

Progressive Development of Women's Human Rights in International Human Right Law and within United Nations System

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Abstract

This article begins by briefly tracing the trajectory of women's human rights discourse starting from the post United Nations period to the present day, within the framework of International law institutions (Kelly, 2005, December: 475; Rampton, 2008). It will get insight into the process of reorientation of human rights law through the development of key International instruments that have caused to materialise the concept of women's human rights. The strengths and weaknesses of the Convention on the Elimination of All Forms of Discrimination against Women will particularly be highlighted by comparing the Treaty with some of the mainstream human rights instruments. The article will focus on the recent increase in the efforts for gender mainstreaming in the various United Nations' bodies. Finally it will argue that in order for any real progress to be made in terms of eradicating the systemic barriers to gender justice and to eliminate the constructive denial of women's rights, the human rights regime must reconfigure its approaches in addressing the needs of women globally.

Keywords: CEDAW Convention, Feminist approaches, Human Rights Law, Women Rights, Discrimination

Theoretic Frame work & Background Knowledge

The article draws on the feminist insights on law/human rights law. The arguments in this discussion are, therefore, formulated within the conceptual framework of feminist legal theory. It argues that the structures of human rights law, largely due to its reliance on patriarchal foundations of liberal political philosophy, neglected the specific concerns of women for a long time (Tamale, 2008: 352; Nash, 2002, August: 3). The Convention on Elimination of All forms of Discrimination Against Women (CEDAW) or Women's Convention 1979 and Vienna Declaration of Human Rights 1993, are the chief women's rights instruments which formally recognised and expressed in unequivocal terms that 'women's rights are human rights'. The article evaluates whether or not the creation of separate treaty for women's rights (i.e CEDAW) has further marginalised women's issues in the International human rights arena. It notes that there are some achievements

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in the *dejure* realisation of women's rights and the issue has been lifted out of its previous secondary or 'special status' sphere, within human rights considerations, and placed in the mainstream agenda (Gottschalk, n.d.: 3). However, several structural barriers continue to exist to *defacto* realisation of such rights. The following section commences by offering a brief introduction of feminist legal theory, it will then present some relevant background information on the history of human rights/women rights.

Feminist legal theory came about in the early 1980's 'out of a political concern for the ways in which law may be implicated in women's subordination' (Chamallas, 2003). Feminist legal theory is build up out of a combination of political, social and ethical claims. It attempts to critique and explore law by evaluating the relationships between gender, power, rights and legal system as a whole. Its primary aim is to change women's status through a reworking of law and its approach to gender. The theory agrees that (binary categories of) gender are socially constructed; gender as a category does not only signify differentiation, it does create and reinforce gender hierarchies, unequal power relationships, domination and discrimination.

Upon this assumption, feminist legal theory contends that the manner in which gender has shaped the world, including through law, is clearly unjust (Knop, 2004: 16). It attempts to promote a perspective that respect marginalized voices and resist thinking in hierarchical binaries.

Those Feminists who have critiqued international law maintain that international/human rights law is prejudiced against women in its very conception (Charlesworth, 1998: 785-786). The conceptual, procedural and substantive dimensions of International/human rights law have been increasingly challenged by such critics (Fellmeth, 2000: 667). Arguably, feminist analysis of law is helpful in identifying gendered components and gendered implications of apparently neutral laws and practices (Cryer, n.d.: 63). In the light of feminist insights and arguments legal institutions can be assessed and sometime even modified (Fineman, 1992: 15).

The ideals of dignity and equality of all human beings underpins the conceptual basis of human rights law (Radacic, 2010: 830). The roots of international human rights can be traced back in the philosophical foundation of liberal theory originating from (secular) natural rights tradition (Radacic, 2010: 830). However, the norms and institutions of human rights law shaped by this philosophy proved ineffective to adequately address gender specific violations of women's human rights. Liberal conceptualisation of equal treatment strategy does not challenge structural disadvantages attached to (gender, race etc.) differences, therefore failed to bring any meaningful change in these areas of human rights law. For some feminists, this was the basis for a reform agenda. In mid 1990s, persistent struggle of women advocacy brought home the fact that the strategy of adding 'women question' in human rights law discourses had done little for the cause of women. On the strong proposal of various feminist groups the UN intensified

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its efforts on mainstreaming the gender perspective into all its policies and programmes (Radacic, 2010: 447; Rosenmlum, n.d.). Another challenge to human rights law, particularly effecting women, is the separate sphere philosophy of liberal theory. Early feminists had identified and addressed this problem in their struggle for women's rights. Therefore, during women liberation movement of 1970s, known also as second wave of feminism, "personal is political" was a frequently heard feminist rallying cry (Hanisch, 1969; Matsuda, n.d.). In this slogan "political" refers to any power relationships, not just those of government or elected officials. The women activists chanted this mantra to convey the message that whatever harm most women suffer in private sphere is a matter of public concern, therefore, should be regulated by some public policy. Later Postmodern feminists by utilising deconstructive techniques exposed the public/private divide in the human rights discourses. This divide, they argue, is not only false but also gendered, it makes women rights abuses invisible. Re-conceptualisation of key themes of human rights law, including formal equality and public/private dichotomy, was demanded in a manner that transcends all barriers and acknowledges various layers of identity for the purposes of women empowerment in the true sense. Legislative reforms in many countries in the field of domestic violence against women, abortion and statutory rape, to protect violations of women human rights in private sphere, are a consequence of feminists' efforts.

Key Development in the Field of Women's Human Rights

The human rights discourse within the UN remained 'gender-blind' for a considerable period of time. Nevertheless, advocacy efforts of women activism have significantly contributed to the emergence of the women's human rights concept and integration of women's related matters in the UN human rights regime. Since many feminist groups realised that the existing human rights instruments have failed to adequately address women's concerns, they put their energies behind the instrument that can achieve women's equality (Evatt, 2002: 2). This resulted into the adoption of the Convention on Elimination of All forms of Discrimination Against Women or Women's Convention¹ by the UN General Assembly in 1979². The UN Commission on the Status of Women (CSW) (Byrness & Bath, n.d.: 519) also played a key role in this process, it had drafted, *inter alia*, the Convention and initiated four World Conferences on women (Meyersfeld, 2010: 19; Bunch, 2000: 46).

As the global feminist activism gained momentum during early 1990's it called for the acceptance of women's rights as human rights. (Bunch, 2000: 4) Thereupon women's rights were recognised as human rights for the first time in the Vienna Conference on Human Rights 1993³. This was reaffirmed and asserted in the Women World Conference Beijing 1995, where Clinton in her speech made the famous remark that 'women's rights are human rights, and human rights are women's rights' (Clinton, 1995). This categorical

recognition finally facilitated the entry of women's rights into the framework of International, regional and national human rights law and policy. The achievements both, at the Vienna and Beijing meetings, can largely be ascribed to the consistent efforts of advocacy groups, prior to which women's rights were a residual category within the human rights system (Kelly, 2005: 480). However, as the euphoria of Beijing Platform for Action (BPA)⁴ dissipated with the passage of time, it became clear that what was actually envisioned in Beijing did translate little into the reality of women's lives. The global monitoring report, *Beijing Betrayed 2005*, while assessing governments' progress, noted that the promises made by most of the state parties have yet to be fulfilled (Zeitlin, 2005, June). It is argued that ineffectual character of the document itself is responsible for the governments' failure to achieve the goals (Chinkin, 1996: 121). The governments did not take the BPA seriously because it contains no firm commitments, lacks formal legal status and fails to provide concrete targets or resources goals (Chinkin, 1996: 122).

The CEDAW Convention, known also as the International Women's Bill of Rights (Evatt, 1992: 435; Neubauer, 2011: 6; Erturk, n.d.: 1) marks an important step in bringing a gender dimension into human rights law (Charlesworth, 1998).

It is the outcome of a long process to bring the concerns of women into the human rights framework. The Convention recognizes that due to historic discrimination, the status of women in many societies is not equal to that of men, therefore, formally equal laws may yield unequal outcomes for women (Turquet, 2011-12: 9). Hence the substance of the Convention rests on the two interrelated core concepts, substantive equality and non discrimination (Sen, 2003: i; Neubauer, 2007: 7). Accordingly the Convention focused on the promotion and protection of women's rights and sets out comprehensive agenda for achieving gender equality. It obliges the state parties to condemn gender discrimination to ensure equality in all areas of life (Evatt, 2002: 435). One of the most prominent features of the Convention is that it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental human rights (Jaising, 2005: 2). It notes the interconnection between cultural stereotypes and regressive laws/policies concerning women. It obliges states parties to modify and eradicate social attitudes and cultural patterns/practices that impede the advancement of women (Neubauer, 2011: 2). Since entering into force the treaty has been ratified by the majority of UN member states (Turquet, 2011-212)⁵. The states parties are obligated to submit reports to the treaty monitoring body, Committee on Elimination of Discrimination Against Women (CEDAW) after every four years⁶. The CEDAW is empowered to monitor progress of individual state and publically discuss issues that are relevant to a specific state, the process has been described as 'constructive dialogue' (Evatt, 2002: 437; Otto, 2002: 6 & 38). However, the extent to which this process can be utilized largely depends on the cooperation and willing participation of the individual state (Evatt, 2002: 437). The dynamic nature of the Convention is one of its useful features. Although some parts of the Convention are more

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influenced by socio-political programs than by legal norms, yet it has a capability to respond to the developments of International human rights law positively, and to integrate new approaches into its work (Neubauer, 2011: 254)⁷. Also on the basis of the information received by the state parties, it has been continually evolved and updated to include new insights and trends. CEDAW Convention's General recommendation 19, designed to address the problem of domestic violence, is a prominent example in this regard (McQuigg, n.d.: 477). It is suggested that by capturing and utilizing the transformative potential of CEDAW Convention, the impact of women's human rights regime can be effectively enhanced. The Vienna and Beijing Conferences proposed for the individual complaint procedure to the Convention, UN General Assembly positively responded to it by adopting Optional Protocol 1999 to the Women's Convention⁸. The Op. Protocol provides for individual complaint as well as inquiry procedures, hundred and four states are parties to the Convention's Op. Protocol as of yet (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en).

That being said several weaknesses of the Women's Convention have also been highlighted. Its major deficiency, regrettably, is the enormous number of reservations attached to its seminal provisions (Meyersfeld, 2010: 27; Redgwel, 1997: 4). Although reservations to human rights treaties are generally assumed as a necessary evil (Marks, 1997: 35), however, in case of the Women Convention this problem is further enlarged, as Reitman notes 'CEDAW is one of the instruments most severely plagued by the reservation phenomenon' (Reitman, 197: 103; Redgwel, 1997: 4). The jurisprudence of international Court of Justice (ICJ)⁹ as well as Conventional law¹⁰ does not support the idea of making reservations to the core provisions of the treaty. However, some of the Convention's reservations are so substantially incompatible with the object of the treaty that they tend to nullify and discredit the whole purpose of the Convention (Kim, 1993-94: 103). For instance articles 2(f), 5, and 16 deals with the subject matter and the essence of women's human rights, they are considered by CEDAW to be core provisions of the Convention (Benninger, 2006: 263). Arguably, any reservations by states to these articles would thus have the effect of violating a state's obligation to the core commitment of this treaty. Yet several states chose to reserve against these provisions (India for Instance). The CEDAW has adopted two General Recommendations on reservations. General Recommendation 4 expresses concern about the significant number of reservations that appear to be incompatible with the object and purpose of the Convention and suggests that States parties reconsider such reservations with a view to withdrawing them (GR 4 CEDAW). However, only a few States have withdrawn or modified their reservations regarding article 2 and 16¹¹. It is therefore argued that the expediency and scope of the Convention's ratification is considerably impaired by the volume of states' reservations (Kim, 1993-94: 49; Charlesworth, 1998: 634). Also the extent and content of these reservations has significantly reduced the norm

creating character/role of the treaty. This is further compounded by the structural problems relating to the enforcement provisions of the Convention. Arguably Women Convention has the weakest implementation and enforcement mechanism of any human rights covenant (McQuigg, 2007: 474; Kim, 1993-94: 390 ; Charlesworth, 1998: 634). The CEDAW lacks official teeth to ensure compliance of its respective instrument (McQuigg, 2007: 474; Mayer, 2000: 244). If a state decline to comply with its provisions CEDAW cannot impose punitive measures (McQuigg, 2007: 475), it is referred to as 'law without sanction' (Sally, n.d.:30). It is argued that the whole system of treaty bodies has been 'stretched almost to breaking point' (Alston, 2000: i). It suffers under- funding, many governments fail to report or to do so very late, there is a considerable back log of individual complaints and expertise of committees' members has been questioned (Crawford, 2000). These difficulties are further aggravated in case of CEDAW, primarily due to inadequate administrative support and lack of prominent profile compared to its counterpart treaty bodies (Onyango, n.d.: 390; Kim, 1993-94: 82). Therefore, issues like chronic under-resourcing and growing back log of reports due to lack of time are some of the common obstacles faced by the CEDAW (Lazarus, 2011: 92; O'Hare, 1999: 368; Charlesworth, 1998: 787)¹¹. The time factor is especially problematic because most of the CEDAW's annual session is consumed by the examination of the state's reports. The CEDAW could not find much opportunity to undertake thorough analysis of the substantive issues contained in the Convention due to the time constraint (Evatt, 2002: 442). The aforementioned factors tend to suggest that women-only-issues are less important compared to mainstream human rights regime in international arena (Edwards, 2011: 369). Accordingly, the ability of the CEDAW to influence change, in various areas that fall within its mandate, has been seriously inhibited due to its functional deficiencies (Evatt, 2002: 449).

It is noteworthy that for decades the CEDAW (and CSW) had operated from Vienna and was the only human rights treaty body serviced by another part of UN Secretariat (<http://www.ohchr.org/EN/NEWSEVENTS/Pages/Cedaw.aspx>). On the other hand most of the UN mainstream human rights work is centred at Geneva, the Human Rights Council and Office of the United Nations High Commissioner for Human Rights (OHCHR) are based there (Gallagher, 1997: 296; Evatt, 2002: 443), as are Secretariats of all the UN human rights treaty bodies. This geographical split, being too conspicuous to escape notice, had rather been perceived as symbolic, since it indicated the pattern of differential treatment that women issues ordinarily receive (Evatt, 2002: 443). Hence, some feminist critics argued that the discrimination may be reinforced the way the UN human rights system itself was divided. Arguably the locational and institutional divide was particularly significant because 'it reflects a view that women's rights are largely a matter of discrimination'. Consequently, on account of increased demand from feminist groups CEDAW had been finally moved to Geneva and it is now serviced by the OHCHR with nine other treaty bodies (<http://www.ohchr.org/EN/NEWSEVENTS/Pages/Cedaw.aspx>). Aside from the Convention's functional difficulties some of its problems are conceptual.

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Arguably, the creation of distinct women's rights instrument had an undesirable effect of further drifting away the mainstream human rights system from women specific mechanism (Otto, 2005). As Charlesworth argue

The price of creation of separate institutional mechanisms and special measures dealing with women within the UN system has typically been the creation of 'women's ghetto', given less power, fewer resources and lower priority than mainstream human rights bodies (Reanada, 1994).

Paradoxically, increased focus on the Convention had successfully highlighted, but simultaneously isolated the women's human rights issues within the International legal/political realm (Onyango, n.d.: 354). A number of feminist groups during 1990's identified that the problem of 'specialisation has become marginalisation' therefore, they initiated the struggle for women's inclusion in the discourse of universal human rights (Gallagher, 1997: 285). Indeed, the impetus behind the struggle for moving away from women specific mechanism towards mainstreaming, by promoting women's rights as human rights, originated from this concern (Otto, 2002: 120). Therefore the Vienna and Beijing outcome documents performed the dual task of articulating women's human rights as well as of requesting other treaty bodies to embrace women perspective into their policy work to make human rights law gender conscious (Evatt, 2002: 6-7). Since then the gender mainstreaming is the priority agenda of the United Nations. All the major treaty bodies such as Human Rights Committee, Committee against Torture (CAT) and Committee on the Elimination of Racial Discrimination (CERD) responded to the call for incorporation of women's rights into the mainstream human rights by including gender aspect in their reports (Evatt, 2002: 6). Also the Committee on Economic Social and Cultural Rights (CESC) integrated gender dimension in its General Comment on the right to health (Evatt, 2002: 6-7). A major strategic advancement was made by the UN General Assembly in this regard by launching the UN agency for women in 2010. The United Nations Entity for Gender Equality and Empowerment of Women, also known as UN Women, was created by fusion of previously four distinct parts of the UN (http://www.unwomen.org/wp-content/uploads/2011/06/UNwomen_AnnualReport_2010-2011_en.pdf)¹³. This merger, by consolidating previously disjointed efforts of various UN offices dealing with gender issues, would aid to facilitate the process of gender mainstreaming (http://www.unwomen.org/wp-content/uploads/2011/06/UNwomen_AnnualReport_2010-2011_en.pdf). To head the UN Women, the Under Secretary General was appointed, who will *ex officio* be a member of all senior UN decision making bodies (<http://www.un.org/News/Press/docs/2010/sga1262.doc.htm>). This strategy would be helpful for the inclusion of gender perspective in all the UN activities. These developments indicate that there are some achievements in the *de jure* realisation of women's rights. Nevertheless, several structural

barriers continue to exist to *defacto* realisation of such rights. According to one view, women's *defacto* inequality can be eliminated by the politics of presence (Naryana, 1998: 23). A statistical increase of women representatives in national and international bodies of political/legal authority, and in state's halls of power has been considered crucial for this purpose. However, a contrary view suggests substantial changes in the prevailing legal and political system (Olsan, 1997: 23). It does not agree that mere involvement of women could purify national or international politics, or their participation by itself could totally reshape the structure/substance of public decision making. Such measures, according to the later approach, could 'mask real discrimination'. It may fail to address underlying disadvantages and structural inequalities, thus perpetuating prevailing patterns of social, economic and political disadvantages. Moreover, it is argued that "an add-woman-and-stir-approach" does not of itself ensure transformation of the existing national/international legal/political order (Charlesworth, 2002 95). To end the inequality of power, removing structural impediments and then reconfiguring the entire system is absolutely inevitable (Dorothy, 1974: 7-13; Rhode, 1997: 244-49). The aforementioned viewpoints can be reconciled by arguing that in order to achieve women's human rights in reality, a comprehensive approach integrating legal reforms, social services and mass education is being required.

Concluding Remarks

This article has presented a brief survey of the progressive development of women's human rights in the past few decades. It argues that the historical lack of concern for women's human rights within the UN institutions was not a result of some omission. The marginalisation or exclusion of women from participation in international decision making bodies was systematic and hence by design, the ultimate aim was to subjugate women (Charlesworth, 1995: 113). As Olsen argue:

Women are not left out of the international law through some oversight but International law is structured on and represent the interests of men as the embodied subordination of women (Olsen, 1997: 363).

This absence of women's perspective in the norm creation process of human rights law had resulted into partial rather than universal or representative human rights system. However, the incessant efforts of advocacy groups have been instrumental in pinpointing the great imbalance in political participation between women and men on national as well as international level. This eventually led the UN to realise that the human rights system has to embrace gender sensitive and holistic approach if it were to represent the global population democratically. The past few years, therefore, have recorded increased focus on gender mainstreaming within UN and other international agencies.

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Notes

1. The Convention' or the 'Women Convention' hereinafter
2. The Convention was preceded by the Declaration of Elimination of All Forms of Discrimination Against Women 1967.
3. Art 18, states that human rights of women and girl child are inalienable integral and indivisible.
4. The outcome document of the Beijing Conference , 'The Declaration and Platform for Action' A/CONF.177/20(1995)
5. Entered into force in 1981, 186 states have ratified CEDAW as of May 2011.
6. Under Article 18 of the Women Convention
7. Basically by adopting General Recommendations CEDAW continue to update and amend itself.
8. UN General Assembly on 15 October 1999, by Resolution A/RES/54/4 adopted Optional Protocol to the Convention on the Elimination of Discrimination against Women.
9. The ICJ in its advisory opinion in '*Reservations to the Convention on the Prevention and punishment of the Crime of Genocide*' case laid down that reservations are impermissible if they are against the object and purpose of the treaty.
10. The object and purpose test has also been codified in the article 19 Vienna Convention on the Law of Treaties (VCLT). Also Article 28(2) of the Women Convention disallows such reservations.
11. the comments of the CEDAW Committee at its 35th session in 2006 on Malaysia's decision to withdraw its reservation to articles 2 (f), 9 (l), 16 (b), (d) (e) and (h) of the Convention, UN Doc. CEDAW/C/MYS/CO/2 or the comments of the CEDAW Committee at its 32 session in 2005 on Turkey's decision to withdraw its reservations, including to article 16 paragraphs 1 (c), (d), (f), (g) of the Convention.
12. CEDAW's hold its meeting only for two weeks every year.
13. These were Division for the Advancement of Women, (DAW) International Research and Training Institute for the

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Advancement of Women. (INSTRAW), Office of the Special Advisor on Gender Issues and Advancement of Women (OSAGI) and the United Nations Development Fund for Women (UNIFEM). UN Women2010-2011.

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