris, 2005).

Furthermore, it is argued that current human rights laws do not adequately reflect women's experiences, and that they are impervious to the structural reality of abuses that women face because of precisely how they operate. Rights, as they currently operate in law, rely on *individuals* raising possible violations in order to seek redress – which, as a result of negative socio-economic conditions – many women may not be in a position to do. Human rights operate in such a way as to construct a zone of defence, pitting the individual in conflict with the state, against whom they are seeking to enforce their right. This approach is epitomised in Dworkin's (1977) famous 'rights as trumps' model – which also has the effect of reducing human rights to a simple conflict between an individual and the state. Failing to provide effective mechanisms by which women can raise possible violations not only serves to entrench even further the types of structural and private conditions that render women voiceless in the 'human rights' arena, but may, in turn, mask more complex relationships surrounding the rights-bearer that may enhance or frustrate human rights – particularly in

the private domain - indeed rights are not simply affected by an individual's engagement with the state, but also with other organisations, and other individuals.

Moreover, given that human rights are cast in such individualistic terms, mechanistically providing a particular *individual* with a certain right does little to enhance the position of that *group* more generally. As Mégret (2011) argues, providing all members of that group with identical rights may be seen to indicate that there is a singular identity to that group which can be remedied by a one-size-fits-all approach to their human rights. Such an approach may in fact gloss over or misrepresent the heterogeneity of such 'groups'; these may include groups such as women, disabled people, children, and older people whose global identities may be – and frequently are – very diverse. In effect, the way human rights as a legal framework have traditionally been structured and substantiated has meant that they are predominantly concerned with a legal subject that is both free from relationships other than with the state, and an individual who has the resources – personal, societal, and economic - to be able assert its power against the state. From a feminist perspective, such an image is seen by many to be unrealistic and 'dangerously one-sided' (Nedelsky, 1993, 13).

Ultimately – and as Carol Smart (1989, 138-159) argues – given the number of limitations inherent within human rights one could question whether they can ever be of any real use in remedying the injustices faced by women, or indeed of any oppressed group. One of the reasons for this line of criticism is that the language of rights in particular may be antithetical to women (Binion, 1995). As Gilligan (1982) famously asserted, women may be less likely to think in terms of rights and more in terms of relationships, and consequently their responsibilities that flow from these relationships. The reality, however – as many have

pointed out notably throughout this edition – is that while humans are individuals, they are also 'relational beings' (Gergen 2009). They are situated within a network of crucial relationships with other individuals, organisations, and the state. Feminist critiques of human rights law are therefore twofold. First, they criticise the substance of human rights by arguing that the individualistic conceptualisations of the self that they promulgate fail to account for the ways in which people are essentially and substantively relational beings - in other words they 'ignore the relational nature of social life' (Tushnet 1989, 410). Second, feminists go beyond a simple critique, and offer modes of thinking about human rights that begin from a different normative perspective – one that sees relationships as ontologically prior to the individual, and which prioritises women's own experiences as the starting point, or, to quote Charlesowrth and Chinkin, challenges the 'narrow referential universe of the international legal order' (Charlesworth and Chinkin, 2000,.211) within which rights discourse exists. As Binion (1995, 511) further notes of feminist jurisprudence more widely, '[it] has certain defining characteristics that are shared with feminist studies generally. These include a focus on women's experience, especially the disempowerment that has been ubiquitous.'

Linked to this masculine paradigm flows a second criticism, and one which features heavily throughout this book. This second strand of criticism argues that because of the individualistic paradigm of the public persona at the centre of human rights law, and because this body of law is only concerned with activity explicitly regulated or undertaken by the state[4] i.e. the public domain, it not only masks violations that happen beyond that – that is, those that occur

[4] See, for example, s. 6 of the Human Rights Act 1998, which makes the Act only applicable to public authorities, or those exercising functions of a public nature (s 6(3)).

in the private domain[5] - but also fail to pay adequate attention to structural conditions that also enable the perpetuation of such 'private' violations. As a result, it is argued that because some of the worst abuses that women suffer – violations such as sexual violence, domestic abuse, and forced marriage – take place within the private realm, human rights laws perpetuate women's inequality because, quite simply, they do not concern themselves with these areas (see also Brammer, this volume). As Wright (1989, p.248) argues,

> It is…the basis on which the State is obliged to refrain from interfering in certain "natural" human rights, such as expression, religion, assembly, association or privacy itself…The State is obliged to refrain from interfering in "private" matters…the innermost "private" arena of home and family remains inviolate…

As many feminists have suggested (Bunch, 1990; Chinkin, 1999; Brown, 2000), one example of human rights law creating this division between the public and the private spheres is the through the right to privacy, which appears in many major human rights treaties.[6] The right to privacy, depending on its interpretation, 'can be seen to both advance or deter emancipation – to cloak inequality or procure inequality' (Brown 2000, 236). If, for example, the right to privacy is used as a mechanism of avoiding state intrusion into private spheres, thereby allowing the perpetuation of violations such as domestic violence – an argument treated less favourably by recent judgments, especially in the European Court of Human

[5] A full discussion on the public-private divide from a feminist perspective is beyond the remit of this chapter, and earlier chapters have sought to uncover the falsity of this divide as it applies to older people. This chapter therefore only concerns itself with how this divide has been played out in human rights and their accompanying feminist critiques.

[6] See, for example, Article 8 of the European Convention on Human Rights, and Article 17 of the International Covenant on Civil and Political Rights: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

Rights[7] - then this represents one obvious example of a frustration of womens' human rights in the name of the right to privacy.

As well as through substantive masculine-framed rights, such as the right to privacy, the abstention of human rights law from the private domain also operates on a more structural level. Because statistically women still find themselves predominantly engaged in activities that essentially remain consigned to the private domain – such as care or domestic work – they naturally do not fall within the purview of traditionally formulated human rights law. In the 2011 Census, for example, in England and Wales 57.7% of informal or unpaid caregivers were women, compared to 42.3% of men (Office for National Statistics, 2013). This is a figure that is replicated with an even greater statistical margin between men and women on a global scale, and has led to the Special Rapporteur on Extreme Poverty and Human Rights to report that '[s]tates' neglecting or failing to address women's disproportionate unpaid care workload can be seen as a major failure to comply with the obligations regarding equality and non-discrimination which are the pillars of international human rights law' (United Nations, 2013, para.19).

Given increasing life expectancies in both developed and developing states, increasing prevalence of chronic health conditions in old age, and a move towards home care in old age

[7] Recent developments in the European Court of Human Rights suggest that that Court at least may be placing much greater emphasis on the need for states to take their positive obligations seriously towards victims of domestic violence, at least where Article 3 (right to be free from inhuman or degrading treatment and torture) and Article 14 (the right to be free from discrimination) rights under the European Convention are concerned. *TM and CM v Moldova* [2014] involved an application to the European Court of Human Rights that a failure to take the claimants' complaints about domestic violence seriously amounted to a breach of their Article 3 and Article 14 rights. The Court found that the failure by the domestic authorities to intervene when they had knowledge of the risk of further violence represented a violation of Article 3, and violation of Article 14 in conjunction with Article 3 in that it represented condoning violence and a discriminatory attitude towards women.

in many countries, a similar trend may be beginning to emerge in relation to older people. Again, during the last census, the provision of unpaid care increased with age in England and Wales. Statistically, the highest amount of unpaid care was provided by those aged between 50-64, and those aged 65+ a close second. Furthermore, more individuals within the over-65 age group were providing more than 50 hours of care per week, compared to any of the other age groups (Office for National Statistics, 2013). Yet, Otto (2005, 109-110) criticises this failure of human rights law to engage with the disproportionate burden of care work resting on women – and as shown from the statistics above, arguably older people – by suggesting that this is due to the masculine paradigm outlined in the previous section;

> The paradigm of formal equality...does not challenge gendered domestic arrangements because its masculine standard limits its scope to equality in the public sphere...for the equality principle to achieve women's full inclusion in humanity, it needs to destabilise the masculine universal....

In light of this, most feminist critics of human rights law do not argue for a version of formal equality that simply requires 'adding women and mixing' (Charlesworth and Chinkin 2000, 50), which would simply require extending the same rights to women, and has arguably been the dominant ideology in human rights law thus far, even in women-specific human rights treaties. Article 3 of CEDAW, for example, states that women are guaranteed 'the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.' Instead, it is convincingly suggested by many – notably once again by Otto (2005) – that human rights laws *must* recognise and acknowledge differences between women and men in order to effectively tackle such abuses, and the structural denial of rights that also facilitate such abuses. Only when this is done is it possible to rebuild 'basic concepts of international

law in a way that they do not support or reinforce the domination of women by men' (Charlesworth and Chinkin 2000, 61). As O'Hare (1999, 367) summarises:

> The exclusion of women's voices from defining the content of human rights discourse has in turn meant that human rights law has evolved along a gendered "fault-line" that distinguishes between the public and private spheres for the purpose of legal regulation.

The brief précis thus far has touched upon the many criticisms by feminist writers on the public-private divide in international human rights law as it has served to perpetually mask private violations of rights experienced by women. As Eisler (1987) points out, this gendered division between men and women has particularly deep historical roots that perhaps do not exist in relation to other oppressed groups, such as older people. Yet if we look beyond the 'women-specific' elements, it is possible to discern certain core concepts that emerge from these criticisms that may be transferrable to the debate around an older person's human rights convention. Ultimately, what the criticisms outlined above demonstrate is that first, human rights convey a particularly individualistic ideology that not only fails to reflect the reality of lived experiences for many, but that this ideology also works in such a way as to have the effect of reinforcing and continuing the subordination of an oppressed group who, by virtue of particular circumstances, fail to meet this notion of the individualistic ideal. The second fundamental assumption that emerges from the critiques offered above is that human rights laws create an artificial divide between two realms – the public and the private – viewing only the former within its remit. Moreover, human rights laws fail to provide any justification for maintaining – or question the validity of – this ideology, and the distinction it creates between the public and the private domains. As Thornton (2005, 4) indicates,

> the fiction of separate spheres remains normatively and ideologically significant and it may be that a simplistic division offers an appealing, albeit treacherously false sense of security in the face of complex and elusive phenomena that operate at a number of levels of meaning.

Yet a large number of the issues that face older people in particular – many of which are elaborated on within this book (e.g. Clough, Herring, Stewart this volume)– call in to sharp relief the validity of the individualistic paradigm at the centre of human rights law, as well as calling into question the conceptual basis for the the division between the public and private realms.

Feminist Criticisms and Old Age

There are two interwoven questions that need raising in relation to the feminist criticisms of human rights laws identified above and how they might be applied to the situation of older people. The first is whether – factually – such criticisms are still valid. *Does* human rights law operate in such a way when it comes to its engagement with older people? Does human rights law apply an individualistic conceptualisation of the self, which thinks in terms of discrete categories, and therefore maintains a distinction between the public and the private spheres? The second issue is a normative one. What can feminist criticisms teach us about what human rights law specifically for older people – as is suggested under a new convention – *should* look like?

There is a dearth of research on older peoples' perceptions of human rights law, yet an analysis of the broader sociological and legal sources indicates that certainly in the application of human rights – and in relation to the principles than underpin them such as autonomy and

dignity – the criticisms articulated above may well hold true in relation to old age. It is well documented in many of the chapters contained within this edition – and indeed elsewhere (Mikołajczyk 2013) – that existing human rights law as it applies to older people fails to recognise the complexity of an older person's relationships, and therefore has, at its heart, an individualistic outlook. As Clough explains in her chapter, in *McDonald v UK* [2014] Elaine McDonald argued that the continued provision of carers to assist her in using the toilet was crucial to her psychological well-being, and therefore both her Article 3 and Article 8 rights under the European Convention on Human Rights. In light of this, she argued that her local authority's decision to replace her night-time carers with incontinence pads was a violation of both Article 3 and 8. As Clough further notes, both the Supreme Court (*R (MacDonald) v Royal Borough of Kensington & Chelsea* [2011]) and the European Court of Human Rights (*MacDonald v UK* [2014]) were less than amenable to this argument[8]- Lord Brown going as far as describing the argument under Article 8 as 'hopeless' (*R (MacDonald) v Royal Borough of Kensington & Chelsea* [2011], [16]). Such an approach to the human rights arguments laid before the court – particularly the Supreme Court – betray what Clements (2011, p.680) calls, an 'able-bodied view of the world'. This may be a view of the world that is not shared by many older people, who face increasing levels of disability and impairment; both physical and cognitive (Giordano, 2012), and renders the older person 'other' (Higgs and Gilleard, 2014) to the dominant able-bodied perspective. Moreover, such a view of the world is individualistic in that it fails to recognise the importance attached to relationships of care in securing fundamental human rights for older people (Herring, 2009; Herring, 2014) – a point I shall return to in due course – or a desire to engage itself in private or intimate issues (Carr, 2012).

[8] Although the European Court did recognise a procedural violation of McDonald's Article 8 rights in relation to the period of time where the local authority had not acted in accordance with a procedure prescribed by law in changing her care plan.

A similar approach can also be discerned in the European Court of Human Rights Case of *HM v Switzerland* [2002]. This case concerned the alleged unlawful deprivation of liberty in a residential home under Article 5 of the European Convention of HM, of an 84-year-old woman living in 'intolerable conditions of hygiene' (*HM v Switzerland* [2002], [18]) in her own home, which she shared with her son. In finding that there had been no deprivation of liberty under Article 5, the Court noted that 'the applicant had the possibility of staying at home and being cared for by the Lyss Association for Home Visits to the Sick and Housebound, but she and her son had refused to cooperate with the association' (*HM v Switzerland* [2002], [44]). In effect, because HM failed to comply with the demands of the caregivers – the Lyss Association – she was removed, ostensibly against her will, to a care home, and moreover under the Court's legal interpretation of Article 5, she was not 'deprived of her liberty' whilst living at the care home. In effect, her failure to comply with what was expected of her in the (able-bodied) eyes of the Court – acceptance of the home care – meant that she was also deprived of any positive protection of her rights under Article 5 of the European Convention when she *was* taken in to a care home. Ultimately, whether an older person has legally been deprived of her liberty is in fact an entirely separate issue from the fact of their refusal of social care at home. Yet in *HM v Switzerland* this latter point – the refusal of home care - is conflated with the legal issue of whether there has been a deprivation of liberty under Article 5, and is used by the Court as justification for finding none, and therefore denying HM any protection under Article 5.

The points raised above highlight how the central feminist criticisms of rights considered earlier – the individualistic and idealistic paradigm – may also play out in relation to older people who bring human rights claims to court. Yet, interestingly, when interpreted in an

alternative light, the cases also highlight the second part of the feminist critique of rights; that human rights, as they currently operated through the courts, remain resistant to disturbing the artificial distinction between the public and the private realms, and therefore fail to pay sufficient regard to the *need* for relationships – and particularly relationships in the private domain - in old age. Relationships of *care*, for example, may be central to an older person's own conceptualisation of autonomy and dignity – values that underpin human rights - and therefore to the relevance of human rights to the older person. Elaine McDonald's central argument, for example – that the replacement of carers to assist her to use the toilet in favour of incontinence pads was a violation of her rights – demonstrates that central to her conceptualisation of her rights under Article 3 and Article 8, and consequently her interpretation of what autonomy and dignity meant to her, were ultimately relationships of care. In Ms McDonald's view, it was these relationships with the night-time carers that secured her dignity, autonomy, and personal integrity - and therefore respect for her rights - not incontinence pads. Furthermore, as some have argued (Pritchard-Jones, 2015), the failure of both the domestic courts and the European Court of Human Rights to engage with the human rights arguments advanced by Elaine McDonald represents a failure to take the rights of older people seriously, and moreover, represents a marked reluctance to seriously engage with, or recognise, the relational meaning of autonomy and dignity to older people.

Indeed, one of the most fundamental and obvious ways in which old age may challenge the clarity of the distinction that human rights law has drawn between the public and the private is in fact through issues that arise in relation to care. While human rights law prefers to cast the public and the private into two discrete categories, issues around care in old age call into question the clarity between the public and the private. Such issues fundamentally

demonstrate the artificiality of this distinction and the fluidity with which the two domains mix when an older person faces, for example, a move from their own home into a care home. As Twigg argues (1999, 388) '[d]isability and its consequences disrupt this traditional ordering, in some cases imposing a radical reordering.' If their own home is the ultimate signifier of this 'private realm' then a care or residential home - where life, and traditionally private activities such as 'bodywork'[9], or sexual intimacy (Twigg 1999, 391; Twigg 2000), for example, become heavily regulated and controlled – signifies the public paradigm. Moving from a private home to a care home or residential home therefore represents a 'symbolic reversal' (Twigg 1999, p.394) of the private and the public domains. When such a move occurs then a tension arises between the public and the private as activities traditionally confined to the private domain must now fit within, and be carried out, in a very 'public' arena (Willcocks, Peace, and Kellaher 1987; Twigg 1999).

Indeed, literature suggests that for older adults, maintaining any element of privacy in care homes is not only important, but also frequently publicly undermined (Willcocks, Peace, and Kellaher 1987; Bauer, et al., 2013; Simpson, et al., 2017). These are not insignificant issues given the current statistics on care homes. In the UK alone, approximately 426,000 adults live in care or nursing homes, and the overwhelming majority - around 405,000 - are over the age of sixty-five (Age UK 2016). Yet as well as highlighting the fluidity of and possibly disrupting the division between the two domains – the public and the private - care issues also highlight a tension that many feminist scholars fail to address; notably, that there is a deep meaning to older people of their 'private' sphere, and desire to retain control, when faced with ever

[9] 'The term 'bodywork' has commonly been applied to the work that individuals undertake on their own bodies, often as part of regimens of health and wellbeing' (Twigg, 2000, 411).

increasing threats to it. This is evidenced in part by a reluctance to leave their own home and a desire to move back there where they have had to move in to a care home (Wilkin and Hughes 1987; Lee 1997; Thein, D'Souza, and Sheehan 2011).

This argument – that relationships are at the core of rights for older people – also finds support in any analysis of broader sociological and legal literature. Human rights – and especially the values of autonomy and dignity that underpin them - are 'relational' in that they are upheld, enhanced, and sometimes desecrated through relationships held by the older person. These may be relationships on both a *macro* level, for example with the state through the provision of state-funded care, or organisations such as the Church. Or, they may be relationships on a *micro* scale - with other individuals such as family, friends, and caregivers – or even with themselves, that is, 'self-relations'. This point resonates with the particular feminist critique – outlined earlier – that traditionally formulated human rights focus too heavily on an individual's relationship with the state. While an older person's relationship with the state will be of importance, particularly in jurisdictions where care in old age may be funded by the state, it is only one among many important relationships that may affect that older person's rights. As Charlesworth and Chinkin (2000, 209) argue in a feminist context, '[t]o assert a legal right...is to mischaracterise our social experience and to assume the inevitability of social antagonism by affirming that social power resists in the state and not in the people who compose it.' In effect, human rights have historically assumed that the state bears the only responsibility for violations of a person's human rights. Yet this disguises one crucial link between the individual whose rights have been violated and the state – other individuals and organisations who perpetrate these violations whether or not imputable to the state.

A wholesale analysis of empirical data in relation to older people and their perception of human rights and the values that underpin them is, of course, outside the remit of this chapter, yet a brief analysis serves to demonstrate the point made above. First, as mentioned earlier, while there is a paucity of literature on older peoples' perceptions of human rights as formal legal mechanisms, empirical research across a multitude of disciplines strongly supports the assertion that the *language* of rights, and the values that underpin them – including autonomy and dignity – are important for older adults, particularly when faced with either personal or structural conditions that might threaten them. These may be physical or cognitive conditions which threaten their ability to live independently, for example, or may require their move into a care home or hospital facility thereby sacrificing some fundamental rights they may have enjoyed at home (Joint Committee on Human Rights, 2007; Kontos, et al., 2016), such as increasing frailty, or the onset of dementia. Or, they may be structural conditions which pervade institutions, such as elder abuse neglect, or ageism[10] and are perceived – rightly – as threats to the older person's autonomy and dignity (Phelan 2008; Herring 2012; Naughton, Drennan, and Lafferty 2013). In the words of one 76-year-old participant in a study conducted by Black and Dobbs (2014, 1304), "[a]s one is able to accomplish less and less, one's sense of worth is worn away and with it, the dignity with which one is treated and which one feels." This approach is also evidenced by a range of other

[10] Ageism may be considered to be attitudes towards an individual, or group, solely based on their age – in relation to older people, this attitude that underlies ageism may be that they are less able and of a lower status. As Butler (1975, p.35) enunciates, 'senile, rigid in thought and manner, old-fashioned in morality and skills...'.

studies involving older people (Becker 1994; Heathcote 2000; Woolhead, et al., 2004; Hollcoat-Nallétamby 2014; Lloyd, et al. 2014).

Yet crucially, such studies also evidence the way in which these values are upheld – and therefore the way that rights are upheld – for older people, is through the maintenance of relationships. It is not only empirical data that recognises this 'relational' element to human rights; it is also how they have been increasingly recognised in certain areas of domestic law. *Re GC* [2008] for example, involved a decision from the England and Wales Court of Protection concerning the residence of GC, an older adult with dementia, who lacked capacity under the Mental Capacity Act 2005. In deciding that it would be in GC's best interests to return to live at home, rather than in a care home, Hedley J notes that 'in residence decisions for the elderly, there is …an importance in place which is not generally recognised by others; not only physical place but also the relational structure that is associated with place' (*Re GC* [2008], [21]). In effect, the maintenance of valuable relationships – individual, spatial, and temporal - becomes increasingly important in upholding the human rights of older people, when such relationships may come under increasing threat from both personal and societal factors. This is a dimension that existing formal human rights laws do not adequately take into consideration, and arguably requires a conceptual shift from viewing rights as 'trumps' (Dworkin, 1977), to viewing rights as 'relationships', a contention advocated by Nedelsky (1993).

The literature considered above on older persons' experiences of autonomy, dignity, and human rights in old age suggests that many of the early criticisms of human rights that were raised by feminists may still be relevant in relation to the construction of human rights and

their underlying principles in old age. These arguments suggest that while human rights *could* be useful as a mechanism for framing the violations experienced by older people – and it has been shown how human rights do retain a certain importance for older people - in their present form they rely on a particular legal paradigm that is overly individualistic, failing to situate the older person within their network of relationships. It is also arguable that more recent developments in human rights law – such as that evidenced by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[11] – represent a shift towards an understanding of human rights that places a higher priority on relationships that could be developed in a new convention for older persons. The emphasis placed on the need for support to exercise legal capacity in the UNCRPD under Article 12(3), or on the need for gender and age specific assistance and support for persons with disabilities and their family and caregivers to avoid exploitation, abuse, and violence under Article 16(2), for example, highlight the importance of the need for relationships of support in order to fully realise rights for traditionally oppressed groups.

Moreover, as both Brennan (1999) and Tomasi (1991) note, a relational approach is not in itself antithetical to the notion of human rights. Both authors highlight how relationships are, in fact, at the heart of human rights. As the latter argues, '…individual rights are fundamentally relational concepts' (Tomasi 1991, p.527). This is because human rights laws – at their core – are used to regulate the power relationships between different actors. As such, those responsible for drafting a new convention for the protection of older people may be

[11] The United Kingdom has both signed and ratified the UNCRPD.

wise to heed feminist concerns about the legal subject that historically lies at the heart of traditional human rights formulations.

Conclusion

While 'rights function to articulate a need, a condition of lack or injury' (Brown, 2000, p.239) it is also arguable that neither can such injuries 'be fully redressed or transformed by rights' (Brown, 2000, 239). In effect – and much as Smart (1989) argued that the language and structure of human rights might be useful in delineating the issues faced by women - human rights do have the potential to help us understand the issues and violations that older people face. Yet, at present, we must not be quixotic about the potential of human rights laws; they are not, after all, a panacea. They cannot, in their current forms, provide all the answers to the issues faced by older people. This is because, first, they are currently structured in such a way as to venerate a legal paradigm that is endowed with particular characteristics - a criticism made by feminist scholars of rights more generally, and picked up in relation to older people in this chapter. Moreover, human rights create a distinction between the public and the private domain, but fail to scrutinise the justification for this line with any degree of seriousness or rigour. Yet, as this chapter has also sought to demonstrate, old age brings with it certain issues, and complexities, that requires proper scrutiny of the validity of this distinction between the public and private, and may call into question its very existence.

Charlesworth, Chinkin, and Wright (1991, 614) note that, 'at bottom, feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women'.

Expanding on this, Chinkin (1997, 13) argues that the 'paramount objective' of feminist interventions into international human rights law and discourse has been to develop 'a more inclusive international legal system that takes seriously the interests of all women.' If this is indeed the case, then there is no reason why drafters of a new convention for the protection of the rights of older people could not learn from the methods of these feminist critics in order to also develop an international legal system that also takes seriously the interests of all older persons. In realising this goal, it is therefore important that any drafters of a new convention listen to feminist concerns about human rights. It is time to displace the independent ideal and the reification of the public-private divide historically situated at the centre of human rights law, in favour of a model of human rights that better reflects the lived experiences of old age. This chapter has suggested that, in this regard, human rights law in relation to older people may have much to learn from feminism.

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