

Feminist Analysis of Human Rights Law

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Abstract

The rhetoric of human rights declares the idea to be universal (Universal Declaration of Human Rights, 1948), this claim inevitably poses a serious challenge when one tries to theorize human rights. In response to human right law's self-proclaimed Universality and Neutrality, two major critiques have been developed which deny the truth of this assumption, namely Feminist and Cultural relativist. This article looks at the universality claim of human rights law from the feminist perspective, according to which, the human rights discourse is an extension of a gendered international legal system that fails to take into consideration the voices of women (Gottschalk, n.d.: 1). The article also explores the stance of cultural relativists on human rights law and shed light on the extent to which it is detrimental to feminist approaches.

Keywords: Public/Private dichotomy, Universalism/Cultural Relativism, Gender bias, Women's Human rights, Feminists

Introduction

Since the conceptual foundations of human rights norms are rooted in the Western liberal thought, the content of human rights represents a specific philosophical account of human society (Langlics, n.d.: 16; Radacic, 2010: 830; Kelly, n.d.: 476). This particular underlying philosophy from which the notion of rights was derived has rendered the nature of the notion of human rights highly contested. The article recognises that the notion of human rights law is not value-free, its agenda is both political and gendered (Radacic, 2010: 830). It argues that human rights conceptual framework is deeply gendered and it privileges a certain set of normative commitments. From this it follows that the legal construction of human rights is unsatisfactory for women because the core theme of human rights law reflects a male viewpoint which may not necessarily resonate with the lived realities of women's lives (Brooks, 2002: 345; Bunch, 1990: 486). Some aspects of male supremacy within the construct of human rights norms could be exposed by taking a close look at the rights' regime established by Universal Declaration of Human Rights (UDHR) 1948. For instance the notion of public/private divide, basically a hallmark of liberal philosophy and

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adopted by human rights discourses, disproportionately privileges men. Public arena in most societies is predominantly occupied by men and women are relegated to private sphere of home and family (Binion, 1995: 5). Given the sanctity attached to it, private realm is often beyond the reach of state regulation which makes the position of women vulnerable within domestic sphere. This article argue that creation of fictional divide between public and private life of individual, and leaving the later outside the state's control set the stage for violation of women's human rights particularly in the form of violence against women at the hands of private individuals (mostly men) (Gottschalk, n.d.: 3 & Binion, 1995: 5). Understanding the historical evolution of the concept of human rights is essential to understand the debates and problems that surround it. This article, therefore, begins with a brief description of the evolution of human rights law.

Historical Background

International law historically was, and to significant extent continues to be, interstate law (Mullerson, 1990: 34). According to the notions of general International Law, the State is considered as the subject while individual as the object of this body of law. This means that only states can directly participate in the process of international norm creation, and the rules so created will govern the mutual relationships of the states. The individual in the pre-WWII era was viewed largely as a passive beneficiary of the rights, guaranteed by states under international law¹. Only after WWII did the protection of human rights become a central concern in the International Law, with recognition that the State is not always a guardian of its nationals (Knut, 2006: 3). The classical concept of absolute sovereignty had justified 'the inner space of states as a sanctuary for commission of what is called 'human wrongs'' (Falk, n.d.). Historically, the juridical ideal of sovereign equality, and higher principle of non-intervention, would not allow one state to intervene into the affairs of other state on such basis. However, the role of individual and certain non-state entities became more visible after the formation of United Nations (Kunt, 2006: 3,5). Especially in the period following the adoption of International Bill of Rights by the UN General Assembly², individual appeared more actively and directly on the international scene (Mullerson, 1990: 34 & Kunt, 2006: 8). The position was even further changed in the regional human rights arena where the individual is clearly moved to the centre of human rights system (Kunt, 2006: 7). The increased participation of the individual in the enforcement of human rights standards, rather than a mere beneficiary of rights, is therefore quite noticeable in the recent period (Mullerson, 1990: 35). The individual is now seen both as the holder of rights stemming directly from international legal provisions, and is entitled to protection following a violation of his/her rights under human rights law. Although the protection of the individual's rights from the powerful state machinery is still the primary concern of human rights law, the recent development of an individual's protection from the oppression of non-state actors has also been recognized and incorporated in International Law as a responsibility of state (Velsasquez, 1988, July 29).

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This notion of state responsibility in the cases of systematic violations of individual's rights by the non-state actors leads to the emergence of the Due Diligence doctrine in International law. A marked decline in the notion of Absolute Sovereignty and its shift towards Restrictive Sovereignty further diluted the state's powers in various fields of activity (Bonita, 2010: 255; Kunt, 2006: 10 & Fellmeth, 673). The discussion so far might have presented a very optimistic picture of the rapid developments and remarkable achievements in the area of human rights law, in a relatively short span of time. Nevertheless, this is only a part of the picture. Various objections have been levelled against the manifest biases of human rights system. The validity of its very foundation has been challenged, primarily, on the ground of its claims to Universality and Neutrality. It is argued here that human rights discourse is not value free, it is greatly underpinned by authoritative power dynamics (Sylvia, 2008: 51). The attack on the validity of notion of human rights law has been launched mainly from two quarters, the Feminists critics and the Cultural Relativists (Brem, 1997: 136). These critiques along with the implications on women's enjoyment of their human rights in general as well as with reference to their right to be free from violence, will be dealt with in the following sections.

Feminist Critique

Subjective Bias in Law

In the wake of gendered nature of International human rights law a strong critique has developed (Oloka, 1995,94: 352). It has been argued that International human rights law ignored the specific concerns of women for a long time, remained inattentive to the predicament of women and has only recently responded to their problems (McQuigg, 2011: 352). Many strands of feminists' critique agree that this is due to the lack of gender equality in law (Friedman, 1997: 2). Therefore, they strongly reject the notion of law as objective and dismiss the characterization of legal system as neutral, apolitical and unbiased (Hilary, 2002: 2). Friedman argues that 'law respect and reinforces the interests of particular group in society, these interests have always been pre-dominantly male'. The human rights law arguably is not an exception either; it has also inherited some of the same biases from the general corpus of law/international law (Oloka, 1994: 110). International human rights law and the institutions established to guide its development and operation are firmly entrenched in structures that are gender-biased. It is argued that human rights law is a product of the dominant half of the humanity, men, therefore most of its instruments are framed in a language which reflects the interests, aspirations and values of those who have drafted them (Eva, 1997: 137). Some critics have gone to the extent of describing it as International men's law (Charlesworth, 1995: 644). Other feminist critiques levelled at the human rights discourse have highlighted the 'fragmented and individualistic language of the mainstream understanding of rights which are based upon a male model of what it means to be human' (Yakin, 2006: 13). Also absence of feminine pronoun from many of the major

human rights treaties reinforces the gender exclusionary trend of law (Alice, 2011: 311). Human rights are defined and understood as the rights of men and women's rights were largely ignored under the human rights instruments. As Charlesworth argues 'issues traditionally of concern to men are seen as general human concerns; 'women's concerns' by contrast are regarded as a distinct and limited category' (Worth, 1995: 104). Feminist critics categorically refute human rights law's assertion of independence from politics and history. It is argued that such claims are not well founded, they merely rest on utopian ideals (Celina, 1994: 88). Copelon remarks that 'International human rights system still operates more in rhetoric than in reality' (Rhonda, 1994: 117).

Public / Private Bifurcation

The Feminists' critique outlined above is not limited to the gender bias aspect of human rights law alone. The challenge concerning relationship between public and private realm is also central to the feminist theory (Ruth, 1992-93: 1). The feminist critique in this respect continues to problematize the basis of human rights discourse (Catherine, 2010: 95 & Nancy, 1993-94: 66). The ideology of separation of spheres has been identified as key feature of Western Liberal thought (Horwitz, 1982, June: 1424). The conceptual and architectural division of public/private realm lies at the heart of liberal legal theory. The construction of state along the lines of public/private distinction combined with patriarchal values is seen as a major impediment in the women's enjoyment of their human rights (Celina, 1994: 86). Therefore the implications of this binary opposition in International Law related to women's human rights, have received much attention in the feminist discourses (Gallagher, 1997, May: 291). This ideology involves artificial/juridical separation of an individual's life into two spheres; domestic sphere, to which women are mostly restricted in theory and practice, and spaces outside the home, which are men's domain (Klein, 1995: 97). Moreover, the philosophy of separation of spheres refers to the demarcation of personal privacy zone protected from state regulation (Higgins, 1999-2000: 874). Implicit in this spatial dichotomy is the contrast between male/female assigned tasks and the gender role stereotyping. Arguably, the line between the home as private/personal and rest of civil/political society as public, defined by social norms and law, is clearly gendered (Higgins, 1999-2000: 849). The construction of home as a private institution, falling outside state control and scrutiny (Higgins, 1999-2000: 847), serves to perpetuate oppressive hierarchical order within family relationships. This private sphere is largely regulated by indigenous customs and cultural norms in pluralistic legal systems.

Interestingly, in non-Western societies 'the universalization of rights was seen as the imposition of Western norms' therefore the Universality claims of human rights discourses are strongly resisted and rejected on this ground (Ghai, 1997: 10). However, such societies would willingly embrace the separation of spheres ideology, which is predominantly Western, to deny women's human rights (Nancy, 1993-94). Moreover, it has been observed

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that non-Western women are more adversely affected by the public/private divide of human rights law (Gallagher, 1997, May: 291). This is because the domain of private activity is very wide in such societies and includes extended family as well as community which is self-regulated and immune from public scrutiny (Gallagher, 1997, May: 291). Wholesale adoption of this liberal social contract philosophy by International/human rights law has rendered the women-associated-private-sphere doubly problematic and therefore subject to intense criticism (Horwitz, 1982, June: 1423). Moreover, the neutrality of human rights discourse is questionable because it is ingrained in the ideology which grants priority to civil and political rights over economic, social and cultural rights. Thomas and Beasley argue that men dominate the public realm in every part of the world and they are more often the major beneficiaries of civil and political rights, the principal concern of human rights law (Dorothy & Beasley, 1993: 36-63). However, these rights have less relevance with women because their participation in public life is merely nominal, being frequently obstructed by structural bias (Dorothy & Beasley, 1993: 39). Thomas and Beasley further argue that gender-neutrality of human rights law is only superficial. This apparent neutrality is even extenuated when human rights law interacts with gendered state structures and discriminatory national laws/legal systems that assign women separate domain of existence (Dorothy & Beasley, 1993: 36-63). Noting precarious conditions of women's lives, most feminists view the private sphere as the 'locus of women's oppression' (Engle, n.d.: 50). They acknowledge that women's human rights often come in conflict with forces that originate from the domestic sphere, and these forces are no less powerful than the state itself as they operate in the immediate context of the person concerned (Ronagh, 2010: 344). As Mcquigg argues that

Women were more directly oppressed by their families than by their governments, although government inaction facilitates the perpetuation of that oppression. International law's priority of the state over civil society and of civil and political rights over social and economic rights, represent and constitute structural bias against women (Mcquigg, 2010: 344).

Feminists are critical of the very primacy accorded to civil, political rights over economic, social, cultural rights in the human rights law (Eva, 1997: 140). The former rights perceived as requiring immediate redress in case of violation while the later understood as goals and aspirations to be realised gradually. The critics have pointed out that public regulation of private conduct is not a new phenomenon, the public/private divide (in human rights law) have been broken in the past a few times (Engle, n.d.: 53). Alston argues that 'Public/private divide is both irrational and inconsistently applied human rights regime do enter private sphere' (Alston & Steiner, 2000: 219) For instance prohibition on slavery is a kind of intervention in private realm (Benninger-Budel; Engle & Hessbruegge, 2005: 5), nevertheless, it receive greater and serious public attention. This is so because in case of violation of right to freedom, 'women just happen to be a victim', it is not a gender-

specific violation (Dyrnes, n.d.: 215). However, such steps had never been taken when doing so would offer protection to women (Engle, n.d.: 53; Charlesworth, 1995: 629). Heise commenting on the discriminatory treatment of women under the human rights system argue that

There is considerable concern when people are beaten to death for their political ideas, but when they are beaten to death simply because they are women, this tend to be overlooked (Heise, 1991-92: 442).

It is argued that the states' decision of non-intervention is gender-biased (Nancy, 1993-94: 72). State appears reluctant and unwilling to intervene in issues of domestic violence against women for the sake of respect for family privacy. However, such 'respect for privacy' is easily ignored when the state chooses to regulate the issues relating to the personal lives of women, such as family planning and abortion laws (Amirthalingam, 2005, May: 683). Further it has been observed that states are usually willing to cooperate over issues of mutual economic/political interests and happily allow external interference in such matters, however, they jealously guard the sovereign right of non interference over women's human rights issues. This provides the ground to argue that what is left for non-intervention by the state is largely the domain of male hegemony (Erturk, 2008: 32). State may continue to be neutral towards private realm as long as it remains consolidating unit of male hegemony (Celina, 1994: 104). It is further argued that while maintaining the separate sphere ideology state wilfully ignores the political aspect of power dynamics within domestic life where authority is unequally distributed among the members (Celina, 1994: 100). Therefore state's decision to leave certain areas of private life immune from regulation is largely political that serves to maintain unequal gender relations (Benninger-Budel; Engle & Hessbruegge, 2005: 5). And the selective use of respect for privacy in the service of state power further reveals the gendered character of law (Erturk, 2008: 856). The dismantling of public/private dichotomy from the human rights discourse in favour of women's interest, therefore, is vehemently called for (Eva, 1997: 141). However, the structural bias feminist critique argues for more radical changes in the HRL (Engle, 2005: 49-51). According to it, the existing structure of human rights system has little to offer to women. Arguably, the gender bias is built-in in the machinery of the system in such a manner that it will reproduce the same discriminatory patterns even when it operates in a so called neutral fashion. Therefore, total revamping/transformation of the entire human rights discourse, to accommodate the specific needs of women, is emphasized (Engle, 2005: 53). A comprehensive re-examination of structural as well as normative institutional elements is suggested with a view to reformulate major human rights instruments (Oloka, 1994: 389). Thomas disagrees with liberal feminists' formal equality approach, she is convinced that the real inclusion of women's perspective is not possible with add women and stir strategy; it should rather be 'add women and alter' (Dorothy, 1993: 39).

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The foregoing criticism has exposed, to some extent, the theoretical aspect of male supremacy within the construct of HRL. However, the practical repercussions of such prejudices, arguably, are far more complex, detrimental, expansive and wide-ranging with reference to women's human rights.

Rhetoric Wrestle Between Cultural Essentialism and Cultural Relativism

This section highlights that culture is a contested terrain in many ways (Erturk, 2008: 25) and shall briefly explain the two extreme positions, Universalism and Cultural Relativism, in the human rights theory as well as the feminists' stance on this debate.

The Universalist model, by far the dominant international discourse, asserts that there are some core moral values which are innate/common to all societies (Bunting, 1993: 7 & Lobban, n.d.: 35). It draws its arguments from Aristotle's reasoning which regards human beings as absolutely invariable in their logically defined essences (Nussbaum, 1992: 205). In human rights theory it means that there are some defining features of humanity that all human beings share independent of their cultural, historical or individual situations/experiences and the promotion of such values will necessarily lead to better life conditions (Holma, 2007). It also argues that there are certain human actions which are essentially wrong. Even the adoption of the term Cultural Relativism is heavily criticised by radical Universalist critique, which according to them is a 'soft moral option' for an obvious bad conduct (Ignatieff, 2006: 7). Ignatieff asserts that Cultural Relativism is 'the invariable alibi of tyranny' (Ignatieff, 2011: 74). Cultural relativism, arguably, is the most debated issue in the human rights discourse.

The Universality claim of human rights discourse and its relevance in various cultural contexts has been consistently challenged by Cultural Relativism (Bunting, 1993)³. The latter thesis holds that different regions/cultures have different conception of human rights, based on their respective moral philosophies, and they have different approaches towards human rights issues (Donnelly, 1984: 400-402). It agrees on the existence of human rights inventory, however, it argues that substantive human rights standards vary among different cultures, therefore tolerance and respect for their self determination is necessary (Teson, n.d.: 869). What is viewed as moral and just in one society may be seen as violation of human right in another (Teson & Perry, 1997: 867-68). The central argument of Relativism maintains that there is no single/external moral/legal standard exists, against which the validity of human rights practices may be measured (Teson & Perry, 1997: 867-68). It contends that there is no independent, objective morality but only many varied moralities as they appear in all their multiple forms, in different places and times (Kerns, n.d.). It holds that the source of human rights is culture, as opposed to the Western concept that regard Natural Law as the source (Bunting, 1993: 9), and since cultures are diverse so too are the

human rights which they dictate (Higgins, 1999-2000: 94). Finally it assumes the position that because human rights discourse is a product of Western Liberal Philosophy, the imposition of such ideology on the rest of world is neither justified nor acceptable (Bunting, 1993: 7 & Lobban, n.d.: 35). Relativists sceptically view it as Western hidden agenda of cultural and economic imperialism and use the defense of 'Asian Values' in response⁴. This idea has created an antagonist position of the West against the rest (Falk, n.d.: 424).

Many feminist critiques have adopted an opposing position in the human rights discourse both against Universalist and Cultural Relativist approach. The validity of Universalism has been much debated by such feminists' critique (Bunting, 1993: 414). It consists in rejection of Universal Essentialist claim contending that it is grounded in hegemonic male ideology that promote and perpetuate sexist norms in HRL. It is unjust because it has failed to include gender perspective in its foundational theory (Duss, 2005: 93). Its claim to Universality is incorrect as women's specific concerns and interests are neglected and devalued in its basic ideology. It further argues that women's use of supposedly universal rights can only resurrect/reinforce male domination; it cannot bring genuine emancipation for women (Otto, 2005: 108-09).

Most feminists' critics confront the claims of Cultural Relativism by maintaining that Cultural discourses have asymmetrical effects on women (Gaten, 2004: 276). Since 'most cultures are suffused with gender biased practices and ideologies' (Okin, 1999), they are generally regarded as hostile to women by feminists' critique. Cultural Relativism is an arbitrary idea; cultures are seldom unified in their view point in different issues. They are largely structured by power mechanism of a given society and project their values (Erturk, 2008: 23). The idea that culture is a monolithic entity--strictly bounded, uniform in its practices, and enforced with the consensus of its adherents--is strongly dismissed by the feminists (Grieff, 2010: 21 & Erturk, 2008). Instead they argue that culture is a malleable concept shaped and reshaped through everyday interaction in social and political arenas (Grieff, 2010: 6; Dianna, 1998: 5). Moreover, it is porous and constantly assuming new practices from outside, moulding them to various degrees in order to accommodate different material conditions (Eagleton, 2003: 62). Arguably, what is usually understood as a singular culture is in fact the dominant (hegemonic) expression of the culture, that is often described as the 'authentic culture' particularly when it comes to the issue of women's rights and VAW (Grieff, 2010: 5). Those who use cultural plea as a pretext to deny women's human rights particularly in case of VAW, assert that they represent the true version of culture, by so doing they silence the alternatives that might challenge their authority. Many feminists criticize the stagnant representation of culture by both the Universalists and Relativists and confront the hegemony of those who speak on behalf of the culture (Erturk, 2008: 21). They maintain that the notion of culture has been employed as an instrument of oppression against women, both in its

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occidental and orientalist form (Erturk, 2008: 17). Moreover, these feminists refute the fallacy, that culture which supports the oppressive policies against women is apolitical and neutral in its nature (Erturk, 2008: 23). It rather acts as a vehicle for hidden political agendas. The selective use of culture by both the Universalists and Relativists underpins this reasoning. As Coomraswamy argues

The charge of Westernization is disingenuous since many of these societies are rapidly globalizing and the question of culture seems primarily relevant only to the subordinate position of women (Coomraswamy, 2005, October 29-November 4).

Arguably, no culture would claim that torture is an essential component to its natural existence, despite its widespread prevalence in many societies, nor culture is justifiable for racism, slavery and so on (Bonita, 2010: 104). However, usually women bear the brunt of cultural politics in terms of violence and control over their life choices. Edwards notes that despite variations across cultures/times, asymmetry of power between men and women is a common feature of gender relations throughout the world (Alice, 2011: 14). Cultural excuse is commonly used to legitimise VAW by various authoritarian groups, such as imperial powers, patriarchal forces, cultural relativists, community/national interests and the like⁵. It is noteworthy that cultural defense against universality has always been raised by the violators of human rights and their advocates and never by the victims (Clapham, 2010: 56). As a result culture in its various guises serves as a major barrier to the implementation of human rights standards and a justification for violations of women's human rights. Many feminists representing non-Western cultures strongly disagree with the claim that human rights can only be available in the philosophies of the European enlightenment (Erturk, 2008: 13). Instead they argue that awareness about rights comes in response to oppression and because oppression is not uncommon in any society, therefore, rights discourses are found in almost all cultural contexts (Erturk, 2008: 9-10). Most feminists urge that it is the duty of states to be active, willing and interventionist in prompting human rights norms, that are more egalitarian and free from gender bias. This article concludes by emphasizing that in order to be more responsive to the needs of women around the globe, human rights system has to transcend cultural barriers. It is further stressed that instead of using cultural norms as a pretext to deny women's human rights, they can be perceived as a unique opportunity for reinforcing human rights standard (Sylvia, 2008: 52).

Notes

1. Such as rights under international Humanitarian Law.
2. Universal Declaration of Human Rights 1948 together with two Covenants ICCPR & ICESCR Of 1966 are known as International Bill of Rights.

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3. 15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences.
4. To guard against the Western Universalism before the Vienna Conference 1993, the term 'Asian Values' was coined in the meeting held by regional network of Asian governments in Bangkok 1993. Amirthalingham.
5. Erturk, Yakin, Intersections of Cultures p.21-22. Rejecting 'cultural' justifications for violence against women strategies for mobilizing state, society and the international community, A Consultation Paper, 'Women's Empowerment in Muslim Contexts: Gender, poverty and Democratization from the inside Out'.

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