GENDER AND INTERNATIONAL HUMAN RIGHTS

ANDREW M. DEUTZ

Is there something particular to the experiences of women that is not covered in the traditional canon of human rights documents? Is there a theoretical need for a reconceptualization of human rights to account for women? Behind these inquiries lies one of a more fundamental nature: Can we meaningfully speak of "women's rights" in contradistinction to "human rights"?

The ideal answer to this question is no. A gender-inclusive understanding of the Universal Declaration of Human Rights and other international human rights instruments, as several of their articles expressly provide, would preclude the necessity of developing a conceptually distinct category of moral claims to secure the bases of human dignity for women. Understood in this way, the phrase "women's rights" should be taken to mean the "human rights of women." This implies that "women's rights" are, theoretically, a redundant subset of human rights, but one which becomes necessary in the practical and political realms because of a contradiction arising between the articulation and the implementation of human rights theory itself. If this is indeed the case, then it would be theoretically possible to develop an ungendered discourse and understanding of human rights, which hopefully would lead toward an ungendered application of human rights. A more realistic answer to the question, then, indicates that there is a gap between the articulation of human rights as universal and non-discriminatory on the basis of gender and their implementation in specific circumstances, which necessitates an ungendered understanding of international human rights.

A feminist critique of human rights can lead us towards an understanding of why there is a divorce between the articulation of human rights as universal and the implementation of them as particular regarding gender. Feminist analysis makes it clear how and why the articulation of human rights is to be understood in a gender inclusive manner and implemented in a non-discriminatory fashion. The feminist critique provides the conceptual tools for understanding gender-based power relations, for understanding the mechanisms and implications of discrimination. An examination of human rights from a feminist perspective can elucidate the different experiences of women and demonstrate how the general human rights norms have to be understood and applied to the experiences of women.

Andrew M. Deutz is a master's degree candidate at the Fletcher School of Law and Diplomacy.

The modern inspiration for contemporary human rights theory can be traced to the origins of liberalism in seventeenth century Europe. For theorists like Locke, "natural rights" were understood to be pre-legal, inalienable claims by individuals against arbitrary state interference. The liberal-democratic theory elucidated at that time was essentially a theory for political control for the protection and expansion of property by privileged male elites.[1] However, the modern conception of human rights theory has developed significantly over time and in so doing has become increasingly inclusive. As a result, we can understand human rights theory as a process of theoretical development from a kernel of the liberal-democratic tradition, broadened through a process of theoretical inclusion by working out some of its historical articulations.

This process of inclusion can be seen as an expansion of the understanding of human rights to various groups who have been discriminated against along class, national and racial background, and gender. Marxism offered an economic critique of liberalism and provided much of the impetus for the expansion of the notion of rights to include socioeconomic claims. Human rights theory was further expanded across ethnic and national lines, in the context of decolonization internationally, and abolition and desegregation domestically. Feminism provides a contemporary challenge to human rights theory, demanding that it become more inclusive along the lines of gender. This challenge, and its implications, are the central concern of this paper, which examines international concern with women's issues historically, feminist challenges to the notion of rights, and an attempted reconstruction of human rights generally in light of women's experiences.

International Concern with Women's Issues

The international community has been drafting gender-specific treaties since the creation of the International Labour Organization (ILO) in the wake of the First World War. In 1919, the ILO drafted the Convention Concerning Night Work of Women Employed in Industry.[2] The intent of the drafters was to protect women from exploitation through a blanket prohibition against working at night, but in so doing, they implied that women were a subordinate group in society. The broad prohibition of the Convention was characterized as discriminatory because women in management positions in signatory states were presumed to be restricted from conducting business affairs after dark, which significantly hindered their professional capacities. In an advisory opinion on this question, the Permanent Court of International Justice affirmed that the restrictions did apply "to women who hold positions of supervision or management and are not ordinarily engaged in manual work." As a result, the Conven-

1. This is a central theme developed by C. B. MacPherson. *The Political Theory of Possessive Individualism* (London, Oxford University Press, 1962).
2. Revised in 1934 and 1948. Adopted by the General Conference of the International Labor Organization, 1935, as modified by the Final Article Revision Convention, 81 UNTS at 147.

tion was revised to exempt women in management and health care from the prohibition.[3] Nevertheless, the ILO followed a similar approach in drafting the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds in 1946.[4]

In a survey of the development of gender-based treaty law, Natalie Kaufman Hevener characterizes these conventions as "protective," meaning that they describe "exclusionary provisions which reflect a societal concept of women as a group which either should not or cannot engage in specified activities."[5] Hevener contrasts these with "corrective" and "non-discriminatory" conventions. She defines the corrective category to include provisions which alter and improve specific treatment that women receive, without making overt comparisons with the treatment of men. This category includes, *inter alia*, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,[6] the Convention on the Nationality of Married Women,[7] and the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.[8] Hevener defines the non-discriminatory category as rejecting the concept of women as a separate group, asserting that biological differences should not be the basis for social or political allocations of benefits and burdens in society. She includes in this category the Universal Declaration of Human Rights[9] and both of the International Covenants,[10] as well as most of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEAFDAW).[11] For present purposes, it is simply worth noting that historically there has been a concern with women's issues in international law and the human rights community. However, because of their limited scope and lack of provisions for international review, the legal instruments concerning women's issues have remained limited in their ability to affect the conditions of women. They have been criticized as representing little more than statements of good intentions on behalf of the states parties and the international community.[12]

---

3. Article 8, 81 UNTS at 152.
4. 40 UNTS at 63.
5. Natalie Kaufman Hevener. "An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective," *Human Rights Quarterly*, Vol. 8, No. 1, 1986, 71.
6. Adopted 2 December 1949, entered into force 25 July 1951, 96 UNTS at 271. There were 65 ratifications as of 9 March 1993.
7. Adopted 29 January 19957, entered into force 11 August 1958, 309 UNTS at 65. There were 62 ratifications as of 9 March 1993.
8. Opened for signature 10 December 1962, entered into force 9 December 1964, 521 UNTS at 231. There were 41 ratifications as of 9 March 1993.
9. General Assembly Res. 217A (III), UN Doc. A/810, at 71 (1948).
10. International Covenant on Economic, Social and Cultural Rights, adopted 19 December 1966, entered into force 3 January 1976, GA Res 2200 (XXI), UN GAOR, Supp. (No. 16) 52, UN Doc A/6316 (1966). There were 120 ratifications as of 9 March 1993. International Covenant on Civil and Political Rights, adopted 19 December 1966, entered into force 23 March 1976, GA Res 2200 (XXI), UN GAOR, Supp. (No. 16) 52, UN Doc A/6316 (1966). There were 117 ratifications as of 9 March 1993.
11. Adopted 18 December 1979, entered into force 3 September 1981. GA Res 34/180, 34 UN GAOR Supp. (No. 46) 193, UN Doc A/RES/34/180 (1980). There were 122 ratifications as of 9 March 1993.

The Public/Private Distinction

To substantively address gender considerations in the human rights discourse, we must grapple with a series of fundamental theoretical questions. How far should the international human rights community delve into the personal relations between individuals? Articulated differently, how far should human rights concerns be extended to what has been described as the private realm, a realm that traditionally has been beyond the scope of state regulation? Finally, what should be the extent of state responsibility internationally for the actions and human rights abuses of private citizens within this "private" realm? To address these issues, we must examine the dichotomy, central to much of feminist theory, between the "public" and the "private."

Historically, the dichotomy between "public" and "private" has been premised on the distinction between the "public" world of the marketplace and formal politics, and the "private" world of family and domestic life. These two spheres have conceptually been linked to the male and female genders respectively. This dichotomy serves to vindicate the distinction between the sexual division of labour and the unequal division of rewards that follows from it. Further, it places restriction on female participation in the "public" realm. Asymmetrical values are associated with these two spheres, which has significant implications: it confers primacy on the male world and hence supports male dominance.[13]

According to the feminist critique of liberalism and liberal legalism, the conceptual distinction between the public and private realms are central to liberal theory and explain the dominance of the male voice in liberal societies. Within the theoretical confines of liberalism, viewing something as "private" indicates that there is no social responsibility for remedying it. The "private" is thus placed beyond the reach of the liberal state. From the feminist perspective, "privacy thus becomes a mechanism undergirding violence against women," in so far as it takes place within the "private" realm of the family and is thus beyond the reach of legal sanction. The legally legitimated notion of marital privacy is seen as a source of oppression, a social structure which maintains women's subordination in the family. The dichotomy therefore institutionalizes gender inequality.[14]

Feminist theory has attempted to recast this dichotomy, as exemplified in the catch-phrase, "the personal is political." Feminist theory posits that relations between men and women within the so-called "private realm" are political, for the simple reason that they embody structures of dominance and submission. Feminists argue that there is no sharp distinction between the two spheres, despite the fact that the liberal state may draw them, at least in theory. In practice, state authority is exercised in a host of areas that impact on the

12. Laura Reanda. "Human Rights and Women's Rights: The United Nations Approach," *Human Rights Quarterly*, Vol. 3, No. 2, 1981, 21.
13. Hilary Charlesworth, Christine Chinkin, and Shelley Wright. "Feminist Approaches to International Law," *American Journal of International Law*, Vol. 85, No. 4, October, 1991, 626-7.
14. Elizabeth M. Schneider. "The Violence of Privacy," *Connecticut Law Review*, Vol. 23, 1992, 975-84.

supposedly reserved domain of the "private sphere" including education, taxation, inheritance, social security, and fetal protection laws.[15] Schneider observes that "The dichotomy of women as private/men as public changes when women are viewed as childbearers." She cites several recent cases involving pregnant battered women to contrast the legal treatment of pregnant women with that of battering men.

In commenting on this dichotomy, Eisler argues that the right to privacy, or "the right to protection from government interference with the right privacy" is still an essential human right, especially for women, and should not be discarded lightly. She argues that the conceptual problem, from a feminist standpoint, is that the terms "private sphere," "family sphere," and "right to privacy" are used interchangeably in normal discourse.

The term private sphere is generally applied to those areas of personal choice, action, and interpersonal relations where the government should not be able to interfere. But it is also often used to refer to the domestic or familial sphere. The question thus tends to become not whether there is interference with the individual right to privacy but whether there is government interference in the familial sphere.

By reframing the question, it is possible to cut through some of this conceptual confusion, and to see how, while ostensibly protecting people's privacy, the distinction conventionally made between the public and the private sphere has often served as a means of preventing the application of developing human rights standards to the relations between men and women.[16]

Instead, Eisler suggests a reconceptualized notion of the right to privacy which would include the right to freely choose with whom to associate, with whom to have and not have intimate or economic dealings, as well as whether or not to conceive and carry a pregnancy to term. The right to privacy thus is not to be understood to entail a right of the (male) head of the household to rule free from state interference.[17]

The challenge for liberal feminism is not simply to reject the notion of privacy for women and opt for state intervention, but to develop both a more sophisticated theory of where to draw boundaries and an understanding of privacy that is equally empowering for women. The feminist critique of the public/private dichotomy must then move towards a reconstructed theory of privacy based on a sensitivity to gender and informed by the experiences of women. Schneider advocates an "affirmative theory of privacy," one which encompasses liberty, equality, freedom of bodily integrity, and autonomy.[18] She advocates a view of privacy that is related to aspects of personal liberty. Indeed, she concludes that "privacy that is grounded on equality, and is viewed as an aspect of autonomy,

15. Schneider, "Violence," 977.
16. Riane Eisler. "Human Rights: Toward and Integrated Theory for Action," *Human Rights Quarterly*, Vol. 9, No. 3, 1987, 292.
17. Eisler, 292-3.
18. Schneider, "Violence," 975.

that protects bodily integrity and makes abuse impermissible, is based on a genuine recognition of the importance of personhood."[19]

At first glance, this reconstructed notion of privacy is not that far removed from the traditional liberal conception of negative liberty, i.e. freedom from state interference. But here, it is applied to women as well as men. Viewed from another perspective, the issue is not freedom from state interference within this realm for women, but freedom from male interference with women's rights to privacy. That of course may mean more state interference with the liberties or "privacies" of men. Then again, the role of the liberal state, at least as regards rights, is to protect the rights of individuals and thereby ensure that the exercise of rights by some does not impinge unduly on the rights of others. Thus, it becomes a matter of ensuring that the state recognizes and guarantees that women have the same rights as men and that they are equally protected. If this can be accomplished consistently, we will have bridged the gap between the articulation and the implementation of human rights for both genders.

Feminist Approaches to Rights

The feminist critique of international human rights standards generally starts from the position that the international human rights movement has focused on the rights of men, that the movement's understanding of the substance and subjects of those rights reflect an underlying assumption that the bearers of rights are male.[20] Human rights theories tend to deal primarily with public sphere, hence, according to the feminist argument, with the relations between men.[21] A number of polemical arguments have been advanced to explain or excuse this focus: that gender discrimination is trivial or a secondary concern; that abuse of women is a cultural, private, or individual issue and not a political matter requiring state action; and that when the abuse of women is recognized, it is considered inevitable or so pervasive that any consideration of it is futile or will overwhelm other human rights questions.[22]

On a conceptual level, the emphasis is usually on the legal rather than the de facto situation, so that discrimination against women arising from customary

---

19. Schneider, "Violence," 995, 999.
20. As but one example, Locke defined the right to private property as arising from the mixing of one's labor with the unappropriated common goods of nature. This formulation is an abstract, individualist expression of the right. However, Locke appears to have had the historical setting of his own society in mind. Placed in context, the right to property though appropriation appears to apply only to the head of the household. In the same paragraph where the right to property is established, Locke continues: "Thus the Grass my Horse has bit; the Tufts my Servant has cut; and the ore I have digg'd ... become my Property." *Second Treatise of Government*, §28. Locke seems to have had in mind that the head of the household could accumulate property based on the labour of his own body and that of those over whom he exercised some form of responsibility as head of the manor, be they his animals, his employees, or, presumably, his women and children.
21. Eisler, 289.
22. Charlotte Bunch. "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly*, Vol. 12, 1990, 488.

law, from traditional practices, or from other forms of oppression is not specifically defined and tends to be ignored. Moreover, the examination of the legal status of women is usually restricted to certain areas which are considered to be "women's rights," such as family rights and the right to vote, rather than on the totality of the human rights and the extent to which women are guaranteed their full protection.[23] Felice Gaer has indicated several aspects of how the UN human rights mechanisms are structured which explain why women's issues do not rank in the human rights community. First, she points out that many of the delegates to the UN bodies are lawyers, and there is a predominant tendency to focus on due process questions and traditional formal procedures. Second, she contends that the human rights bodies tend to focus on civil and political rights, rather than on socioeconomic rights. If the latter are considered at all, it is usually through the lens of development issues. Third, she contends that there is a lack of consciousness of gender discrimination among human rights organizations. Finally, she argues that there is a widespread sense that gender discrimination is private and, therefore, outside the responsibilities of governments.[24]

Part of the explanation for this lacuna by the human rights bodies, of course, rests in the fact that there are separate UN bodies specifically mandated to examine them. The Commission on the Status of Women and the Committee on the Elimination of Discrimination Against Women (CEDAW) meet in Vienna, along with other UN social development bodies, while the UN "human rights" bodies and the human rights secretariat are located in Geneva. As a result, there tends to be little "cross-talk."

Splitting women's rights off from human rights may be seen to serve a repressive function. The most obvious effect is that perpetuating the idea that the rights of women are of a different or lower order than the rights of "man" serves to justify practices that do not accord women full and equal status. In other words, the segregation of "women's rights" from human rights both reflects and reinforces traditions where violations of the rights of women are not violations of either law or custom.[25] The argument underlying much of the feminist critique of human rights theory is that the yardstick developed for defining and measuring human rights violation has been based on the male norm. The development of what may accurately be described as a theory of human rights, therefore, requires both a female and a male yardstick for their protection. The selective limitation of human rights standards to the public or political sphere and the double standard for women and men described by the distinction between "women's rights" and "human rights" may be seen as attempts to evade this basic issue.[26] The central concern for any theory of human rights which attempts to examine and integrate women's experiences concerns

23. Reanda, 15.
24. Felice Gaer. "Human Rights at the UN: Women's Rights are Human Rights," *In Brief*, No. 14, November 1989.
25. Eisler, 291.
26. Eisler, 297.

the extent to which the international purview of human rights organizations should break down this distinction between the public and the private.

Nevertheless, these problems associated with thinking about the notion of "women's rights" have led to some concerns about their appropriateness as mechanisms for social change. Some objections, or rather warnings, have been raised within the liberal camp concerning the articulation and use of the rights discourse as it applies to women. As Hilary Charlesworth has indicated, while the formal acquisition of legal rights by a group experiencing discrimination is often seen as a sufficient remedy, in reality, the promise of the full enjoyment of those rights on an equal basis can remain thwarted by inequalities of power and lingering social attitudes and institutions. Secondly, the rights discourse can be a two edged sword, in that the acquisition of legal rights by a group of individuals may produce counter-assertions of rights in opposition.[27]

These are prudential considerations regarding the translation of human rights as moral claims into rights in positive law. However, there have been challenges from feminist circles to liberal legalism's whole notion of rights as inherently male and patriarchal. As John Hardwig has observed:

> One of the prerogatives of the dominant class is that it gets to define what is real and what is good. The prevalent pictures and models are those generated by the dominant class, generally in the perceived interest of the dominant class. Consequently there is always a danger in any struggle for liberation that the oppressed class will accept too much of the dominant picture and thereby forfeit its soul and lose the real depth of the contribution it could make to a new society. Could thinking in terms of rights be part of a male picture of reality? I suspect that it may well be, because it involves the definition of self and the interests of self in opposition to rather than in relation to others.[28]

These concerns have engendered a series of theories analyzing and deconstructing this conception of rights. The theory behind critical legal studies generally argues that rights are permeated by the possessive individualism of capitalist society. Rights theory portrays individuals as separated owners of their respective bundles of rights. Thus, the rights discourse is seen to overemphasize the separation of the individual from the group, thereby inhibiting an individual's awareness of their connection to and mutual dependence on others.[29] In a similar vein, Hardwig contends on an epistemological level that thinking in terms of rights does more than reflect an egoistic, atomistic situation;

---

27. Charlesworth, 635.
28. John Hardwig. "Should Women Think in Terms of Rights?," Ethics, Vol. 94, No. 3, April 1984, 449.
29. Elizabeth M. Schneider. "The Dialectic of Rights and Politics: Perspectives from the Women's Movement,"*New York University Law Review*, Vol. 61, No. 4, October 1986, 595.

it creates such a situation or reinforces our tendency to move in that direction. He concludes that "thinking in terms of rights is divisive."[30]

Of more immediate relevance to our central concern, feminist legal theory sees rights claims as formal and hierarchical, as premised on a view of law that is patriarchal. That is, law generally, and rights in particular, reflect a "male" viewpoint characterized by objectivity, distance, and abstraction.[31] Feminist theory characterizes genders as socially constructed categories related to a set of dichotomies such as objectivity vs subjectivity, reason vs emotion, culture vs nature, self vs other, knowing vs being, and public vs private. While these categories are recognized to be stereotypical, masculinity is socially associated with the former in each pair, femininity with the latter.[32] Thus, liberal legalism is charged with being a gendered jurisprudence, because it aims at a universal and objective foundation for knowledge, rooted in rationality. Feminist post-structuralist epistemology challenges this assertion. It views the separation of subject and object as deriving from a need for control, and thus objectivity become associated with power and domination. Thus, according to one feminist theorist, "abstract rights authorize the male experience of the world."[33]

Nevertheless, most feminist critics do not argue that rights, as both moral claims and legal goals, should be completely abandoned. That is, after deconstructing *in extremis* the notion of rights as the institutionalization of patriarchal structures in language, law, and society, the task for most feminist theorists is to reconstruct the notion of rights to take into account women's experiences and perspectives, that we may thus continue the discourse. A focus on rights cannot, by itself, achieve social reconstruction. Nevertheless, properly understood, rights discourse is a necessary aspect of any political and legal strategy for change.

Charlotte Bunch has suggested four approaches to link human rights and women's concerns. She lists the first as the identification of women's rights as political and civil rights by raising the visibility of women who suffer general human rights abuses. Second, she proposes conceptualizing women's rights as socioeconomic rights by focusing on women's economic subordination as the key to other issues of women's vulnerability to violence. Third, she discusses women's rights and the law, aiming at the creation of new legal mechanisms to counter sex discrimination, use existing legal and political institutions for women, and expand the state's responsibility for violations of women's human rights. Finally, she proposes a feminist transformation of human rights that will take greater account of women's lives and be more responsive to their needs.[34]

---

30. Hardwig, 448.
31. Schneider, "Dialectic," 595.
32. J. Ann Tickner. "Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation" in Grant and Newland, eds. *Gender and International Relations* (Bloomington, Indiana University Press, 1991), 29-30.
33. Catherine A. MacKinnon. *Toward a Feminist Theory of the State* (Cambridge, Harvard University Press, 1989), 248-249.
34. Charlotte Bunch. "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly*, Vol. 12, 1990. 492-498.

Essentially, this fourth suggestion is an encapsulation of the first three. Indeed, it would not be consistent to separate these approaches since, as Bunch has observed, "some important aspects of women's rights do fit into the civil liberties framework, but much of the abuse against women is part of a larger socioeconomic web that entraps women, making them vulnerable to abuses that cannot be delineated as exclusively political or solely caused by states."[35]

Women's Experiences and Human Rights

There are several different ways to approach the topic of women's experiences as they relate to human rights. As much of the feminist critique indicates, the usual method of looking at human rights abuses as they relate to women is to examine how they have been denied traditional civil and political rights. Thus, the focus is on issues related to the violation of the integrity of the person. For example, a listing by Amnesty International of the "human rights abuses women suffer" includes rape, sexual humiliation, abuses related to pregnancy, torture, exploitation of family relationships, inadequate medical treatment during detention, imprisonment on grounds of conscience, unfair legal proceedings, cruel and degrading punishments, and disappearance.[36] Many of these rights abuses are not gender specific, although pregnancy resulting from rape and abuses of pregnant women obviously are. In addition, the category of abuse of family relationships demonstrates how gender concepts can be linked to the psychology of repression. The traditional role of men as protectors can be exploited by state authorities through the victimization of women as a mechanism to extract confessions or otherwise punish male relatives. For the women, "this torture is not only a brutal physical degradation, but also the ultimate objectification of her person" because she is significant to her captors only because of her role as woman and relation to the target male. Her own identity is thus completely denied.[37]

This approach to the human rights of women focuses exclusively on abuses related to the physical integrity of the person that are perpetrated by state authorities. The feminist critique, on the other hand, suggests looking beyond the public realm of abuses by state agents and examining behavior in the private realm to uncover "covert structural violence" against women, violence with which the traditional human rights conception is unable or unwilling to grapple. Bunch describes several mechanisms through which "sexism kills." Before birth, amniocenteses used for sex selection leads to the higher abortion rate of female fetuses, at rates as high as 99% in some locales. During childhood in many countries, girls are fed less than boys, breast feed for a shorter period, receive medical care and checkups less frequently, and die or are physically or mentally

35. Bunch, 488.
36. Amnesty International, "Women in the Front Line: Human Rights Violations Against Women" (New York, Amnesty International Publications, March 1991), 18-39.
37. Jessica Neuwirth. "Towards a Gender-Based Approach to Human Rights Violations," *Whittier Law Review*, Vol. 9, No. 3, 1987, 403.

maimed by malnutrition at a higher rate than boys. Further abuses include wife battery, incest, rape, dowry deaths, genital mutilation, and sexual slavery.[38] In addition, the majority of refugee populations are comprised of women and children, raising issues of the rights to shelter, food, medical facilities, and, in some cases, nationality.[39]

Even stronger feminist critiques regard the family unit itself as an institution of male dominance supported by cultural and official sanction. The family is regarded as a structure of patriarchy whereby male ownership of females is institutionalized and the woman's value is related to her virginity before marriage and her fidelity after. Thus, Kathleen Barry characterizes female genital mutilation as a socially accepted form of "ritualistic torture" and veiling and female seclusion as "imprisonment."[40] Viewed with these experiences in mind, the real measure of human rights would not consist solely in the civil and political realm of the public, but also in the status of each member in the private sphere of the basic social unit. Thus, equal rights should reflect equal status in social relations between women and men.

Gender in the Universal Declaration of Human Rights

The Universal Declaration of Human Rights, proclaimed by the General Assembly in December of 1948, declare in Article 2 that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind," including by sex. The Declaration is explicitly non-discriminatory. However, Helen Berquaert Holmes takes exception to a few provisions of the UDHR, particularly those dealing with the family, and suggests that discrimination may be implicit. Article 16(3) states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Her principle objection to this articulation is that protection of the family can harm individuals, depriving them of other rights listed in the Declaration, such as the rights to liberty, freedom from slavery, and freedom from torture.[41] Nevertheless, Holmes does not think that the family unit should be dissolved or the state take over the functions of child rearing. Rather, she argues that Article 25's declaration that "Motherhood and childhood are entitled to special care and assistance" should be vigorously implemented.[42]

---

38. Bunch, 488-9.
39. Fran P. Hosken. "Towards a Definition of Women's Rights," *Human Rights Quarterly*, Vol. 3, No. 2, 1981, 2.
40. Kathleen Barry. "Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression," *Human Rights Quarterly*, Vol. 3, No. 2, 1981, 48-50.
41. Article 3 states: "Everyone has the right to life, liberty, and the security of person." Article 4 states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
42. Helen Bequaert Holmes. "A Feminist Analysis of the Universal Declaration of Human Rights," in Gould, ed. *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa, NJ, Rowman & Allanheld), 1983, 253-4.

Holmes also critiques the language of the declaration, arguing that the use of masculine pronouns in several articles to refer to both sexes may contribute to the perpetuation of sexist distinctions in rights, despite the exhortations of Article 1 that "All human beings are born free and equal in dignity and rights" and Article 2, which states that "Everyone is entitled to all the rights and freedoms set fourth in this Declaration, without distinction of any kind, such as race, color, sex." Diane Bell has asserted that the informing concept of person behind this articulation is that of the post-Enlightenment rights-holder, a notion which, she asserts, carries with it the cultural baggage of being gendered: "He is the rational man differentiated from women, who constitutes the Other in this scheme. His canvas is the world of political rights; hers, the moral domain of family." She goes on to assert that despite the fact that the masculine pronoun in English can be interpreted as generic, "When we can observe that women customarily do not occupy certain positions, own less land, and work longer hours, we can be forgiven for thinking that this person to be endowed with rights is gender-specific 'man'... There is a significant slippage between the apparent inclusiveness of the use of 'everyone' and the characteristics which 'person' possesses."[43]

Johannes Morsink offers a different interpretation of the UDHR through a review of the internal drafting history of the document. She concludes that "The drafters wrote a declaration that is amazingly free of what we today would call sexist language. They intentionally chose words like 'everyone' and 'no one' and meant these to be taken literally. That is the reason why women's rights are not more often explicitly mentioned."[44] Morsink attributes this "progressiveness" to the existence of a vocal and active "women's lobby" involved in the drafting of the Declaration, lead by a de facto alliance between Bodil Begtrup, chair of the Commission on the Status of Women, and the Soviet delegation. Begtrup called attention to the fact that while the Enlightenment way of thinking (as embodied in the U.S. Declaration of Independence and the French Declaration of the Rights of Man and the Citizen) made no mention of the rights of women and did not even imply them, times had changed. Nevertheless, her suggestion that a note be added to the document's preamble, to the effect that "when a word indicating the masculine sex is used in the following Bill of Rights the provision is to be considered as applying without discrimination to women," was ignored. When she and others raised this issue in debate, Eleanor Roosevelt, chair of the Human Rights Commission, the UN body charged with drafting the declaration, argued successfully that "the word 'men' used in this sense was generally accepted to include all human beings."[45] Thus, the drafters

43. Diane Bell. "Considering Gender: Are Human Rights for Women, Too? An Australian Case," in An-Na'im, ed. *Human Rights in Cross-Cultural Perspectives* (Philadelphia, University of Pennsylvania Press, 1992), 347. The masculine pronoun is used in Articles 8, 10, 11, 12, 13, 15, 17, 18, 21, 22, 23, 25, 27, and 29, though in most cases it follows the phrases "everyone" or "no one".
44. Johannes Morsink. "Women's Rights in the Universal Declaration," *Human Rights Quarterly*, Vol. 13, No. 2, 1991, 256.
45. Morsink, 232-34.

of the declaration were aware of this linguistic situation, but understood the document in an inclusive manner.

In reviewing the drafting history of Articles 23 and 25, which speak of a person's work and standard of living as adequate for "himself and his family," Morsink concedes that the use of the word "his" does imply that a woman's natural place is in the home and not in the world of production. Apparently, the women's lobby never challenged this articulation. Nevertheless, Morsink contends that the drafters were aware of the problem of women being entrapped in the family setting, as evidenced by the statement in Article 16 that men and women have equal rights as regards "marriage, during marriage and at its dissolution."[46]

Morsink concludes that "it is crucial that we read 'everyone' and 'no one' literally. The drafters intended it that way."[47] Her careful study of the drafting history of the Declaration suggests that Holmes is off the mark in attributing deliberate sexism to the Declaration itself, whatever *ex post*, abstract interpretations of the language may support. This does not rule out the possibility of a contemporary sexist interpretation by a government looking for a justification of particular policies or practices. In this sense, the feminist analysis uncovers one potential source of the divorce between the articulation of human rights as universal and nondiscriminatory and their sometimes contrary implementation.

The Convention on the Elimination of All Forms of Discrimination Against Women

The specific issues and concerns of the human rights of women were taken up by the UN Commission on the Status of Women following the General Assembly adoption of the Declaration on Elimination of Discrimination Against Women in 1967.[48] The Commission was authorized to draft a treaty which resulted in the Convention on the Elimination of All Forms of Discrimination Against Women (CEAFDAW). The convention is comprehensive, incorporating issues dealt with in several other individual treaties. To a considerable extent, it seeks to further break down the distinction between the public and private realms, as they have been understood to limit the scope of international human rights instruments. Article 1 presents a broad definition of discrimination against women as "any distinction, exclusion or restraint made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."

Nevertheless, reactions and commentaries on the Convention have been

46. Morsink, 236-50.
47. Morsink, 255. (emphasis added).
48. GA Res 2263, 22 UN GAOR Supp. (No 16) at 35, UN Doc. A/6716 (1967).

diverse.[49] Eisler characterizes CEAFDAW as a significant development in the field because it recognizes that women's human rights have generally been ignored. She argues that it addresses some of the major theoretical barriers to a unified, ungendered theory of human rights.[50] Charlesworth has noted positive aspects of the convention. She observes that it draws attention to distinct concerns of women, such as trafficking in women and prostitution (Art. 6), as well as unique concerns of rural women and women in non-monetized sectors of the economy (Art. 14). Second, the Convention creates the Committee on the Elimination of Discrimination Against Women (CEDAW) and obligates states parties to submit reports to the Committee (Art. 18). The reporting requirements are intended to ensure that women's issues continue to be annually addressed and that they do not get submerged and ignored in consideration of other human rights issues. Third, Charlesworth argues, CEAFDAW provides an important mix of civil and socioeconomic rights necessary to address the realities of women's experiences.[51]

Hevener views the Convention as a progressive document because it moves beyond the traditional conceptions of woman as wife and mother, reaffirming a broad range of rights in the public and familial domains. She views it as the culmination of a historical process in the substance of provisions of international legal instruments:

> From (1) the treatment of all women as wives and potential mothers, and therefore, in need of protection at all times, to (2) recognition of the possibility of separating women in general from women temporarily identifiable as wives and mothers with only the latter in need of protection, to (3) the desirability of creating corrective measures for the latter during pregnancy and lactation, to (4) the recognition of the role of men as well as women in the reproductive function; the need to protect both as potential parents and the desirability of creating supportive programs for women during pregnancy and lactation and for both parents during childbearing years.[52]

Charlesworth regards CEAFDAW as an "ambiguous offering" at best, arguing that the Convention recognizes some of the particular experiences and problems of women, but attempts to remedy them on the basis of "good will, education and changing social attitudes and does not promise any form of structural, social or economic change for women."[53] One may inquire, of course, what international human rights treaty does offer such "structural change"?

Nevertheless, it should be noted that CEAFDAW does contain some strong

---

49. For a bibliographic survey of the literature related to women's issues and human rights in general, and CEAFDAW in particular, see Rebecca Cook. "The International Right to Nondiscrimination on the Basis of Sex," *Yale Journal of International Law*, Vol. 14, No. 1, Winter 1989.
50. Eisler, 304.
51. Charlesworth, 632.
52. Hevener, 86.
53. Charlesworth, 634.

provisions relating to social and cultural change. Article 5 obligates states parties to "take all appropriate measures [*inter alia*] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[54] These provisions, however, are not the radical innovations that they might appear. The International Convention on the Elimination of All Forms of Racial Discrimination, an earlier treaty also concerned with affecting discriminatory practices and underlying social attitudes supporting them, contains similar provisions, particularly in the fields of education and culture.[55] Unfortunately, these broad requirements of CEAFDAW are not as effective internationally as might be hoped. Compared with the Racial Discrimination Treaty, to which states parties have made few substantive reservations, there are nearly one hundred substantive reservations to CEAFDAW, many of them significantly affecting the scope of the Convention.[56]

The Convention, of course, allows for reservations, but also provides that "A reservation incompatible with the object and purpose of the present Convention shall not be permitted."[57] Several of the reservations appear to do just that. By its reservation, Bangladesh "does not consider binding upon itself the provisions of Article 2 as they conflict with Sharia Law based on Holy Quran and Sunna." Egypt and Libya have made similar reservations. Sweden, joined by Mexico and Germany, has objected that "the reservations in question, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to everything the Convention stands for."[58] The question then, is who has the authority to determine incompatibility? The Legal Advisor of the UN has rendered an opinion that neither the Secretary General,

---

54. The Convention also notes the important role of education in this process in two articles. Article 5 continues "To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in a all cases." On the role of public education, Article 10 states "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure, on a basis of equality of men and women [*inter alia*] the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods."
55. Article 7 reads: "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture, and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among national and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention." Opened for signature 7 March 1966, entered into force 4 January 1969. 660 UNTS at 195. There were 135 ratifications as of 9 March 1993.
56. Charlesworth, 633.
57. Article 28(2).
58. Belinda Clark. "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women," *American Journal of International Law*, Vol. 85 , 1991, 299-300.

as depository, nor CEDAW has the legal capacity to do so.[59] Article 20 of the Racial Discrimination Convention provides that if two thirds of the states parties to it register an objection to a reservation with the Secretary General, the reservation shall be considered incompatible. CEAFDAW contains no analogous provision. It does provide in Article 29(1) that any dispute "concerning the interpretation or application" of the Convention which is not settled by negotiation shall be submitted to arbitration. Should that fail, the dispute may be referred to the International Court of Justice. However, Article 29(2) states that any state party may exempt itself from this provision. A significant number have which, combined with the number and scope of substantive reservations, augers ill for any authoritative determination of incompatibility by the states parties or the ICJ.

Cultural Tensions in Human Rights Instruments

The controversial substantive reservations relate to issues of culture, religion, and tradition. They reflect some general tensions in the international human rights movement, which have been reflected in other instruments as well, revolving around the nexus of women, marriage, and family. In the Covenant on civil and political rights, the provisions of Article 27 regarding the protection of the culture and religion of persons belonging to minority groups may well collide with Article 23's ban on arranged marriages, especially in the case of aboriginal women. Similarly, Article 17 of the African Charter of Human and People's Rights calls for the protection of moral and traditional values as a duty of the state.[60] Article 18 of the Charter describes the family as the basic unit of society and notes that discrimination against women should be eliminated, but the conjunction of the notion of equality with the protection of the family and "traditional" values is potentially contradictory.[61] Additionally, the Covenant on Economic Social and Cultural Rights speaks of the family as "the natural and fundamental group unit of society" in Article 10(1) which may come into conflict with the rights of everyone to "take part in cultural life"[62] (Art. 15 (1)(a)) to the extent that cultural practices discriminate against women.

From an anthropological perspective, Bell argues that these statements belie an implicit Western assumption of the universality of the family as the "natural and fundamental group unit of society" with an entitlement to protection by "society and the state." Drawing on her research in aboriginal Australia, she argues that this articulation threatens aboriginal social structures and denies ways in which women maneuver within plural and arranged marriages. She contends that for aboriginal women, the most "natural" social unit may be a

59. Rebecca Cook. "Reservations to the Convention in the Elimination of All Forms of Discrimination Against Women," *Virginia Journal of International Law*, Vol. 30, No. 3, Spring 1990, 708-709.
60. Adopted 27 June 1981, entered into force 21 October 1986. O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981).
61. Charlesworth, 637.
62. Article 15 (1)(a).

grouping of other women. To expect that a husband, wife, and children constitute the basic unit of society limits the political, economic, and civic responsibilities of aboriginal women. It also promotes a unit that may itself be a locus of oppression and violence for many women and one that is a normative, rather than an actual, patterning of residential units.[63]

Bell points out how the preservation of culture, a normative value in both international human rights covenants, may come into conflict with other individual rights that are articulated in the covenants. She implies that arranged marriages, for example, are not necessarily the pejorative institutions that they are sometimes made out to be because they can create alternative networks of relations for women. Hence, Bell implies that it is ethnocentric or simply naive for western human rights advocates or feminists to identify one single issue regarding women and seek its immediate curtailment or abolition. Particular cultural institutions must be examined within their full cultural context to identify the social function that they may play in perpetuating or institutionalizing patriarchy but also to examine what social functions they may serve for women within the cultural system. By simply excising a particular cultural institution, where culture is understood as an integrated pattern of human interaction, a situation may be created that, in the short run at least, could be severely detrimental to women. This is not to be taken as a defense of all cultural practices, but only to suggest that declarations, articulations, and understandings of rights in and of themselves will not be sufficient to alter them. Nor may this be the best approach, especially if pursued in isolation since there is much more at stake than any particular, individuated practice.

Conclusion: Privacy versus the Private

This discussion has lead us back these fundamental questions: To what extent should the human rights movement delve into the private, and what should be the scope of state responsibilities in these areas? In response to such questions, some feminist theorists have drawn an analogy between the public and private sphere discussed above, and the structure of the international legal order. The rationale for the analogy is that, traditionally, just as what a man does within the privacy of his own home is considered his own business, what a government does within the confines of its own borders is its own business. The explicit rejection of this latter proposition has been the impetus for the international human rights movement.[64] Charlesworth has suggested that a feminist transformation of international law would lead to international regimes that focus on structural abuse of women and revisions of our notions of state responsibility and also lead to a challenge to the centrality of the state in international law.[65] In essence, she advocates a structural overhaul of the international legal order.

63. Bell, 341.
64. Eisler, 289.
65. Charlesworth, 644.

Following the logic of the public/private analogy, it is readily apparent that the principle of state sovereignty can function to protect or perpetuate patriarchal structures within a state. However, suggestions and solutions must be more practically grounded than a naive call for a complete reordering of the international legal system because its "normative structure" does not fit a particular moral agenda.

Charlesworth does offer a series of more practicable suggestions. The first is to promote economic and social reform and development to better the material conditions of women. This appears self-evident. Second, she suggests expanding the scope of state responsibility to incorporate responsibility for systematic abuse based on sexual discrimination and to extend imputability to the state for acts committed by private individuals.[66] The first part of this suggestion advocates broadening the scope of international purview for abuses against women. This is essentially the route of CEAFDAW and CEDAW: a convention defining new international responsibilities that a state consents to undertake, and an international body to monitor, however weakly, the states parties' actions in regard to those obligations. Even the notion of expanded imputability to the state can be fostered only through a similar, treaty mechanism. A state would have to accept as an international obligation a duty to alter its domestic law to criminalize various forms of gender-based discrimination. Then, other states parties, or a treaty monitoring body if set up, could examine and raise questions concerning state compliance with its treaty obligations. Basically, this notion too comes down to the CEAFDAW and CEDAW approach, but envisaged with a stronger convention and a more powerful watchdog body. Third, Charlesworth suggests the creation of an international mechanism to hear complaints from individuals and groups along the lines of an optional protocol to CEAFDAW that would authorize CEDAW to receive petitions from individuals.[67] This suggestion is sensible, though considering the quantity and scope of reservation to CEAFDAW, it seems unlikely that too many states would sign on.

This suggestion points to a disturbing fact: on the practical level, there is a difference between labeling something a human rights violation and a women's rights violation, at least as far as the prospects for action by UN bodies. Separate mechanisms exist for human rights in contradistinction to women's rights. The Human Rights Commission has the authority to appoint special rapporteurs on country-specific matters and on thematic issues. It also has a confidential mechanism to consider complaints. Correspondingly, the Commission on the Status of Women lacks these mechanisms.[68] Secondly, the Human Rights Committee, created under the Covenant on Civil and Political Rights may receive petitions from individuals in states acceding to the Optional Protocol. The Committee for the Elimination of Discrimination Against Women has no such authority. Additionally, the Human Rights Committee may receive inter-state

66. *Ibid.*, 645.
67. *Ibid.*
68. Sullivan, Donna. "Human Rights at the UN: The Implementation of Women's Rights," *In Brief*, No. 29, October 1990.

complaints from states which have acceded to the Optional Protocol. CEDAW lacks this capacity as well.[69] Thus, at the UN at least, there is a difference between human rights and women's rights.

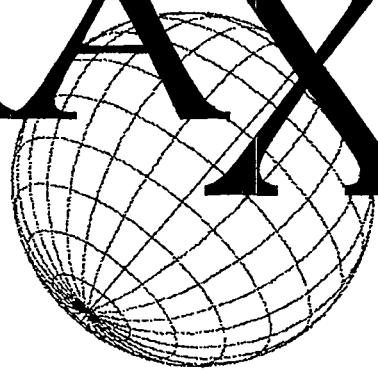
The feminist approach to international law and human rights has suggested that the traditional scope of international law needs to be redefined so as to acknowledge the interests of women.[70] If we take this to mean redefining legal and juridical bases of international law, we aim at no less than a fundamental reordering of the international legal order. However, if we take this redefinition to incorporate the political realm, by putting women's experiences and issues in the international agendas as legitimate concerns, recognizing them, and taking them into account, we have the beginnings of a political agenda and a political process. We then face two tasks: establishing an understanding of the articulation of the nondiscriminatory nature of international human rights, and then establishing their nondiscriminatory implementation.

These tasks cannot be accomplished by international law, or treaties, or human rights declarations alone, though these do have an important role to play in the political process. There is a limit to what the international community can accomplish within the domestic jurisdiction of any of its member states. Women's constituencies must mobilize domestically in individual states to press for this agenda. This process can take guidance from international instruments and articulations of the human rights of women to challenge government and social practices. At the same time, the international community's understanding of the substance of these rights can be informed by the various experiences of these constituencies. The result is a dialectical relationship between rights and politics.[71]

In other words, the articulation of abstract, universal human rights is already in place. The next step is the understanding that they apply universally, nondiscriminatorily, and to concretized them in light of women's experiences. If this contention is substantiable, then gender based treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women and the whole project of the international human rights of women movement can be viewed as a response to the gap between the articulation of human rights as universal and non-discriminatory on the bases of gender, *inter alia*, and their implementation in specific circumstances. They can be viewed as political attempts to refocus attention on abuses which the human rights community traditionally has not dealt with explicitly. At the stage of articulation, they serve the function of consciousness-raising, and at the level of implementation, the significant function of concretization.

69. Theodore Meron. "Enhancing the Effectiveness of the Prohibition of Discrimination Against Women," *American Journal of International Law*, Vol. 84, No. 1, January 1990, 215-217.
70. Charlesworth, 645.
71. This notion is suggested by Schneider, "Dialectic."

PRAXIS



The Fletcher School Journal of Development Studies

Volume I, No. 10 Spring 1993

FOCUS: LAW AND DEVELOPMENT

Roberto MacClean on developments in Latin American law • Paul H. Brietzke on state *vs.* private ordering • Ali Fadlalla on health regulation in Sudan • Stuart Kerr: a report from the ILI trenches • Ruth Junkin on rural development and the environment • Laura Svat on US asylum law
K. Oteng Kufuor on housing in Ghana

FEATURES • BOOK REVIEWS • ENVIRONMENT REPORT

SPECIAL AFRICA SUPPLEMENT

Adekeye Adebajo on the OAU and *Pax Africana* • Martin Kilson: From Kleptocracy to Civil Society • A.K. Sawyer on marginalization in Africa
John T. Okwubanego on Nmamdi Azikiwe: early Pan-Africanist
Tom Valentine on the African Informal Sector • Herman Cohen on US foreign policy to Africa • Elizabeth Rowley on refugees in Malawi
Lidwien Kapteijns on African women in Muslim countries
Nigerian political poetry